

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 15-1056

United States Court of Appeals
for the District of Columbia Circuit

HEARTH, PATIO & BARBECUE ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**BRIEF OF STATES OF NEW YORK, ALASKA, CONNECTICUT,
ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, OREGON,
RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE PUGET
SOUND CLEAN AIR AGENCY AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

LETITIA JAMES

Attorney General

State of New York

BARBARA D. UNDERWOOD

Solicitor General

ANISHA S. DASGUPTA

Deputy Solicitor General

PHILIP J. LEVITZ

Assistant Solicitor General

(518) 776-2406

MICHAEL J. MYERS

Senior Counsel

NICHOLAS C. BUTTINO

Assistant Attorney General

of Counsel

(Counsel listing continues on signature pages.)

Dated: September 18, 2020

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties. All parties, intervenors, and amici are listed in the Brief for Petitioner Hearth, Patio, and Barbecue Association, except that Pellet Fuels Institute is no longer a party, and the amici joining this brief are the States of New York, Alaska, Connecticut, Illinois, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington, and the Puget Sound Clean Air Agency.

B. Rulings Under Review. References to the agency action at issue appear in the Brief for Petitioner Hearth, Patio, and Barbecue Association.

C. Related Cases. This Court granted Pellet Fuels Institute's motion to dismiss voluntarily in Case No. 15-1140 and terminated the consolidation of that case with this one.

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GLOSSARY OF TERMS AND ABBREVIATIONS

g/hr	Grams per hour
NESCAUM	Northeast States for Coordinated Air Use Management
PM _{2.5}	Fine particulate matter
Puget Sound	Puget Sound Clean Air Agency
Puget Sound Study	Puget Sound Clean Air Agency, <i>Preliminary Review and Critique of Analyses of NSPS Test Method Variability (Curkeet, 2010) and the Relationship of EPA Certified Values to “In-Home Use” (Houck, 2012)</i> (Dec. 5, 2012)
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INTRODUCTION AND INTERESTS OF AMICI

New York, Alaska, Connecticut, Illinois, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Washington's Puget Sound Clean Air Agency (Puget Sound) (collectively, the States) submit this amicus brief in support of the Environmental Protection Agency (EPA) in this challenge to a 2015 EPA rule establishing emission and audit standards for wood-burning devices. *See Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces*, 80 Fed. Reg. 13,672 (Mar. 16, 2015) (Rule).

The amici States have a compelling interest in protecting their citizens from the emissions of wood-burning devices, which produce multiple pollutants that cause serious health effects. To advance this compelling interest, the amici States have enacted their own measures to mitigate the risks of wood-burning devices, and have participated in efforts to reduce wood-burning device pollutants at the federal level.

EPA promulgated its original federal standards for wood heaters in response to a lawsuit filed by New York. New York and several States later sued to ensure that EPA fulfilled its statutory duty to update the

original standards, resulting in a consent decree that paved the way for the 2015 Rule at issue in this case.

The state studies described in this brief confirm that there is no merit to petitioner Hearth, Patio & Barbecue Association's objections to the audit-testing provisions in the 2015 Rule. As the States' analyses demonstrate, the audit-testing provisions are necessary to ensure compliance with the Rule's emissions standards. Petitioner's testing variability concerns are overblown: those concerns are based on flawed statistical analysis and avoidable testing choices made by the manufacturers themselves. Accordingly, the States urge this Court to uphold the Rule in full, and reject the petitioner's challenge.

BACKGROUND

A. Wood Smoke's Harms to the Amici States

Wood-burning devices emit numerous pollutants that endanger public health and welfare, such as fine particulate matter (PM_{2.5}), carbon monoxide, polycyclic aromatic hydrocarbons, and polycyclic organic matter. Studies have found that PM_{2.5} emissions from wood-burning devices are associated with significant increases in morbidity and mortality for men,

African-Americans, and low-income persons.¹ Moreover, emerging research shows that long term exposure to PM_{2.5} increases the mortality rate from COVID-19, including in minority and low-income communities.²

Carbon monoxide from wood-burning devices can cause headaches, nausea, unconsciousness, and even death.³ Polycyclic aromatic hydrocarbons from the devices can cause cancer.⁴ And polycyclic organic matter from the devices can cause cancer, skin disorders, and respiratory

