

**State of Louisiana
Office of the Attorney General**



**State of Tennessee
Office of the Attorney General & Reporter**



April 3, 2023

**SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV**

Appliance and Equipment Standards
Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, D.C. 20585

**Re: Energy Conservation Program: Energy Conservation Standards for Consumer
Conventional Cooking Products, No. EERE-2014-BT-STD-0005**

Dear Secretary Granholm,

The States of Louisiana, Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Texas, Utah, and Virginia appreciate the opportunity to comment on the Department of Energy’s proposed standards (the “Proposed Standards” or “Standards”) for consumer conventional cooking products. *See* Dep’t of Energy, Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 6,818 (Jan. 31, 2023). These Standards represent another attempt by this Administration to micro-manage the lives of Americans—and there is little to support this claim of regulatory authority.

While the States have broad concerns about the Proposed Standards—and at the end of this comment, flag two issues pertinent to those concerns for the Department’s consideration—this comment focuses in depth on three issues that the States have unique expertise to discuss based on prior litigation between many of the States and this administration and based on the States’ role as separate sovereigns in the constitutional system:

First, the States are concerned about the Department’s extensive use of the social costs of carbon, methane, and nitrous oxide (the “social cost of greenhouse gases” or “SCGHG” or “IWG estimates”) developed by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). *See generally* IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990 (Feb. 2021) [hereinafter 2021

TSD].¹ The Department’s analysis ignores numerous issues with how the IWG developed those numbers and the legal issues with those numbers—especially in the context of the EPCA. The proper response—especially since there is no empirical way to determine whether the Proposed Standards’ effect on greenhouse gas will have an economic impact—is to forgo the analysis.

Second, the Department’s federalism analysis under Executive Order 13,132 is deficient. The Proposed Standards are “policies that have federalism implications” within the meaning of the Executive Order, and so the Proposed Standards’ claim that further action under the order is not required is incorrect. The Department must rectify this issue before promulgating any final standards.

Third, the Proposed Standards fail to grapple with important constitutional concerns—specifically, it fails to grapple with the proper scope of federal regulation under the Commerce Clause. The EPCA prohibits distribution of products “not in conformity with an applicable energy conservation standard” “in commerce,” 42 U.S.C. § 6302(a)(5), which includes anything “which affects trade, traffic, commerce, or transportation” between the States, § 6291(17). That is, the EPCA, by its terms, applies to purely intrastate activity. That claimed scope of authority is an artifact of a conception of congressional authority that “has drifted far from the original understanding of the Commerce Clause.” *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). Even under modern Commerce Clause jurisprudence, the Proposed Standards are problematic for there has been no showing that the intrastate activity they would reach substantially affects interstate commerce. *See id.* at 559. The Department’s analysis can, and constitutionally must, take those limits into account.

Comment

I. The Department should not use, or reference, the IWG estimates in its analysis.

A. The IWG estimates uses a model that is driven by unquantifiable and value-laden assumptions instead of data.

The Proposed Standards use the IGW estimates in evaluating the environmental benefit of the proposed regulation. *See* 88 Fed. Reg. at 6,865 (“[A]s a member of the IWG . . . [the Department] agrees that the [IWG estimates] represent the most appropriate estimate of the [SCGHG].”). The heart of the IWG estimates is a probabilistic Monte Carlo analysis of three Integrated Assessment Models (IAMs): Dynamic Integrated Climate and Economy (DICE) 2010, Climate Framework for Uncertainty, Negotiation, and Distribution (FUND) 3.8; and Policy Analysis of the Greenhouse Gas Effect (PAGE) 2009. *See* 2021 TSD, *supra*, at 22. Those IAMs calculate the economic damages that occur for each additional metric ton of a greenhouse gas emitted in a particular year by “predicting (1) the amount of warming that all greenhouse gases in the atmosphere now and those that will be added will have on the planet over a certain time period, (2) the overall effects that warming will have on society, and (3) the costs that those effects will have on society.” Ex. A ¶10. The IWG sets various assumptions and then averages the results of the three IAMs to

¹ Available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf. The States attaches this, and all other articles referenced in this comment that are available online, as Exhibit C.

determine the gross damages for all 300 years, and then discounts that amount to a present value. *See* 2021 TSD, *supra*, at 22–23. “The present value of a future benefit or cost is the amount you would have to invest today that would grow in value to match that benefit or cost at the specified time in the future.” Ex. A ¶19. Using a 3 percent discount rate, the IWG estimates values for the SCGHG in 2020 are \$51 (carbon), \$1500 (methane), and \$18,000 (nitrous oxide). 2021 TSD, *supra*, at 24–25; *see* 88 Fed. Reg. at 6,821 (using the values produced using a 3 percent discount rate for “presentational purposes”).

