No. 25-879

IN THE

Supreme Court of the United States

AMERICAN GAS ASSOCIATION et al.,

Petitioners,

v.

DEPARTMENT OF ENERGY et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL, PLUMBING-HEATING-COOLING CONTRACTORS—NATIONAL ASSOCIATION, AND NATURAL GAS ASSOCIATION OF GEORGIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are associations representing individuals and businesses with an interest in preserving consumers' and builders' access to the non-condensing appliances that the Department of Energy's new energy efficiency standards would eliminate. Millions of Americans rely on these appliances, which often cannot be replaced with condensing alternatives without renovating buildings that were designed for non-condensing appliances.

Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) is a nonprofit trade association representing and providing training for more than 1,150 member companies operating in the wholesale heating, ventilation, air-conditioning, and refrigeration (HVACR) industries across the country. This includes 570 wholesalers and distributors with 1,300 branch locations, as well as suppliers, manufacturers, and service vendors. About 80% of HARDI's members are small businesses. HARDI's members manufacture, distribute, and sell (and its members' customers and contractors install and service) natural gas, electric, and dual-fuel HVACR equipment, parts, and supplies in all fifty states. Together, HARDI's members form wholesale channels serving as critical links in the efficient and reliable

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[1] All parties were timely notified of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

distribution of HVACR products and systems that end users choose for their homes and businesses.

HARDI is concerned that its members, their related contractors, and the ultimate consumers—as well as the safety, welfare, and standard of living of all Americans—will be harmed by federal regulations that eliminate commonly available appliances, constraining consumer choice and taking affordable and reliable options off the market.

The Plumbing-Heating-Cooling Contractors—National Association (PHCC) is a nonprofit association representing about 3,000 plumbing, heating, and cooling contractors—many of them small businesses—across the United States. PHCC's members install and service new and replacement plumbing and HVAC products. For many members, much of their business derives from residential gas-fired appliance repair or replacement. And it is often PHCC's members who will find themselves having to explain to residential consumers the additional burdens and costs the Department's rules will impose, which can include renovations and forced switching to alternate fuel sources such as electricity.

PHCC has been following the residential gas furnace rulemaking since 2012. PHCC has long maintained that the ability of a non-condensing gas furnace to use a building's existing venting system is a valuable and desired feature that provides significant utility to consumers, especially in replacement situations. PHCC's members know from experience that replacing one non-condensing gas product with another is a cost-effective solution for homeowners who typically have not budgeted for substantial HVAC

replacement, redesign, and renovation costs. PHCC is concerned that by taking away that solution, the Department's rules will harm its members and their customers.

The Natural Gas Association of Georgia is a non-profit trade association representing more than fifty member companies that directly and indirectly serve natural gas customers in Georgia. Members include interstate pipeline operators, local distribution companies, municipal gas providers, natural gas marketers, and vendors and associated businesses that supply those companies. Together, the association's members make up the various channels that deliver natural gas to residential, business, and manufacturing customers in the state.

The Natural Gas Association of Georgia is concerned that its members and their customers will be harmed by federal regulations forcing those who need to replace their non-condensing appliances to either install new ventilation systems or switch away from their fuel of choice. Customers who avoid the upfront cost of renovations by switching to electricity face increased costs in the long run compared to sticking with non-condensing gas appliances.[2] Besides, it is far more efficient to use gas directly than to convert it to electricity to power an appliance.[3] So in places like

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[2] Am. Gas Ass'n, Building for Efficiency: Home Appliance Cost and Emissions Comparison 39 (2024), https://www.aga.org/wp-content/uploads/2025/01/AGA-Report_2024_Building-for-Efficiency-08-MV.pdf (comparing residential gas and electricity prices).

[3] *See id.* at 18-19 (reporting that the natural gas system's "cumulative efficiency—from the wellhead to the residential meter—is 92%," compared to 40% for gas-based electricity).

Georgia, where natural gas fuels about half the state's electricity (and growing), switching fuels likely means using more energy.