¹ See, e.g., Qian Di et al., *Air Pollution and Mortality in the Medicare Population*, 376 *New Engl. J. Med.* 2513, 2520-21 (2017), <https://www.nejm.org/doi/full/10.1056/NEJMoa1702747>; see also Richard Burnett et al., *Global Estimates of Mortality Associated with Long-Term Exposure to Outdoor Fine Particulate Matter*, 115 *Proceedings of Nat'l Acad. of Scis.* 9592, 9593 (2018), <https://tinyurl.com/yxbo9pmd> (estimated 4 million deaths worldwide due to PM_{2.5} exposure in 2015).

² Xiao Wu et al., *Exposures to Air Pollution and COVID-19 Mortality in the United States: A Nationwide Cross-Sectional Study* 2, 12 (Apr. 27, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2>.

³ Ctrs. for Disease Control & Prevention, *Carbon Monoxide Poisoning* (last updated Oct. 26, 2016), <https://tinyurl.com/yxjmtmvd>.

⁴ Ctrs. for Disease Control & Prevention, *Toxic Substances Portal: Polycyclic Aromatic Hydrocarbons (PAHs)* (last updated Aug. 28, 2014), <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=121&tid=25>.

harms.⁵ In addition, greenhouse gases produced by wood-burning devices have adverse climate impacts. *See* 80 Fed. Reg. at 13,674.

The health effects of wood-burning devices are acute in the amici States. The amici States have hundreds of thousands, if not millions, of residents who rely on wood-burning devices for heating. New York alone contains nearly 150,000 homes that use wood as a primary heating source and 500,000 homes that use wood for supplemental heat.⁶ In Vermont, 22% of homes use wood as a primary heating source, and 35% of households burn wood for at least some heating.⁷

Wood-burning devices pose a particular risk to residents of rural areas in the amici States. One study found “[v]ery high spikes” in wood

⁵ EPA, *Polycyclic Organic Matter (POM)* (Sept. 23, 2016), <https://www.epa.gov/sites/production/files/2016-09/documents/polycyclic-organic-matter.pdf>.

⁶ N.Y. State Energy Research & Dev. Auth., *New York State Wood Heat Report: An Energy, Environmental, and Market Assessment* 8 (Apr. 2016), <https://tinyurl.com/y2vow9w6>.

⁷ Vt. Dep’t of Forests, Parks & Recreation, *Vermont Residential Fuel Assessment for the 2018-2019 Heating Season* 15 (Nov. 2019), <https://tinyurl.com/y2vf8b9s>; *see also* Wilson Ring, *Vermont No. 1 in Per Capita Wood Stove Emissions*, Burlington Free Press (Mar. 14, 2015), www.burlingtonfreepress.com/story/news/local/2015/03/14/vermont-per-capita-wood-stove-emissions/24784007/.

smoke concentrations in a seven-county rural area of upstate New York, where 26% of the monitored population were exposed to elevated wood smoke posing serious health risks.⁸

B. The Amici States' History of Supporting Stricter Emissions Limits for Wood-Burning Devices

The amici States have enacted many measures to mitigate the harmful effects of wood-burning devices. New York has launched the Renewable Heat New York program, which provides support and funding for development and demonstration of safer wood heaters.⁹ Vermont imposes restrictions on allowable fuels and siting for wood-burning devices, and has promulgated regulations prohibiting the operation or sale of wood heaters that are not certified as meeting the 2015 Rule standards (which otherwise are applicable only to new heaters).¹⁰ Alaska likewise has promulgated regulations prohibiting the installation of wood

⁸ N.Y. State Energy Research & Dev. Auth., *Spatial Modeling and Monitoring of Residential Woodsmoke Across a Non-Urban Upstate New York Region* xvii-xix, 4-1 (Feb. 2010), <https://tinyurl.com/y5uyf867>.

⁹ See N.Y. State Energy Research & Dev. Auth., *Renewable Heat NY*, <https://www.nyserda.ny.gov/All%20Programs/Programs/Renewable%20Heat%20NY>.