That analysis is fatally flawed, as expert declarations that the States have provided in court show. Those declarations are attached and incorporated by reference.² But four policy choices encoded in the IWG estimates starkly illustrate the problem with those numbers:

1. The first policy choice is the IWG’s decision to use global, instead of domestic, damages. That clearly increases the costs of the measured gases. Although not adjusted for inflation, the Trump administration estimated that the domestic value for the social cost of carbon was roughly \$7 per ton—seven times less than the interim social cost of carbon. Similarly, the domestic social cost of methane was roughly \$55 per ton—27 times less than the interim social cost of methane. *See* Jean Chemnick, *Cost of Carbon Pollution Pegged at \$51 a Ton*, *Sci. Am.* (Mar. 1, 2021), (“These social cost figures replace the \$1-to-\$7-per-ton CO₂ values and \$55-per-ton methane value of the Trump administration, which were produced by ignoring all climate damages that occur outside the continental United States.”);³ Ex. B ¶29. That is typical; OMB practice—embodied in Circular A-4—directs agencies to focus on domestic costs and benefits. Ex. B ¶65.

The IWG, by contrast, used global SCGHG estimates. *See* 2021 TSD, *supra*, at 16. That, however, reflects nothing but a policy choice—as the IWG’s justifications illustrate: “GHG emissions contribute to damages around the world regardless of where they are emitted”; global impacts “will have a direct impact on [overseas] U.S. citizens and the investment returns on those assets owned by U.S. citizens and residents”; global issues “impact the welfare of individuals and firms that reside in the United States through their effect on international markets, trade, tourism, and other activities”; and taking global damages into account “allow[s] the U.S. to continue to actively encourage other nations, including emerging major economies, to take significant steps to reduce emissions.” *Id.* at 15–16; *see also* 88 Fed. Reg. at 6,866 (reiterating essentially those points). That is, the decision to use a global or domestic measure for the cost of greenhouse gases is not quantifiable decision; it is a choice among different policies. *See, e.g.*, Ex. B ¶75.

It is, however, a choice for Congress. And the problem is that the IWG’s justifications are untethered from any indication that Congress wanted federal agencies to include damages incurred by other countries in making cost-benefit analyses. That is an issue because there is a presumption that statutes do not apply extra-territoriality. *See, e.g., RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (“It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world.”) (quotations omitted); *see also* Ex. B ¶¶66–69.

² Exhibit A is an expert declaration filed in *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo.). Exhibit B is an expert declaration filed in *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La.).

³ Available at [https://www.scientificamerican.com/article/cost-of-carbon-pollution-pegged-at-51-a-ton/#:~:text=Contributing%20to%20climate%20change%20is,to%20about%20\\$51%20per%20ton.](https://www.scientificamerican.com/article/cost-of-carbon-pollution-pegged-at-51-a-ton/#:~:text=Contributing%20to%20climate%20change%20is,to%20about%20$51%20per%20ton.)

So while a statute could require accounting for global damages in a cost-benefit analysis, the default is that it does not unless Congress “clearly expressed” otherwise. *RJR Nabisco*, 579 U.S. at 335. The IWG estimates—by locking in a global measurement of the SCGHG—ignores that. By using those estimates, the Proposed Standards makes the same mistake.

2. The second policy choice is the discount rate. As the IWG admits, the discount rate “has a large influence on the present value of future damages” but is not reducible to a formula; it is instead a debatable policy proposition involving “highly contested and exceedingly difficult questions of science, economics, ethics, and law.” 2021 TSD, *supra*, at 17; *see also* 88 Fed. Reg. at 6,866. To illustrate the influence this value-laden metric has: at a 7 percent discount rate, the average social cost of carbon in the FUND Model for 2020 equals negative 45 cents. Ex. A ¶23. That is, under a 7 percent discount rate, there is a *benefit* to emitting an extra ton of carbon dioxide. *See id.* A similar result holds for the DICE model’s estimate for the social cost of carbon dioxide, methane, and nitrous oxide. Ex. A ¶¶22, 25–26.