SUMMARY OF ARGUMENT

The decision below and the Department of Energy rules it approved shake the foundations of the national appliance standards program Congress established in the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§6201 *et seq*. The Department's new standards for gas furnaces and commercial water heaters, along with the December 2021 Interpretive Rule that serves as their legal underpinning, represent a sea change for the appliance industry, builders, and consumers.[4]

There is no debate that the rules will make non-condensing furnaces and commercial water heaters unavailable. Nor is there any dispute that non-condensing and condensing appliances work differently in ways that affect where and how they can be installed; they differ in the necessary venting structure and material, the need for condensate management, related space and location requirements, and the ability to integrate with existing buildings without modifications. The only question is whether these distinct installation-related attributes are performance characteristics or features that Congress prohibited the Department from making unavailable when setting

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[4] Energy Conservation Standards for Consumer Furnaces, 88 Fed. Reg. 87502 (Dec. 18, 2023); Energy Conservation Standards for Commercial Water Heating Equipment, 88 Fed. Reg. 69686 (Oct. 6, 2023); Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 86 Fed. Reg. 73947 (Dec. 29, 2021) (December 2021 Interpretive Rule).

standards. The answer, based on the plain text, statutory context, and the Department's own prior views, is yes.

As *amici* well know from their experience in this industry, the ability to choose non-condensing gas furnaces and commercial water heaters matters to builders and consumers in the real world. Millions of homes and buildings were designed for and built around non-condensing appliances. Condensing appliances require fundamentally different venting structures and material, and they need piping and drainage to manage the liquid condensates they produce. These core differences mean that forced replacements of non-condensing appliances with condensing ones will often be expensive and complex, requiring substantial renovations rather than a simple like-for-like replacement. Seamless replacements with non-condensing appliances provide real utility to consumers. They mean less money spent renovating, less disruption, and less time without heat or hot water. And make no mistake: Replacements are the norm, not the exception; they make up about 80% of the market for the affected products.

Recognizing that different buildings accommodate different types and sizes of appliances, EPCA strikes a balance between pursuing energy conservation and protecting consumer choice. To that end, Congress expressly prohibited the Department from using its standard-setting authority in a way that would take generally available "performance characteristics" off the market. Non-condensing technology fits comfortably within that term's ordinary meaning, which encompasses appliances' distinguishing capa-

bilities. Non-condensing technology allows appliances to use the kind of venting already installed in millions of buildings, and it avoids the need for piping to manage condensates. The statutory context further reinforces that Congress's concern for consumer choice reaches installation-related attributes like these.

The D.C. Circuit majority's and the Department's contrary view—which takes an undisputedly broad term and narrows it to an appliance's raw output—cannot be squared with EPCA's text or structure. Which is perhaps why the Department's prior practice contradicts its new narrow interpretation. In standard after standard, the Department has protected installation-related attributes from unavailability because that is what the statute requires.

If allowed to stand, the decision below will not just eliminate non-condensing gas furnaces and commercial water heaters, but also give the Department free rein to remake the appliance industry, running roughshod over Congress's carefully crafted protections for consumer choice. Far from authorizing such a major change, Congress unambiguously prohibited it. Rather than pursuing energy conservation at all costs, Congress chose throughout EPCA to preserve consumer choice, too. It chose to gradually improve appliances' efficiency, not regulate them out of existence. Because the Department's rules and the decision below contravene that choice as expressed in EPCA's plain text, this Court should grant certiorari and reverse.

ARGUMENT

The Energy Policy and Conservation Act establishes a sweeping national energy policy. *See, e.g.*, 42 U.S.C. §6201 (listing purposes).[5] One component of that policy is EPCA's energy conservation program for appliances, which address both consumer products, §§6291-6309, and industrial equipment, §§6311-6317.

One way to achieve the goal of "improved energy efficiency of … major appliances," §6201(5), might have been to set the most aggressive standards the economy and technology could bear, even if that came at the cost of consumer choice. That is not the approach Congress chose.

Congress instead designed a program that embraced both conservation and choice: Taking generally available appliance types and features as a given, Congress opted for standards that would incrementally increase energy efficiency (or reduce energy use) for each kind of appliance. It tasked the Department of Energy with designing (and periodically updating) standards "to achieve the maximum improvement in energy efficiency" that "is technologically feasible and economically justified." §6295(o)(2); *accord* §6295(o)(3); *see also* §6295(m)(1) (requiring the Department to consider amendments every six years). And it protected consumer choice by prohibiting the Department from setting standards that would make unavailable "performance characteristics" (including "reliability," "features," "sizes," "capacities," and "volumes") that were generally available at the time of the standard.