¹⁰ 16-3 Vt. Code R. 100 § 5-204.

heaters that are not certified as meeting the 2015 Rule standards.¹¹ Alaska also relies on certification test results to limit the wood-burning devices qualifying for use in an area of the State with particularly high PM_{2.5} levels.¹² After the Tacoma-Pierce County area was identified as having dangerously high PM_{2.5} levels, Washington and its Puget Sound Clean Air Agency imposed burning restrictions and offered incentives to change out older, dirtier wood-burning devices, which substantially reduced PM_{2.5} levels in the region.¹³

The amici States also have a long history of urging EPA to promulgate standards for wood-burning devices that protect the health of amici's citizens. EPA promulgated the original federal emissions standards for wood heaters in 1988, in response to a lawsuit filed by New York. *See* 53 Fed. Reg. 5873 (Feb. 26, 1988); 40 C.F.R. §§ 60.530-60.539b. In 2012, Puget Sound urged EPA to update the standards for wood-

¹¹ Alaska Admin. Code tit. 18, § 50.077.

¹² *Id.*

¹³ *See* Wash. Dep't of Ecology, *Progress in Reducing Fine Particulate Air Pollution in Tacoma-Pierce County* 1 (Apr. 2019), <https://fortress.wa.gov/ecy/publications/documents/1902009.pdf>.

burning devices, including by imposing audit testing procedures.¹⁴ In 2013, New York and several States filed a complaint to force EPA to fulfill its statutory duty to update those standards. *See* Compl., *New York v. McCarthy*, No. 13-cv-1553 (D.D.C. Oct. 9, 2013), ECF No. 1. The States also asked that EPA be required to set emissions standards for wood boilers, which were exempted under the 1988 rule. *Id.* at 7-8. EPA and the States resolved that matter through a consent decree that required EPA to promulgate updated standards. *See* Partial Consent Decree, *New York v. McCarthy*, No. 13-cv-1553 (D.D.C. Apr. 28, 2018), ECF No. 27-1.

When EPA proposed new standards, *see* 79 Fed. Reg. 6330 (Feb. 3, 2014), New York and other States submitted comments urging EPA to adopt a new 1.3 g/hr emissions limit for wood stoves, which was consistent with the proposed rule. The States also urged EPA to adopt a three-to-four-year phase-in schedule, which was faster than the proposed rule's phase-in periods of up to eight years. The States explained that many wood stove models already could achieve EPA's proposed standards

¹⁴ *See* Letter from Puget Sound to Stephen D. Page, Dir., Office of Air Quality Planning & Standards, EPA (Dec. 5, 2012), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0734-0060>.

and there was negligible evidence that manufacturers needed more than three-to-four years to comply with the stricter standards.¹⁵

C. The 2015 Rule and Petitioner's Challenge

After completing a thorough review of the available data, EPA issued the 2015 Rule at issue in this litigation. To allow manufacturers flexibility, EPA permitted a five-year phase-in period, in two stages. EPA set the emissions limits for wood heaters at 4.5 g/hr beginning in 2015 and at 2.0 g/hr (or 2.5 g/hr if manufacturers tested with cordwood¹⁶) beginning in 2020—higher than in the proposed rule, to address

¹⁵ See Comments Submitted by New York, Maryland, and Massachusetts on Proposed Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters at 6 (May 5, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0734-1477>; see also 79 Fed. Reg. at 6339, 6343; 80 Fed. Reg. at 13,678, 13,681, 13,686-87.

¹⁶ Cordwood has more irregularities than the crib wood that is more commonly used for testing; thus, some commenters argued that cordwood could have more variability in testing results. See EPA, *Burn Wise: Cordwood and Crib Wood Testing* (last updated May 15, 2020), <https://www.epa.gov/burnwise/cord-wood-and-crib-wood-testing>; EPA, Response to Comment on Proposed Rule, 'Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters,' at 83, 468-69 (Feb. 2015) (Response to Comments), <https://tinyurl.com/y6adkawd>.

manufacturer concerns. 80 Fed. Reg. at 13,678. EPA also set separate new emissions limits for wood boilers and forced-air furnaces. *See id.* at 13,681.

