No. 25-879

In the Supreme Court of the United States

AMERICAN GAS ASSOCIATION, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, Competitive Enterprise Institute (CEI), is a nonprofit educational and research institute headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, the institute has focused on raising public understanding of the problems of overregulation through policy analysis, commentary, and litigation. CEI also pursues public-interest litigation to ensure that federal agencies act within the constraints of the United States Constitution, the Administrative Procedures Act, and its enabling statutes. CEI's mission is to develop and advocate for policies that advance the right to freedom, fairness, property, and prosperity for Americans. CEI's Center for Energy and Environment ("the Center") advocates for free market reforms that ensure abundant and affordable energy and better protect personal energy choices of Americans.

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[1] Amicus affirms that no counsel for a party authored this brief in whole or in part, that no person other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel notified the parties' counsel of record of the intent to file this brief. Counsel for Petitioner (AGA) and Respondent (DOE) received timely notice as required by rule 37.2(a). Counsel of record for Intervenor (Earthjustice) was notified within a shortened timeframe due to them being added as a counsel of record after original notice was given. Intervenor has consented to CEI submitting this brief and to the shortened notice period.

SUMMARY OF THE ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit (the Circuit) upheld the Department of Energy's (DOE) 2023 energy efficiency standards for residential furnaces and commercial water heaters. 10 C.F.R. § 430.32. The Circuit's decision violates the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6295, by effectively eliminating non-condensing technology and in effect mandating the use of condensing technology or shifting consumer choice in energy sources (*i.e.* electricity). The Circuit's decision denies tens of millions of American families a consumer choice and in certain cases, energy choice.

The Circuit's interpretation of the statute at issue, 42 U.S.C. § 6295(o), not only frustrates the purpose of that very provision, but also deviates from this Court's requirements on deference under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) and canons of statutory interpretation. Rather than engaging in an independent analysis to interpret the statute, the Circuit deferred to "agreed upon" interpretations of the statutory provision that underlies this case. CEI submits that the Circuit's interpretation is flawed and the process that the Court undertook to arrive at its interpretation deviates from the requirements of this Court in *Loper Bright*. CEI respectfully urges this Court to grant Petitioner's request for certiorari to reinforce the Court's role when it comes to interpreting statutes under the *Loper Bright* standard and protect consumer choice in accordance with EPCA. *Id.*

ARGUMENT

I. The Circuit Improperly Relied on DOE and Petitioner's Agreed Interpretation to Improperly Interpret Key Provisions of the Underlying Statute in Violation of EPCA's Statutory Protection of Consumer Choice, When Setting Energy Efficiency Standards

A. The Plain Meaning of the Phrase "Performance Characteristics" Can Be Enforced Without an Absurd Result

EPCA expressly prohibits DOE from prescribing energy standards that are "likely to result in the unavailability . . . in any product type (or class) of *performance characteristics* . . . that are substantially the same as those generally available in the United States at the time . . . ." 42 U.S.C. § 6295(o)(4) (emphasis added). But the Circuit's ruling in the case below resulted in the undisputed elimination of non-condensing gas furnaces currently used in millions of households across America. *See Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th at 487 at 502 (Rao, N., dissenting) (D.C. Cir. 2025). In support of its findings, the Circuit determined that the venting mechanism, installation factors, or space-related attributes of non-condensing furnaces did not constitute "performance characteristics" within the meaning of EPCA. 42 U.S.C. § 6295(o)(4). Thus, the issue before this Court is whether the Circuit properly interpreted the phrase "performance characteristic" under EPCA when it evaluated the venting features of condensing and non-condensing furnaces. *Id.*

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotations omitted). "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024)

Here, the Circuit appropriately began with a recitation of the dictionary definition of the word "performance" and "characteristics." *Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th 476, 487 (D.C. Cir. 2025). Thereafter, without stopping to independently interpret the plain meaning of those words in the context of EPCA, the Circuit determined the phrase to be "broad" based on the agreement of the parties and the dissent. *Id.* at 488. Referring again to the parties' agreement, the court found "the plain text of 'performance characteristic' means a product attribute that provides utility to consumers desiring the use of the product." *Id.* Then, citing to DOE's Interpretive Rules, the Circuit found "because every appliance offers a unique function to consumers, the concept of a feature or performance characteristic is very case-specific . . . and no single definition could capture the potential for features across the broad array of consumer products . . . " subject to EPCA. *Id.* citing 2021 Interpretive Rule, 85 Fed. Reg. at 73948.