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[5] All further statutory references are to 42 U.S.C. unless otherwise indicated.

§§6295(o)(4), 6313(a)(6)(B)(iii)(II)(aa); *accord* §6297(d)(4) (same restriction when waiving preemption for state or local standards). Likewise, Congress required separate standards for appliances that use different kinds of energy or have distinct "capacity or other performance-related feature[s]" that warrant higher or lower standards. §6295(q)(1).

The decision below nevertheless signed off on the Department's asserted power to eliminate entire groups of non-condensing appliances just because their distinguishing features affect installation, not the appliances' basic output once successfully installed. That decision undermines consumer choice, is contrary to the statutory text and objectives, and will have far-reaching consequences.

I. The decision below undermines consumers' ability to choose among a range of affordable, reliable appliances that seamlessly replace existing appliances.

The ability to choose non-condensing gas furnaces and commercial water heaters matters to builders and consumers in the real world. There is no dispute that these appliances are installed in millions of buildings today. Pet.App.50a. And there is no dispute that the challenged rules will take these products off the market. Pet.App.8a, 57a. The decision below turned solely on whether non-condensing technology provides utility to consumers who wish to use these products. Pet.App.15a-17a.

It does—as *amici* well know from their experience in this industry. Practical differences between condensing and non-condensing versions of the same appliance run the gamut from pricing to energy effi-

ciency to installation and suitability for certain buildings.

The root of these practical differences is a difference in how non-condensing and condensing appliances work.[6] Condensing appliances have a second heat exchanger used to capture heat from exhaust gases before they are vented, causing the gases to cool down enough for water vapor to condense into liquid—hence the name. Pet.App.6a-7a. As a result, condensing appliances are more energy efficient than non-condensing versions, leading to greater energy savings and lower energy costs over the life of the appliance. *See* Pet.App.47a-48a; Patterson-Kelley, *supra* note 6. But that benefit comes with an upfront cost; non-condensing appliances are generally cheaper to purchase and have lower maintenance and repair costs. *See* Patterson-Kelley, *supra* note 6.

The difference in technology also produces two key differences in how the appliances must be installed. First, the liquid condensates that give condensing appliances their name must be managed through piping and drainage or pump systems that non-condensing appliances do not need. *See* Patterson-Kelley, *supra* note 6; Pet.App.49a (citing 86 Fed. Reg.

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[6] For a general overview of the technologies' differences, see, for example, Patterson-Kelley, *Understanding Commercial Condensing vs. Non-Condensing Appliances*, Patterson-Kelley Sols. Blog (Feb. 17, 2025), https://info.pattersonkelley.com/blog/commercial-condensing-vs.-non-condensing-appliances; and Kevin Dunn, Wash. Gas Light, Workshop Presentation to Department of Energy (Oct. 9, 2014), https://www.energy.gov/documents/october-9th-workshop-presentation-kevin-dunnpdf.

4776, 4816 (Jan. 15, 2021) (January 2021 Interpretive Rule)).

Second, the condensing process changes the exhaust gases, requiring different venting. Pet.App.6a-7a. Non-condensing appliances generally vent vertically, such as through a traditional chimney, without the need for fan propulsion. Pet.App.6a, 44a-45a. By contrast, condensing appliances' cooler exhaust gases must be propelled by a fan and can be vented horizontally. Pet.App.7a, 48a. They also need vents made of corrosion-resistant material like PVC. Pet.App.7a; 88 Fed. Reg. at 87563 n.111. Non-condensing appliances often use metal venting instead and tend to share a common vent with other non-condensing appliances. *See* 88 Fed. Reg. at 87563; Dunn, *supra* note 6, at 7.

Those differences are one thing for new construction, when a building can be designed and built for the selected types of appliances. But they are quite another for existing buildings. When it comes time to replace an appliance, a condensing version cannot simply be swapped in where a non-condensing appliance used to be.

Millions of existing homes and commercial buildings were built for non-condensing appliances, from the location and space set aside for them, to the type of venting, to the lack of piping and drainage. *See* Pet.App.44a, 47a-48a. Replacing one non-condensing furnace with another can be as simple as removing the old one and dropping the new one in. Pet.App.51a.