To be permitted to sell a wood-burning device under the Rule, manufacturers are required to certify their compliance with emissions standards for each model line, based on a certification test. 40 C.F.R. §§ 60.533(b), 60.5475(b). To enforce the emissions standards, EPA renewed audit testing procedures that had originated in the 1988 rules, with only slight variation. *Id.* §§ 60.533(n), 60.5475(n); 80 Fed. Reg. at 13,708, 13721; *see also* EPA Br. at 19-20 (describing minor changes in audit procedures).

Thereafter, petitioner Hearth, Patio & Barbecue Association brought this suit challenging the Rule. In its brief, petitioner claims that the Rule's audit-testing provisions do not account for testing variability—i.e., potential variability in test results at the initial certification stage and the audit stage—and are therefore arbitrary and capricious.¹⁷

¹⁷ The Pellet Fuels Institute also filed a petition for review of the Rule, but voluntarily dismissed its petition. *See Order, Pellet Fuels Inst. v. EPA*, No. 15-1140 (June 26, 2020), Doc. No. 1849126.

ARGUMENT

In reviewing an agency decision, “a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency need only “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (quotation marks omitted). “[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted).

The amici States agree with EPA that petitioner’s challenges to the Rule are meritless, for the reasons stated in EPA’s brief. The States file this brief to inform the Court of the States’ own research, which underscores that the audit-testing provisions challenged by petitioner are necessary to ensure compliance with emissions standards, and that petitioner exaggerates testing variability as an impediment to reliable auditing.

A. Audit Testing Is Necessary to Ensure Compliance with the Rule.

The amici States have long emphasized the importance of audit testing to confirm compliance with emissions standards for wood-burning devices.¹⁸ The Northeast States for Coordinated Air Use Management (NESCAUM)—an association of eight States committed to working together to address air pollution—recently explained that “[e]ffective compliance audit testing is needed to ensure the integrity of the emission certification process.”¹⁹ Because manufacturers certify their compliance with emissions standards without regulatory oversight, audit testing is necessary to ensure that errors in the certification process—whether willful or unwitting—do not go unchecked. Audit testing also gives consumers confidence that the devices they purchase actually meet the

¹⁸ *See, e.g.*, Comments of New York State Department of Environmental Conservation on Advance Notice of Proposed Rulemaking, “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces,” at 4-5 (Feb. 13, 2019), <https://tinyurl.com/y6ky26t8>.

¹⁹ Comment Submitted by NESCAUM on Advanced Notice of Proposed Rulemaking for New Source Performance Standards for Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Heaters at 3 (Feb. 12, 2019), <https://tinyurl.com/y3vv6vyy>.

certified emissions standards. And audit testing promotes a level playing field among manufacturers.

State analyses of manufacturers' certification reports underscore the critical need for audit testing. For instance, the Alaska Department of Environmental Conservation has conducted a systematic review of wood-burning devices that have been certified to be compliant with EPA standards.²⁰ The Department found that 59% of the certifications had inaccurate certification data, and 64% had certifications based on non-representative testing methods—i.e., methods that were not consistent with ordinary consumer use. What is more, three certifications lacked certification test reports altogether.²¹ These results suggest serious

²⁰ See Alaska Dep't of Env'tl. Conservation, Div. of Air Quality, *Air Non-Point & Mobile Sources: Manufacturers & Vendors*, <https://dec.alaska.gov/air/burnwise/manufacturers-vendors/#Regulations>.

²¹ The Department evaluated 128 certifications, and posted two lists with error data. See Alaska Dep't of Env'tl. Conservation, Div. of Air Quality, *Transition List* (Sept. 14, 2020), <https://tinyurl.com/yxl9m8rh>; Alaska Dep't of Env'tl. Conservation, Div. of Air Quality, *Disapproved List* (Sept. 9, 2020), <https://tinyurl.com/y6pd37f3>. On these two lists, 75 out of 128 certifications reported data inaccurately (listed as IDU) and 82 out of 128 certifications had non-representative data reported (listed as NR). The lists also identify two certifications as not having a test report

problems in the certification process.²² And those problems in the certification process in turn demonstrate why EPA must have a way to check on manufacturers—and hold them accountable—through audits.