That 7 percent rate is one the IWG estimates reject, but its use would be consistent with longstanding guidance provided by the peer-reviewed OMB Circular A-4. The theoretical difference between that rate and the rate the IWG chose to use (3 percent) stems from what each rate attempts to measure: a 7 percent rate measures the cost of government regulation displacing investment (it is what a government project must “earn” (pre-tax) to justify the cost, else it would have been better to invest in the market); a 3 percent rate measures the opportunity cost of government regulation that displaces future consumption (for example, that a person considers \$1.03 tomorrow (post-tax) equal to a \$1.00 today). *See* OMB, Circular A-4 at 33–34 (Sept. 17, 2003). The IWG chose to use the consumption rate of return, alleging that it calculated the SCGHG in terms of consumption. *See* 2021 TSD, *supra*, at 17; *see also* 88 Fed. Reg. at 8,866. The IWG, however, conceded that its analysis only works if it can convert “displaced investment . . . into a flow of consumption equivalents”—something it suggested it had yet to do. *See* 2021 TSD, *supra*, at 18; *see also id.* at 19 (needing “a more complete measure of costs, accounting for displacement of investment”).

The IWG further claimed that 3 percent was proper because government regulation displaces a mix of investment and consumption, and so the discount rate associated with government regulation is lower than the investment rate of return. *See id.* at 18–19. But it did not use “a blended discount rate,” *id.* at 18, it used the rate that applies where government regulation displaces consumption, *see id.* at 17, 18. The IWG also reasoned that a lower discount rate showed benefits to greenhouse-gas mitigation, thus avoiding “the risk to society of maintaining” a discount rate that was possibly too high. *Id.* at 19. The IWG suggested that “uncertainty and ethics when discounting in an intergenerational context” argued for a lower discount rate. *Id.*

In short, the IWG (and, by extension, the Proposed Standards) used a discount rate based on policy judgments and assumptions that do little to undermine the validity of using a 7 percent discount rate in this context. *See* Ex. B ¶80. That is, there is no evidence that the 3 percent discount rate is empirically required or justified as a matter of policy. *See* Ex. B ¶¶81–82 (showing that the IWG’s discount rates are inconsistent with the underlying models they used).

Indeed, the Proposed Standards themselves highlight that fact—for the cost-benefit analysis the Standards conduct *outside* the context of monetizing the value of greenhouse gas emissions use

different discount rates. For example, in calculating the impact of the Proposed Standards on manufacturers, the Department uses “a real discount rate of 9.1 percent.” 88 Fed. Reg. at 6821. For consumers, the Department evaluated “total consumer benefits” using 3 and 7 percent discount rates. *Id.* There is no reason not to use similar rates (*i.e.*, 9 percent or 3 and 7 percent) in monetizing the value of greenhouse gas emissions. The inconsistency on this front renders the Proposed Standards arbitrary and capricious, and highlights that choice of a discount rate is, at best, an example of an arbitrary “choice[] among value judgments [or] choice[] based on hunch or guesswork or even the toss of a coin” that is inherently legislative and not quantifiable. *Hector v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996).

3. The IWG’s decision to run the IAMs through the year 2300 is another policy choice that has an outsized impact on the social cost of greenhouse gases. *See* Ex. A ¶28. This choice was made in the 2010, when a predecessor interagency working group developed similar measures of the social cost of greenhouse gas and justified, on the basis that because “[m]any consider 2200 too short a time horizon because it could miss a significant fraction of damages under certain assumptions about the growth of marginal damages and discounting.” Interagency Working Grp. On Social Cost of Carbon, U.S. Gov’t, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, at 25 (Feb. 2010) [hereinafter 2010 TSD];⁴ *see* Ex. A ¶29 (“[I]n every TSD to date, including the 2021 TSD, the IAMs have calculated damages based on projections ending in 2300—nearly 300 years into the future.”); Ex. B ¶31 (noting the IWG uses the prior assessments adjusted for inflation). In other words, without going to the year 2300, the costs would be lower—too low for the IWG’s liking.

Extending a time horizon in order to create sufficient costs is plainly arbitrary. It is all the more so where, as here, the underlying models are not even designed to go out that far. To estimate costs to 2300, for example, the IWG (again, following what its predecessor did in 2010) adjusted the PAGE Model because it was designed to end in the year 2200. *See* 2010 TSD, *supra*, at 25. Furthermore, because it did not have data projections for GDP, population, and greenhouse gas emission trajectories after 2100, the IWG made assumptions about those trajectories. *Id.*; *see* Ex. B ¶55. Indeed, the IWG made assumptions about core aspects of the damages model—for example, “the shape of the damage function” “for temperature changes exceeding” 3 degrees Celsius. Ex. B. ¶45.