Without engaging in any independent textual analysis of the statute, the Circuit again cites to the parties' agreements and DOE's analysis of "performance characteristic" to find that "the plain text of the statute does not get us home" and set out to resolve the "specific ambiguity" as it relates to consumer furnaces and commercial water heaters. *Id.* at 488. From that point on, the Circuit evaluated each attribute presented by Petitioners in the context of "utility" rather than the actual definition of "performance characteristics" because it essentially determined performance characteristic to be a measure of utility. *Id.*

This was the first mistake the Circuit committed in its interpretation of the law. The Circuit had a duty to analyze the statute to independently determine whether the statute is in fact ambiguous. This step is necessary for them to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). By failing to independently determine whether there was an ambiguity based on the statutory text and instead relying on DOE's analysis in its rulemaking, the Circuit failed to follow this Court's directive under *Loper Bright*.

Resolving the meaning of "performance characteristics" is a question of law to be carried out by the courts. Had the Circuit examined the statute's text, it could have stopped its analysis of the phrase at its plain meaning. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (when the statute's language is plain, the court must enforce it according to its terms.) While it is true that examples

of "performance characteristic" may differ from one product to the next, the definition of the phrase can stay the same and still make sense of the statute, which provides:

> The Secretary may not prescribe an amended or new standard under this section if the Secretary finds . . . that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding.

42 U.S.C. § 6295(o)(4). The definition of "performance" and "characteristics" can be combined to mean a distinguishing trait, quality or property of a product's execution of an action. *See Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th at 487 (D.C. Cir. 2025) (quoting *Performance* and *Characteristics*, Merriam-Webster, Inc. (Ninth New Collegiate 1985). The plain meaning of this phrase is sufficient to resolve the question of whether the different venting features of condensing and non-condensing gas furnaces constitute a "performance characteristic" without reaching an absurd result. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Therefore, the Court erred in determining the statutory language was broad and deferring to DOE's interpretation of this phrase. *Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th 476, 487 (D.C. Cir. 2025).

As the Circuit summarized in its technical/factual analysis of condensing and non-condensing furnaces, all gas furnaces burn gas to heat the air. *Id.* at 483. In non-condensing furnaces, excess heated gas vent out of the building through an unpowered heat exchanger such as a vertical chimney. *Id.* Venting is necessary "to avoid excessive condensate production in the vent." *Id.* quoting Consumer Furnaces Rule, 88 Fed. Reg. at 87563 n.111. "Non-condensing appliances are currently used in millions of homes and commercial buildings." *Id.* at 502 (Rao, N., dissenting).

On the other hand, in condensing gas furnaces, excess heat is not vented through a vertical chimney. *Id.* at 483. Instead, excess heat is vented into a powered heat exchanger, which captures the *excess* heat and turns it into condensed water vapor. *Id.* This feature makes it more energy efficient because the excess heat is captured for use and not wasted. *Id.* This additional process results in leftover liquid condensate, which is then deposited into a drain. *Id.* at 43. Because water is involved, the vents for non-condensing furnaces must be "corrosion-resistant." *Id.* This means non-condensing appliances cannot share vents with condensing appliances" *Id.* (internal quotations and cites omitted).

Applying the dictionary definition of "performance," the "action being executed" by the furnace is the burning of gas to heat air and releasing the heated air to warm homes. The performance characteristic would be the furnace's "distinguishing trait" or "quality," when it executes the action of heating air. In a non-condensing furnace, the gas is burned, heat is released to warm the house and excess heat is immediately vented out as hot air to prevent the unit from overheating and failing. In a condensing furnace, gas is

burned and heat is released, but excess heat is vented for further treatment to capture additional heat before it is finally released as condensate.

Whereas non-condensing furnaces produce heat for use in a single step and can work with a vertical vent, condensing furnaces produce more heat, but over two steps, requiring more (usually horizontal) vent space to allow for the second capture of heat. Thus, while they may both perform the same act of burning gas and releasing hot air, the different ways in which hot air is treated afterwards are characteristics that distinguish non-condensing from condensing furnaces. As such, under the plain meaning of the phrase "performance characteristics," non-condensing furnaces have different performance characteristics from condensing furnaces. Non-condensing furnaces possess performance characteristics that are distinct from condensing furnaces and are in wide use amongst older homes in America. Thus, they should be protected from elimination under EPCA under the plain meaning of EPCA.