B. Testing Variability Does Not Impede Effective Audit Testing.

1. Petitioner relies on a flawed statistical analysis of testing variability.

Contrary to petitioner’s claims, potential variability in test results at the certification stage and the audit stage do not render the Rule’s audit-testing provision problematic. As Washington’s Puget Sound Clean Air Agency found in a study on which EPA relied in finalizing the Rule, testing of wood-heating devices is sufficiently precise to make audit

(one listed as NTR and the other stating “no test report”) and one certification that relied on an incorrect test report.

²² Amici’s examination of testing data from other sources confirms these concerns. *See, e.g.*, Intertek, Certificate of Conformity at 15-17 (July 16, 2020), <https://tinyurl.com/y662yhcs> (lab disregarded unfavorable test runs without replacing them with additional runs); OMNI-Test Laboratories, Inc., Certification Test Report: Catalytic Wood Burning Factory Built Fireplace Model: 42 Apex at 5, 7, 31 (July 20, 2018), <https://www.travisindustries.com/docs/EPA/EPA%20Report%2042%20Apex.pdf> (lab relied on data showing model emitted negative particulate matter, which is not possible); OMNI-Test Laboratories, Inc., Certification Test Report: Travis Industries, Inc. Model: Large Flush Wood Hybrid Fyre Insert at 5, 7, 35 (June 2018), <https://tinyurl.com/yym7cpkh> (same).

testing reliable and effective.²³

Petitioner misplaces its reliance on a study by Rick Curkeet, which petitioner proffers as evidence of the problem of testing variability. EPA appropriately relied on Puget Sound's demonstration that there were serious flaws in the Curkeet study.²⁴ As Puget Sound's analysis showed, the Curkeet study suffers from three main defects. First, the Curkeet study incorrectly applied statistics applicable to a normal distribution to data that was not normally distributed.²⁵ Second, the Curkeet study improperly divided its dataset and drew conclusions from data that were

²³ See Response to Comments at 236; Puget Sound, *Preliminary Review and Critique of Analyses of NSPS Test Method Variability (Curkeet, 2010) and the Relationship of EPA Certified Values to "In-Home Use" (Houck, 2012)* (Dec. 5, 2012) (Puget Sound Study), <https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OAR-2009-0734-0060&fp=true&ns=true>.

²⁴ Rick Curkeet & Robert Ferguson, *EPA Wood Heater Test Method Variability Study: Analysis of Uncertainty, Repeatability and Reproducibility Based on the EPA Accredited Laboratory Proficiency Test Database* (Oct. 6, 2010), <https://tinyurl.com/y4bq27g6>.

²⁵ Puget Sound Study at 6-7. Normal-distribution statistics apply when the distribution of values falls along a predictable bell-curve. See, e.g., *Palmer v. Shultz*, 815 F.2d 84, 93-94 (D.C. Cir. 1987). In contrast, where the data points are not normally distributed, statisticians use different tests that do not assume that the data falls on a bell curve. See, e.g., *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1164 (Fed. Cir. 2018).

not representative of the dataset as a whole, allowing particularly extreme values to be highlighted and taken out of context.²⁶ Finally, the Curkeet study conflated absolute difference in values with a confidence interval, leading to a dramatic overestimate of uncertainty.²⁷ Based on these problems with the Curkeet study, EPA reasonably discounted Curkeet's conclusions.²⁸ EPA further noted that it performed its own analysis of the data, and found that the Curkeet study was inconsistent with that analysis.²⁹

EPA's explanation of why it decided to discount the Curkeet study satisfied its legal obligations. "EPA specifically analyzed and responded" to the study, and identified the flaws that led EPA to reject the study's conclusions. *See International Fabricare Inst. v. EPA*, 972 F.2d 384, 394 (D.C. Cir. 1992). The Court's role is only to ensure that EPA looked at the data and made a reasoned decision—as it did here. *See State Farm*, 463 U.S. at 43.

²⁶ *See* Puget Sound Study at 9.

²⁷ *See id.* at 9-10.

²⁸ Response to Comments at 236.