Not so for switching to a condensing furnace, which would require at least a new venting system and potentially piping or a pump depending on the

drainage situation. Pet.App.50a-51a; 86 Fed. Reg. at 4786, 4816.

Commonly vented appliances, often found in multifamily housing and larger buildings, compound these challenges. Commonly vented appliances share a chimney, so as each non-condensing appliance is replaced with a condensing version, its individual exhaust output is removed from the common vent. Because chimneys depend on a proper ratio of exhaust volume to capacity, removing enough appliances can leave the chimney oversized for the remaining non-condensing appliances, preventing it from working properly and requiring further renovations. *See* 88 Fed. Reg. at 87563; Dunn, *supra* note 6, at 7. Beyond those technical complications, installing new venting systems for condensing appliances can come with legal complications in multi-owner buildings like condominiums, where vents may need to cross property lines.

Now factor in an urgent replacement. If the Department has its way, a homeowner whose non-condensing furnace fails at the height of winter needs not only a rapid replacement furnace, but also urgent renovations to accommodate the forced switch to a condensing model. And weather conditions could of course complicate or prevent those renovations, including by increasing the risk to workers.

The upshot is that non-condensing appliances provide real utility to consumers, especially those replacing their appliances. The ability to install a drop-in replacement without needing structural modifications matters; it means cheaper, less disruptive replacements and less time without heat or hot water.

The vast majority of the affected products will be for replacements, not new construction. The Department itself estimates that in 2029, replacements will account for 81% of the residential gas furnace market, resulting in 2.36 million units sold for replacements in that year alone. 88 Fed. Reg. at 87599 tbl. IV-12. It also estimates that non-condensing models will make up about 39% of the residential gas furnace by then (without standards prohibiting them). 88 Fed. Reg. at 87575. The market shares for commercial gas water heaters are similar.[7]

In short, by allowing the Department's rules to stand, the decision below would undermine consumer choice. Driving non-condensing furnaces and commercial water heaters out of the market removes an affordable, reliable option—and often the only option compatible with existing buildings without the need for renovations—for residential and commercial consumers alike. As explained below, that is exactly what Congress prohibited the Department from doing.

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[7] For the Department's discussion of condensing appliances' market share, see 88 Fed. Reg. at 69765-66. The Department published its estimates of the replacement market share only in a separate spreadsheet. *See* Dep't of Energy, Doc. No. EERE-2021-BT-STD-0027, Commercial Water Heater National Impact Analysis (NIA) Spreadsheet (Final Rule) (July 28, 2023), https://www.regulations.gov/document/EERE-2021-BT-STD-0027-0041. Tab "CGSWH_SL0," columns "Z" and "BG" estimate replacement market shares above 80% for every year through 2055 with or without the amended standards.

II. EPCA's text and structure establish that Congress's protection of consumer choice includes installation-related features.

EPCA's plain text strikes a balance between pursuing energy conservation and protecting consumer choice. That protection includes preventing the Department from doing what it did here: taking away access to a feature that allows appliances to be replaced without requiring renovations. The Department's contrary view, which the D.C. Circuit accepted, cannot be squared with EPCA's text or structure or with the Department's own practice.

A. Non-condensing technology readily satisfies EPCA's broad protection for "performance characteristics."

EPCA expressly prohibits the Department from issuing new or amended appliance standards

> likely to result in the unavailability in the United States in any 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 … .

§6313(a)(6)(B)(iii)(II)(aa) (emphasis added); *accord* §6295(o)(4) ("performance characteristics (including reliability), features, sizes, capacities, and volumes").

This unavailability provision reflects Congress's policy decision to conserve energy by pursuing improved energy efficiency for each kind of appliance while protecting consumer choice among existing product options. And by providing separate protection for "sizes, capacities, and volumes," Congress made

clear that it cared not just about what appliances do once they are installed, but also whether and where they can be installed to begin with. That makes sense: Many appliances are replacements; many buildings are built to accommodate certain types and sizes of appliances; and consumers understandably value the ability to make seamless replacements.[8]

The rest of the statute points the same way. Rather than promoting energy conservation at all costs, Congress repeatedly required the Department to balance that objective with protecting consumer choice, ensuring cost-effectiveness and feasibility, and mitigating impacts on manufacturers. *See Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1103-04 (9th Cir. 2024) (recognizing that EPCA's text reflects Congress's concern for appliances' actual availability to consumers).