The changes had the desired effect of increasing the costs of greenhouse gas emissions significantly. *See* Ex. A ¶30. That is, of course, simple logic; “[t]he longer the horizon, the more years are summed into the damages and those years have greater and greater damages in a future that is difficult if not impossible to predict.” Ex. A ¶34; *see* Ex. B ¶58 (finding that 48 percent of the social cost of carbon for the 3 percent discount rate occurs in the years 2100-2300); *see also* Ex. B ¶46 (“Excessive extrapolation on the temperature change effect becomes a very substantial concern for damage estimates in years between 2100 and 2300.”). To illustrate that effect, when the DICE Model (at a 3 percent discount rate) is only run until the year 2150 (roughly half the time period) the damages are 13.42 percent to 20.29 percent lower. Ex. A ¶35–36. Moreover, even the basic assumptions that permit the models to run nearly 300 years are questionable. These models cannot predict dynamic changes—and their long time horizons all but guarantee that the world

⁴ Available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf>.

they model is not the world that will be. *See* Ex. B ¶60. After all, commonplace technological innovations such as the modern internet, smartphones and GPS technology were barely in their crude infancy 30 years ago—and inconceivable 300 years ago. *See* Ex. A ¶29. To illustrate, given how much different is the world of today to the early to mid-18th century (roughly 280 years ago), would that society “have anticipated the present overriding importance of electricity to 2020’s society, given that Benjamin Franklin’s famous kite experiment only occurred in 1752?” Ex. B ¶64; Ex. B ¶¶62–63 (comparing today’s world to the world of 1900). To project the world of today onto the world of 2300, as the IWG estimates do, makes no sense.

The 300-year timeframe also is an ill-fit to the other aspects of the Department’s analysis of the Proposed Standards. Outside of the greenhouse gas emissions context, the Department uses a 30-year horizon in analyzing the costs and benefits of the Proposed Rule. *See, e.g.*, 88 Fed. Reg. at 6,821; *see also id.* at 6,890 (“The national impacts are measured over the lifetime of consumer conventional cooking products purchased in the 30-year period that begins in the anticipated year of compliance with amended standards (2027-2056).”). The two analyses are therefore incomparable; the latter rests on a timeframe that is about 10 percent of the former. To provide both is thus confusing and suggests an equivalence that does not exist.

4. Another policy choice that causes drastic changes to the IAMs, and therefore the IWG estimates, is the IWG’s decision to use an out-of-date ECS distribution. As a result, the IWG estimates do “not reflect the tremendous increase in the scientific and economic understanding of climate-related damages that has occurred in the past decade”—as the IWG admits. 2021 TSD, *supra*, at 22; *id.* at 32.

An “ECS is a distribution that probabilistically quantifies the earth’s temperature response to a doubling of carbon dioxide concentrations.” Ex. A ¶39. For each IAM, it shows the carbon dioxide impacts on climate and the “[s]econdary effects, such as sea-level rise, all depend on a reliable ECS.” *Id.* The ECS the IWG used is more than a decade old, and it vastly overstates the probability of high-end global warming compared to more recent distributions. Ex. A ¶40; *see also* Ex. B ¶¶35–36. And that’s before considering technical issues with how the IWG used the models. *See* Ex. B ¶37 (quoting criticism from the originator of the DICE model).

By changing just this one factor, the average social cost of carbon (at a 3 percent discount rate in 2020 dollars) is reduced by as much as 45 percent for the DICE Model and 80 percent for the FUND Model. Ex. A ¶¶43–46. Indeed, more recent ECS distributions suggest lower probabilities of extreme global warming in response to carbon dioxide concentrations. Ex. A ¶41. Using the ECS distribution in Lewis and Curry (2015), for example, the DICE Model’s values for the social cost of carbon (in 2020 dollars) go from \$46.43 to \$24.15 in 2020, \$55.47 to \$28.95 in 2030, \$65.43 to \$34.25 in 2040, and \$75.83 to \$39.94 in 2050. Ex. A ¶43. The FUND Model’s values go from \$23.75 to \$4.09 in 2020, \$26.76 to \$4.79 in 2030, \$29.93 to \$5.52 in 2040, and \$33.25 to \$6.25 in 2050. Ex. A ¶45.

The IWG made still other policy choices that effectively ratchet up the SCGHG. For example, the IWG failed to account for agricultural benefits caused by increased carbon dioxide concentrations. Ex. A ¶47. Of the three IAMs, only the FUND Model includes some quantification of these benefits. *See* Ex. A ¶48. Using the outdated Roe Baker ECS distribution, the FUND Model (at a 3 percent discount rate) has a greater than 10 percent chance to generate a negative social cost of

carbon through 2040. Ex. A ¶49. Changing the discount rate to 7 percent significantly raises that probability. Ex. A ¶50. And with an updated ECS distribution, there is a greater than 50 percent chance the social cost of carbon is negative through the year 2050 under the FUND model. Ex. A ¶51. There is good reason to believe that if the DICE Model was permitted to account for those benefits, it would also generate some negative social cost estimates. See Ex. A ¶52. Thus, under alternative, realistic assumptions, the models would find that additional carbon emissions are *beneficial* and so further carbon emissions should be *encouraged*. See Ex. A ¶54.