²⁹ *Id.*

2. Testing variability is largely attributable to manufacturers' own testing choices.

NESCAUM's analysis shows that testing variability may be minimized if manufacturers use a reliable certification test and scrupulously follow that test method. In issuing the Rule, EPA required labs to follow a certification method designated Method 28R, but allowed for approval of alternative test methods. 40 C.F.R. §§ 60.534(a)(1)(i), 60.5476; 80 Fed. Reg. at 13,709. At the request of manufacturers, EPA approved ASTM 3053, an industry-developed test, as an alternative test method.³⁰ But using ASTM 3053 produces more variability than Method 28R because ASTM 3053 contains fewer specific instructions. To illustrate, where Method 28R states that manufacturers should use fuel logs that are no less than 5/6 the length of the firebox, ASTM 3053 contains no such limitations.³¹

³⁰ See Letter from Steffan Johnson, EPA, to Justin White, Hearthstone QHPP, Inc. (Feb. 28, 2018), <https://tinyurl.com/y2hfp58w>.

³¹ Compare EPA, *Air Emission Measurement Center (EMC): Method 28 – Certification and Auditing of Wood Heaters* § 7.1.4 (Aug. 4, 2017), <https://www.epa.gov/emc/method-28-certification-and-auditing-wood-heaters>, with ASTM Int'l, *Standard Test Method for Determining Particulate Matter Emissions from Wood Heaters Using Cordwood Test Fuel*, <https://www.astm.org/Standards/E3053.htm>.

A NESCAUM study shows the testing variability that may result from ASTM 3053.³² NESCAUM tested six wood stoves, including five that used ASTM 3053 for their certifications and one that used Method 28R. NESCAUM replicated the results of the stove certified using Method 28R—in other words, there was no substantial testing variability using that method. However, two of the five stoves using ASTM 3053 had high variability between the certification test results and NESCAUM's results. NESCAUM determined that these stoves used non-typical fueling approaches, such as by burning short logs or logs stacked in unusual ways, which likely explained the variation in test results.³³

NESCAUM noted that manufacturers could generate more reliable ASTM 3053 test results by conducting certification tests in a manner that was more representative of consumers' ordinary use of the stoves.³⁴ For example, the manufacturer of one of the stoves in NESCAUM's study used the ASTM 3053 test for certification, but with a representative

³² Memorandum from Barbara Morin & Lisa Rector, NESCAUM, to the NESCAUM Board of Directors Concerning the Reproducibility of Test Results in Step 2 Stoves (Sept. 4, 2020), <https://tinyurl.com/y6js5wnn>.

³³ *Id.* at 4-7.

³⁴ *Id.* at 8-9.

testing technique (by loading the stove as a consumer would). NESCAUM found that that stove emitted almost exactly the amount in NESCAUM's test that the stove was certified to emit.³⁵

NESCAUM concluded that it was able to reproduce certification test results using either Method 28R or ASTM 3053 with little if any testing variability so long as the certification tests were conducted in a manner representative of consumer use. In sum, amici's experiences and analyses confirm that the Rule's audit provisions provide a reliable—and necessary—mechanism for ensuring compliance with the Rule's emissions standards.³⁶

³⁵ *Id.*

³⁶ *Id.*

CONCLUSION

For the reasons stated above, the Court should uphold the Rule and dismiss the petition in its entirety.

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Albany, New York

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Amici Curiae

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
PHILIP J. LEVITZ
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel

By: /s/ Nicholas C. Buttino
NICHOLAS C. BUTTINO
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 776-2406
Nicholas.Buttino@ag.ny.gov
of Counsel

(Counsel listing continues on the next page.)

CLYDE "ED" SNIFFEN, JR.
Acting Attorney General
State of Alaska
1031 W. 4th Ave
Anchorage, AK 99501

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301-4096

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph St.
Chicago, IL 60601

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

KEITH ELLISON
Attorney General
State of Minnesota
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101

JENNIFER A. DOLD
General Counsel
Puget Sound Clean Air Agency
1904 Third Avenue, Suite 105
Seattle, WA 98101

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,352 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ William P. Ford

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Court's CM/ECF system on September 18, 2020. I certify that all parties and counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 18, 2020
Albany, NY

/s/ Nicholas C. Buttino