Consistent with the unavailability provision, Congress required the Department to set different standards for products that use "different kind[s] of energy," thus preserving choice among fuels. §6295(q)(1)(A). It likewise required separate standards for products with "a capacity or other performance-related feature" that "justifies" a different standard compared to other products of the same type or class. §6295(q)(1)(B). And it directed the

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[8] For those who find it helpful, the legislative history confirms the point. The House Report discussing §6295(o)(4) explains that the unavailability provision was designed to ensure that standards do not deprive purchasers of "product choices and characteristics, features, sizes, etc." and that energy savings would be achieved "without sacrificing the utility or convenience of appliances to co[n]sumers." *See* H.R. Rep. No. 100-11, at 22-23 (1987).

Department to make that determination by considering at least "the utility to the consumer of such a feature." §6295(q)(1).

Congress backstopped its restrictions on the Department's standard-setting power by also barring the Department from waiving preemption for state or local standards likely to make performance characteristics unavailable. §6297(d)(4); *see also* §6316(b)(2)(D) (incorporating §6297(d)'s restrictions on waivers for industrial equipment standards). It also prohibited the Department from waiving preemption for regulations that "will significantly burden manufacturing, marketing, distribution, sale or servicing" of covered appliances. §6297(d)(3). And it required the Department to evaluate that burden by considering, among other things, "the extent to which the regulation would result in a reduction … in the current models, or in the projected availability of models, that could be shipped." §6297(d)(3)(C).

Especially when read in this context, the unavailability provision's term "performance characteristics" readily encompasses non-condensing technology. A "characteristic" is "[a] distinctive mark, trait, or feature" or "a distinguishing or essential peculiarity or quality." *Characteristic*, Oxford English Dictionary (2d ed. 1989) (def.B.1). And "performance," as relevant here, refers to "the capabilities of a machine or device." *Performance*, *id.* (def.2a). So at its simplest, an appliance's performance characteristics are its distinguishing capabilities—which Congress defined to include, at a minimum, its "reliability, features, size[], capacit[y], and volume[]," §6313(a)(6)(B)(iii)(II)(aa). Given the term's ordinary meaning and the statutory

context, the parties and the D.C. Circuit correctly recognized that "performance characteristics" includes "product attribute[s] that provide[] utility to consumers desiring to use the product." Pet.App.15a.[9]

Non-condensing technology is just such an attribute. As discussed, because of how they work, non-condensing appliances have the ability to vent through ordinary, unpowered vertical chimneys and do not need piping or pumps for condensate management. Those features distinguish them from condensing appliances and provide concrete benefits, including the ability to install them without renovations in millions of buildings that are not configured for condensing appliances. Just as an appliance's "size" or "volume" affects its suitability for or ease of installation in a particular building or space—and thus provides utility distinct from its "capacity"—so too for features like condensing or non-condensing technology.

Non-condensing technology is thus a protected performance characteristic, and so EPCA prohibits the

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[9] There is reason to doubt that Congress equated performance characteristics with utility. Section 6295(o)(2)(B) sets out cost-effectiveness criteria for amending a standard, which include "any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard." §6295(o)(2)(B)(i)(IV). And as explained above, §6295(q)(1)(B) names "utility to the consumer" as one factor in determining whether a performance-related feature warrants a separate standard. Rather than equating performance characteristics with utility, these provisions' use of "utility" alongside "performance" terms establishes that utility is a separate, albeit related, consideration—and that when Congress wanted utility to drive the decision, it said so.

Department from setting standards that make non-condensing appliances unavailable. §§6295(o)(4), 6313(a)(6)(B)(iii)(II)(aa).

B. The Department's contrary view is inconsistent with the statute and the agency's own longstanding practice.

Departing from this straightforward reading, the D.C. Circuit majority adopted the Department's far narrower view. On that view, the only "utility" that matters is the appliance's basic function (here, its ability to "provide hot air or hot water"), or perhaps other attributes a consumer notices and values when operating an already-installed appliance. Pet.App.19a & n.6. That view has nothing to recommend it.