There's more. Four of the five EMF-22 scenarios (inputs for all three IAMs) "represent the modelers' judgment of the most likely pathway absent mitigation policies to reduce greenhouse gas emissions, rather than the wider range of possible outcomes." 2010 TSD, *supra*, at 16. In addition to climate and emissions policies and rules in the last decade, President Biden announced "that America would aim to cut its greenhouse gas emissions 50 percent to 52 percent below 2005 levels by 2030." Brad Plumer and Nadja Popovich, *The U.S. Has a New Climate Goal. How Does It Stack Up Globally?*, N.Y. Times (Apr. 22, 2021).⁵ Numerous other nations have also pledged to cut emissions—including China, the world's largest emitter of greenhouse gasses—over the next twenty to forty years. See *id.* The IWG estimate's use of the four BAU scenarios is therefore unjustified for it fails to account for the fact that the no-mitigation pathway much of the world is currently on involves policies that will, on their own, reduce the amount of greenhouse gas emissions. See Ex. B ¶55 (noting that the IAMs "do not incorporate . . . emissions-reducing regulatory actions"). That is, the IWG's assumptions overstate the cost of no-mitigation.

In sum, any number of reasonable (and factually based) assumptions cause the SCGHG to swing from positive to negative, making them too sensitive to be reliable.

Those are far from the only issues with the IWG analysis—and they are presented here at a high level. Dr. Smith's analysis, for example, provides an extensive, detailed discussion of the issues with the IWG estimates that the Department should review and consider. See *generally* Ex. B. But the upshot is clear: By relying on the IWG estimates, the Department's monetization of the reduction of greenhouse gas emissions "is predicated on faulty models that are prone to user-selected manipulation. This model is highly sensitive, or produces a vastly disparate range of results, based on the user assumptions. Essentially the assumptions, and not quantifiable data, drive the results—garbage in, garbage out." Ex. A ¶15. There can be little better example of arbitrary and capricious reasoning than using a model that, under equally reasonable—or more reasonable assumptions—returns a completely opposite result. See *Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981) ("There must be a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results.").

B. There is no lawful basis for using the IWG estimates.

Analytically, therefore, the IWG estimates are flawed. They are also unlawful—as the Department well knows. The Proposed Standards consistently note that a federal district court issued a preliminary injunction barring the Department from "adopting, employing, treating as binding, or

⁵ Available at <https://www.nytimes.com/interactive/2021/04/22/climate/new-climate-pledge.html>.

relying upon” the IWG estimates. *Louisiana v. Biden*, 585 F. Supp. 3d 840, 852, 870 (W.D. La. 2022), *appeal docketed* No. 22-30087. The Fifth Circuit, to be sure, stayed the injunction pending appeal—but it did so based on the “Plaintiff States[’] lack [of] standing.” *Louisiana v. Biden*, 2022 WL 866282, *2 (5th Cir. Mar. 16, 2022). “[S]tanding in no way depends on the merits.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Thus, the Department cannot refuse to grapple with the district court’s substantive analysis by relying on the Fifth Circuit’s interlocutory order. *See Texas v. Biden*, 20 F.4th 928, 992 (5th Cir. 2021), *rev’d on other grounds* 142 S. Ct. 2528 (2022) (being aware of legal challenges to a rule means the agency must “consider the problem” identified in the challenge). It instead must address why the *Louisiana* court was wrong to conclude that IWG estimates are unlawful or why the Department may use them regardless.

Especially relevant to the Proposed Standards is the *Louisiana* court’s conclusion that “the EPCA unambiguously precludes the consideration of global effects.” 585 F. Supp. 3d at 867. On a purely analytical level, that makes sense. Comparing *global* benefits to *domestic* costs—as the Proposed Standards’ emission analysis does—biases the analysis in favor of the benefits. Indicia of congressional intent support that common-sense conclusion. The factors listed in 42 U.S.C. § 6295(o)(2)(B)(i) do not reference global impacts. And while § 6295(o)(2)(B)(i)(VII) permits the Secretary to consider “other factors [she] considers relevant,” it does not “clearly express[] congressional intent” that the Secretary is allowed to consider global impacts. *RJR Nabisco*, 579 U.S. at 335. Indeed, that the other factors listed in § 6295(o)(2)(B)(i) focus primarily on domestic effects or effects on regulated parties strongly militates against such a reading. It would be odd if Congress, after expressly focusing on inherently domestic considerations (*e.g.*, “consumers of the products subject to” EPCA standards or “the need for national energy . . . conservation,” § 6295(o)(2)(B)(i)(II), (VI)), implicitly authorized the Secretary to consider global affects via an “ancillary” catch-all provision. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). The Proposed Standards ignore that, and so ignore the best reading of the EPCA.