B. Textual Analysis of the Statute Does Not Support the Court's Deferential Interpretation of "Performance Characteristics"

Without attempting to apply the plain meaning of the phrase, the Circuit declared it to be ambiguous and relied on the Parties' agreement to define "performance characteristics" as the products "useful output." *Id.* at 487. This definition, however, is inconsistent with the statute because it effectively treats performance and utility as one and the same, even though the word "utility" appears nowhere in the provision at issue. *See* 42 U.S.C. § 6295(o)(4). Under the provision at issue, the factors for consideration include performance character-

istics (including reliability), features, sizes, capacities, and volumes. *Id.* The word "utility" is not amongst factors to be considered. "Utility" does, however, appear in a different part of the statute — the standard for evaluating *economic justification* at 42 U.S.C. § 6295 (o)(2)(B)(i)(IV), which provides:

> In determining whether a standard is economically justified, the Secretary shall . . . conside[r] . . . any lessening of the *utility or* the performance of the covered products likely to result from the imposition of the standard . . . .

(emphasis added).

What is more, when the word "utility" appears in the statute, it is separated from "performance" by an "or." "The word 'or' is almost always disjunctive and is generally used to indicate an alternative." *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024) (internal quotations omitted). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise. . . . " *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). But here interpreting "or" as a disjunctive makes sense because performance is used elsewhere, independent of "utility." Therefore, both words must be given meaning when they appear together. *Id.* at. 339 ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.")

Moreover, because Congress did not use the word "utility" in 42 U.S.C. § 6295(o)(4), it is inappropriate for the Circuit to interpret performance characteristic as being about "useful output" or utility. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (internal

quotation omitted) ("when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presumes that Congress intended a difference in meaning.") Utility should not have played a role in the Circuit's evaluation of performance characteristics of non-condensing furnaces. In fact, its application yielded a rather different interpretation. It resulted in the Circuit completely ignoring the critical difference between condensing and non-condensing furnaces that forms the subject of Petitioner's claims. It resulted in the complete failure to recognize the literal retrofitting that millions of consumers must make to their homes when forced to transition to condensing furnaces to accommodate their different performance characteristics.

II. Legislative History Does Not Support the Circuit's Interpretation of EPCA

The Circuit's takeaway from the legislative history related to AGA's statements to Congress is misplaced. The Circuit found that "Congress was well aware of Petitioner's perspective regarding venting mechanics for small gas furnaces when it amended EPCA in 1987" because the AGA submitted a statement to the Subcommittee on Energy Conservation and Power in 1986 . . . . " *Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th at 487, 488 (D.C. Cir. 2025) citing *National Appliance Energy Conservation Act of 1986: Hearing on H.R. 5465 Before the H. S. Comm. on Energy Conservation and Power Comm. on Energy and Commerce*, 99th Cong. 146 (1998) (Statement of the American Gas Association). The Circuit further reasoned that "[i]f Congress intended particular methods of venting such as unpowered venting to be a perform-

ance characteristic, it had an opportunity to say it, but it did not." *Id.* at 489. The Circuit's findings are plain wrong. It not only mischaracterizes AGA's statement to the Subcommittee but fails to account for the actions Congress took in what appears to be a direct response to AGA's statement.

Unsurprisingly, AGA's 1986 statement to the Subcommittee had nothing to do with the venting systems of condensing or non-condensing furnaces. *See National Appliance Energy Conservation Act of 1986: Hearing on H.R. 5465 Before the H. S. Comm. on Energy Conservation and Power Comm. on Energy and Commerce*, 99th Cong. 146 (1998) (Statement of the American Gas Association). Rather, the statement asked Congress to amend H.R. 5465, because the bill as written would ban atmospherically vented furnaces because of the defined test procedures and prescribed AFUE level of no less than 78%. *Id.* at 149. At the time, the AFUE for mid-efficiency furnaces ran from 71% to 80%. *Id.* The statement did not contain any discussion related to the venting features of gas furnaces. AGA was concerned that the bill would exclude the bulk of conventional non-induced draft gas furnaces, and drive consumers to opt for the least energy-efficient option of electric resistance baseboard heating and electric furnaces. *Id.* AGA, therefore, asked Congress to amend the bill to lower the AFUE standard to 71% for small gas furnaces to protect the availability of small gas furnaces in the market. *Id.* at 150.