C. The issues with the IWG estimates show that the Department should not use them in evaluating the Proposed Standards.

In light of the issues with the IWG numbers, the Department should not use the numbers. Indeed, not doing so would be consistent with EPCA. As the States showed, *see supra* § I.A, there is no way to determine, using the IWG numbers, whether the emissions reductions the Department estimates will have an “economic impact.” 42 U.S.C. § 6295(o)(2)(B)(i)(I). That is so because under equally reasonable assumptions, the SCGHG may be negative, essentially zero, or positive. As a result, there is no way to determine if the effect of the Proposed Standards on greenhouse gas emissions has an economic impact.

That is essentially what the Department has done in the Proposed Standards. The Standards stress that the Department “would reach the same conclusion presented in this proposed rulemaking that the Proposed Standards are economically justified no matter what value is ascribed to climate benefits.” 88 Fed. Reg. at 6,865. That is, the Department monetized the estimated reductions in greenhouse gas emissions from the Proposed Standards, and then declared them irrelevant. The States’ proposal is functionally the same, though it has the benefit of being consistent with the EPCA’s text. *Cf. Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (saying, in the context of fuel economy standards promulgated under a different provision of the

EPCA, that if the agency believes there is a non-zero value for a reduction in greenhouse gas emissions, it must include the value in its analysis). The States’ proposal also has the benefit of clarifying that the Department means what it says. The amount of ink the Proposed Standards spill discussing the IWG estimates suggests that the SCGHG are quite relevant despite the Department’s claims. After all, as Queen Gertrude said, one can protest too much.

In all events, the Department should be clearer about the role SCGHG plays in its analysis. For example, the Proposed Standards do not say what role, if any, the SCGHG plays in calculating the rebuttable presumption set forth in 42 U.S.C. § 6295(o)(2)(B)(iii). That is, even if the IWG estimates play no role in the ultimate conclusion to promulgate EPCA standards, the Department should clarify if they played a role in some part of the analysis.

II. The Department’s analysis does not comply with Executive Order 13,132.

Next, the Proposed Standards’ analysis under Executive Order 13,132 is deficient. Per the Proposed Standards, the Department “tentatively determined that [the Standards] would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” because (1) “EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule” and (2) “States can petition [the Department] for exemption from preemption.” 88 Fed. Reg. at 6,899. Thus, the Proposed Standards say, “no further action is required by Executive Order 13,132.” *Id.*

That is incorrect. The Proposed Standards clearly have federalism implications within the meaning of Executive Order 13,132. For example, if the Proposed Standards are promulgated, “[a]ny State regulation which sets forth procurement standards” relating to covered stove tops or ovens, is “superseded” unless those “standards are more stringent than the corresponding Federal energy conservation standards.” 42 U.S.C. § 6297(e). Preempting—even in part—State procurement rules is plainly a direct effect on the States and alters the federal-state relationship by directly regulating the States. It therefore implicates Executive Order 13,132. *See id.* § 6(c).

As another example, State institutions consume energy, including natural gas—and have for a very long time. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923) (noting that States have standing to sue for the threatened loss of natural gas to “various public institutions and schools”). The States have no reason to believe that such consumption does not include the use of gas stoves. That, of course, implicates reliance interest that the Department must consider before finalizing the Proposed Standards. *See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). But it is also another example of an effect of the Standards on the States. Indeed, it is an example of an effect that could give rise to “substantial direct compliance costs.” Exec. Order No. 13,132 § 6(b). So, since the Proposed Standards are “not required by statute,” the requirements of section 6(b) apply to the Standards.

In short, the Proposed Standards misstate whether Executive Order 13,132 applies. It does. The Department must rectify that before promulgating any final standards.

III. The Department failed to consider the EPCA’s constitutional issues in analyzing the Proposed Standards.

Next, the Proposed Standards do not reflect consideration of the EPCA’s constitutional issues. The EPCA is an exercise of Congress’s Commerce Clause power. The law prohibits “any manufacturer or private labeler to distribute in *commerce* any new covered product which is not in conformity with an applicable energy conservation standard established in or prescribed under this part.” 42 U.S.C. § 6302(a)(5) (emphasis added). “Commerce,” in turn, “means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).” § 6291(17). Consistent with that language, the Proposed Standards do not differentiate between interstate and intrastate markets. That is, the Standards—like § 6291(17)—cover all commercial activity, whether inter- or intrastate.

That is improper. Precedent dictates that Congress can regulate intrastate activity under the Commerce Clause only when that activity “substantially affects interstate commerce.” *United States v Lopez*, 514 U.S. 549, 559 (1995) (quotations omitted). Thus, for the Proposed Standards to reach the intrastate market for stoves and ovens, the Department must show that the intrastate activity covered by §§ 6291(17) and 6302(5) substantially affects the interstate market for covered stoves and ovens. There is no such analysis in the Proposed Standards—and so no constitutional basis for application of the Standards to intrastate stove and oven markets. Furthermore, if such an analysis showed that the intrastate market did not substantially affect the interstate market (and so was not properly the subject of federal regulation), then the Department must redo its cost-benefit analysis since the Standards would apply to a more limited set of stoves and ovens—those traveling interstate. *See* 42 U.S.C. § 6295(o)(2)(B)(i) (focusing on the effect of “the proposed standard”).

Moreover, even if the Department finds that intrastate commerce in stoves and ovens substantially affects interstate commerce, it should *still* exclude purely intrastate activities from any promulgated standard. The original understanding of Commerce Clause does not give Congress the power to regulate “activities that ‘substantially affect’ interstate commerce.” *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). That includes pairing the Commerce Clause with the Necessary and Proper Clause. If, by combination of the two, Congress could regulate intrastate activities with a substantial effect on interstate commerce, “much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage.” *Id.* at 588–89. Such a construction also threatens to turn “the Tenth Amendment on its head” by giving “to the United States all powers not expressly *prohibited* by the Constitution.” *Id.* at 589; *see also Printz v. United States*, 521 U.S. 898, 923–24 (1997) (“When a Law for carrying into Execution the Commerce Clause violates the principle of state sovereignty . . . it is not a Law proper for carrying into Execution the Commerce Clause.”) (alterations and quotations omitted); *In re MCP No. 165*, 20 F.4th 264, 283 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc) (The Commerce Clause is “not a clause that grants the national government all of the police powers customarily associated with state governments in order to fix any new societal challenge.”).

The Proposed Standards for gas stoves illustrate the point. Taking the Department’s latest statement at face-value, *but see infra* (noting the States’ concern that the Department’s statement is inaccurate), over half of the current market for gas cooking tops does not meet the relevant

standard set forth in the Proposed Standards. *See* 88 Fed. Reg. at 12,605. Moreover, of the models the Department tested, only “4 percent currently achieve” the proposed efficiency standard. *Id.* So the Proposed Standards effectively bans half of the current gas stove market—and almost all of the design diversity—based on prognostications about events 30 to 300 years in the future. And once such Standards are promulgated, they cannot be altered administratively even if the Department’s cost-benefit analysis turns out to be incorrect. *See* 42 U.S.C. § 6295(o)(1).

Such a rule is unprecedented and sweeping. The Department has not, in the history of the EPCA, issued a performance standard for gas stoves—much less a standard affecting such a large swath of the market. *See* 88 Fed. Reg. at 6,825–26. It now proposes to do so and “foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise”—regulation of consumer goods. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). That surely turns “the Tenth Amendment on its head,” *id.* at 589 (Thomas, J., concurring), and suggests the EPCA does not provide the Department such authority, *see, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (major-questions doctrine); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (avoiding agency interpretations that push constitutional boundaries); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (federalism canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (avoiding interpretations that raise constitutional doubts).

The answer is to exclude from the Proposed Standards all intrastate activity even if such activity has a substantial effect on interstate commerce in covered stoves and ovens. *See In re Aiken County*, 725 F.3d 255, 261 (D.C. Cir. 2013) (opinion of Kavanaugh, J.) (Under the Take Care Clause, “the President (and subordinate executive agencies supervised and directed by the President) may decline to follow [a] statutory mandate or prohibition if the President concludes that it is unconstitutional.”). Doing so helps ensure that the federal government stays within its constitutionally proscribed lane and preserves the “healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front.” *Gregory*, 501 U.S. at 458.

IV. The States’ concerns regarding the Department’s regulation of gas stoves and preliminary NEPA comments.

1. The States are concerned about the methodology the Department used to determine the impact of the Proposed Standards on gas stoves. As the Association of Home Appliance Manufacturers (AHAM) notes, the Department has given conflicting statements about how many gas stoves currently on the market meet the Proposed Standards. *See* Press Release, Statements from AHAM on Gas Cooking (Mar. 24, 2023) (providing a link to the Department’s conflicting statements on gas cooking);⁶ Brian Dabbs, *DOE Rule May Block 50% of Current Gas Stove Models*, Energy Wire (Feb. 24, 2023) (noting the conflict between the Department’s technical support document, which showed that 20 out of 21 tested models failed to meet the standard, and the Department’s subsequent statement).⁷ *Compare* Dep’t of Energy, *Technical Support Document: Energy*

⁶ Available at https://www.aham.org/AHAM/News/Latest_News/AHAM_Supports_Save_Our_Gas_Stoves_Act.aspx.