Critically, the Circuit failed to mention in its analysis that H.R. 5465 as written at the time (which would have eliminated small gas furnaces), never became law during that legislative session because it was vetoed by President Reagan who expressed concerns

of the bill's impact on eliminating consumer choice and raising costs:

> The bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase lower-cost appliances, and constitutes a substantial intrusion into traditional State responsibilities and prerogatives.
>
> H.R. 5465 fails to advance this goal in a manner that takes account of the tremendous cost to consumers, who would have to spend an estimated extra $1.4 billion per year on appliance purchases. Higher prices would force many to buy more expensive appliances than they would prefer, and make some delay or forgo some appliance purchases altogether. By eliminating the lower-priced models, the bill would hit low-income consumers particularly hard. It could also discourage and slow the introduction of useful product innovations.

Ronald Reagan, Memorandum of Disapproval of the Appliance Energy Conservation Bill, (Nov. 1, 1986), https://www.presidency.ucsb.edu/node/254420. The concerns shared by President Reagan track those shared by AGA today as it relates to the DOE's new energy standards.

In response to President Reagan's veto, the Committee on Energy and Natural Resource introduced the following amendments:

> New section 325(j) [which] establishes the criteria by which the Secretary may prescribe new or amended standards . . . . With respect to the small gas furnace, it is the Committee's

> intent that should the Secretary determine that significant switching is occurring as a result of the small gas furnace standard, then he has the authority to review the standard and through a rulemaking establish a new standard, otherwise consistent with this Act, which the Secretary determines will avoid such switching. Obviously, in this case, the Secretary is authorized to lower an energy conservation standard notwithstanding section 325(j)(1), but he may not lower the standard below 71 percent.

S. Rep. 100-6 (1987).

While the Circuit is correct about the Committee not addressing venting methods (because it was never raised), it is clear from the foregoing statement that they most definitely addressed concerns raised in AGA's statement and the adverse impact the energy standards at the time would have on consumers and small gas furnaces. The Committee not only authorized the Secretary to drop the standard to 71%, if the new standard resulted in energy switching, but more importantly, the Committee introduced the precise statutory provision that underlies this case to protect consumer choice and against the elimination of appliances that are widely in use, providing as follows:

> New section 325(j)(4) . . . prohibits the Secretary from prescribing a new or amended standard if he finds that the standard is likely to result in the unavailability in the United States in any covered product type or class of performance characteristics (including reliability), features, sizes, etc.

> With respect to the small gas furnace standard (section 325(f)(1)(B)), the Secretary must consider the impact of any lessening of competition that is likely to result from the establishment of a standard for small furnaces. He must consider the economic impact of the standard on manufacturers and consumers . . . .
>
> Finally, section 325(j)(4) *forbids a standard being set so as to result in the unavailability in the United States in any covered product type (or class) of performance characteristics*, such as size or capacity. This paragraph, upon a sufficient showing, would forbid a standard for small gas furnaces being set at a level that would increase the price to the point that the product would be noncompetitive and that would result in minimal demand for the product.

S. Rep. 100-6 (emphasis added).

These provisions were later passed into law under the National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, § 325, 101 Stat. 103, 116 (1987). The legislative history clearly shows that Congress passed this provision with the express intent of forbidding what will happen if the Circuit's decision is allowed to move forward. The Circuit's failure to consider or even mention this in its review of AGA's Statements and related legislative history undermines its interpretation. But, more importantly, President Reagan's veto and Congress' actions clearly support reversal of the Circuit's decision and works against application of the DOE's new energy standards to eliminate non-condensing furnaces. Notably, as the

dissent noted, the statute gives DOE an out because it can choose to put non-condensing in a separate class. *Am. Gas Ass'n v. United States Dep't of Energy*, 157 F.4th at 487 at 504 (Rao, N., dissenting) (D.C. Cir. 2025) citing 42 U.S.C. § 6295(q)(1) ("the unavailability provision, which ensures products with valued characteristics remain on the market, is paired for consumer appliances with a requirement that the Secretary 'shall specify' a separate efficiency standard for any product with a 'performance-related feature' that provides 'utility to the consumer.'" DOE is not left without a path forward to improve America's energy efficiency. The path to America's improved standards on energy efficiency cannot be one that unlawfully deprives consumers of choice.

CONCLUSION

For these reasons this court should grant Petitioners' petition for writ of certiorari.

Respectfully submitted,

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