⁷ Available at <https://www.eenews.net/articles/doe-rule-may-block-50-of-new-gas-stoves/>.

Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Consumer Conventional Cooking Products 8-38 tbl.8.2.43 (Dec. 2022) (showing only 4 percent of tested gas cooking tops meet the Proposed Standard), with 88 Fed. Reg. at 12,605 (saying “nearly half of the total gas cooking top market currently achieves” the Proposed Standard). Indeed, AHAM has indicated that based on manufacturers’ own testing, “the vast majority of gas cooking appliances do not comply with the” Proposed Standards. Press Release, *supra*. Given that, and the President’s statement he “does not support banning gas stoves,” *see, e.g.,* Collin Anderson, *Turns Out They Are Coming for Your Gas Stoves*, Free Beacon (Feb. 25, 2023),⁸ the States are concerned the Department is being purposely opaque to avoid further public and congressional pushback, *see* Dabbs, *supra* (discussing negative congressional reactions to the Proposed Standards and gas stove regulation). Hiding the ball is the opposite of proper agency rulemaking. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (“The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”).

2. Lastly, the States acknowledge the Department’s statement that it has not yet finished its NEPA analysis but “anticipates that this rulemaking qualifies for categorical exclusion B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in categorical exclusion B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it otherwise meets the requirements for application of a categorical exclusion.” 88 Fed. Reg. at 6,899.

The States disagree. The Proposed Standards clearly involve “extraordinary circumstances . . . that may affect the significance of the environmental effects of the proposal.” 10 C.F.R. § 1021.410(b)(2). In particular, the Department should consider whether regulation of gas stoves results in substitution to electric stoves, with a corresponding increase in demand for electricity and attendant effects on a stretched power grid and on pollution. Building on that, the Department must also consider the effect of pending regulatory actions, such as the EPA’s denial of 19 SIPs and their attendant effect on electricity generation and pollution. *See, e.g.,* Fact Sheet, EPA, Final Disapprovals: “Good Neighbor” State Implementation Plans Addressing Interstate Transport Obligations for the 2015 Ozone National Ambient Air Quality Standards.⁹

The States look forward to the Department’s NEPA review, and reserve further comment until then.

⁸ Available at <https://freebeacon.com/energy/turns-out-they-are-coming-for-your-gas-stoves/>.

⁹ Available at <https://www.epa.gov/system/files/documents/2023-01/2015%20O3T%20SIP%20Disapprovals%20Fact%20Sheet.pdf#:~:text=On%20February%202022%2C%202022%2C%20EPA%20proposed%20to%20disapprove,the%202015%20ozone%20NAAQS%20at%20a%20later%20time.>

Conclusion

To summarize:

- 1) The Department should eschew any reference to the IWG estimates of the SCGHG. The IWG used a fatally flawed model to generate those estimates. Furthermore, the estimates are unlawfully promulgated and inconsistent with the EPCA. The States' suggestion is thus modest and logical: eschew the analysis. After all, the IWG's analysis does not turn on data, but assumptions—and under equally reasonable assumptions, the SCGHG may be negative or essentially zero. There is thus no reason for the Department to conclude that the Proposed Standards' effect on greenhouse gases will have an economic impact. So disclaiming the analysis altogether is consistent with the EPCA and addresses the legal issues with the IWG estimates.
- 2) The Department needs to redo the federalism analysis that Executive Order 13,132 requires because the Proposed Standards are "policies that have federalism implications" within the meaning of the order.
- 3) The Department should exclude intrastate commerce in stoves and ovens from any final standards to avoid constitutional issues with the regulation. At a minimum, the Department must adjust its analysis to reflect the fact that the federal government can regulate purely intrastate activity under the Commerce Clause only where such activity has a substantial effect on interstate commerce.

Sincerely,



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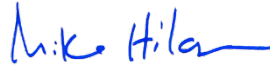
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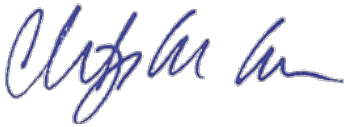
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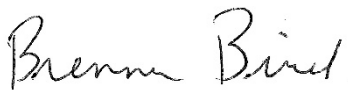
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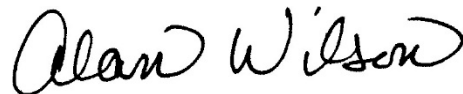
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