1. Despite recognizing that "the plain meaning of 'performance characteristics' is broad" and accepting the parties' understanding that it encompasses "a product attribute that provides utility to consumers desiring to use the product," Pet.App.15a, the majority followed the Department's lead in narrowing the term.

Aside from improper deference to the Department's interpretation, *see* Pet.16-21, the majority's reasoning rested on two unsupported leaps of logic from the parties' arguments, not the text. The majority first jumped from the parties' reference to consumers' desire to use an appliance to the conclusion that "a performance characteristic has to be about using the product." Pet.App.16a (cleaned up). And from there, it took a still bigger jump, landing on its insistence that only use after a successful installation matters, so that the only relevant "utility" the appliances at issue provide is their raw output: "hot air or hot water." Pet.App.19a.

None of that follows from the parties' agreed definition, let alone the text Congress wrote. A consumer "desiring to use [a] product," Pet.App.15a, cannot do so unless she can first install it. Product attributes that enable an appliance to be installed without costly renovations thus provide "utility" to such a consumer as that word is ordinarily understood. They make the appliance more "useful or serviceable" for that consumer; more "fit[] for some desirable purpose or valuable end." *Utility*, Oxford English Dictionary (2d ed. 1989) (def.1a) ("The fact, character, or quality of being useful or serviceable; fitness for some desirable purpose or valuable end; usefulness, serviceableness."); *see also id.* (def.1d) ("[t]he intrinsic property of anything that leads an individual to choose it rather than something else").

The D.C. Circuit majority, however, declared it "obvious" (at least "[a]t a certain level") that "consumers do not buy small furnaces or commercial water heaters because of how the appliance vents." Pet.App.18a. That is anything but obvious, which is perhaps why the majority could not muster any factual support. True, "both condensing and non-condensing appliances" require "venting." *Id.* But they require fundamentally different venting. *Supra* pp.10-11. Even assuming that consumers are indifferent to the distinction for new construction, a rational consumer replacing an appliance is bound to consider "how the [potential replacement] vents," Pet.App.18a, which determines whether that replacement will require the additional time, expense, and disruption of renovations before it can be used. If anything is "obvious" here, it's that the typical consumer will care about the difference between a drop-in replacement of

the same type of appliance and a replacement that requires renovations. So if utility is what's required, non-condensing technology provides it in spades.

2. If the consumer-facing function of the appliance—producing hot air or hot water—were the only performance characteristic that mattered, surely Congress would have said so. All it would have needed to do is prohibit regulations from making a type or class of product (those with the same function) unavailable. But Congress chose a far more robust protection for consumer choice. It used an expansive term, "performance characteristics"; specified that the term reaches both functional attributes like "reliability" and "capacity" and physical characteristics like "sizes" and "volumes"; and included the broad term "features" to boot.[10]

What's more, both the unavailability provision and §6295(q) reflect an understanding that there will be variation among the "performance characteristics" of appliances that share the same basic function. Section 6295(q)(1)(B) requires setting a higher or lower standard for a group of products within a product class that "have the same function or intended use" but nevertheless have distinct "capacit[ies] or other performance-related feature[s]." Limiting "performance characteristics" to the basic function of the appliance is irreconcilable with Congress's express protection for distinct performance characteristics among appliances sharing the same function. *Contra*

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[10] *See, e.g.*, *Feature*, Oxford English Dictionary (2d ed. 1989) (def.4) ("[a] distinctive or characteristic part of a thing").

Pet.App.19a; December 2021 Interpretive Rule, 86 Fed. Reg. at 73951.

Similarly, the D.C. Circuit majority's view stands in tension with Congress's decision to require separate standards for each "kind of energy," such as gas, oil, or electricity, §6295(q)(1)(A). If all that matters is that the furnace produces "heated air" when a consumer "adjusts the thermostat," Pet.App.24a (quoting 86 Fed. Reg. at 73953), why bother preserving choice among fuels? After all, gas and electric furnaces both heat air.

Contrary to the majority's view, *see* Pet.App.17a-18a, the legislative history does not narrow, but rather reinforces, the broad provision Congress wrote. The examples of "performance characteristics" and "features" in the House Report provide a range of both functional and physical attributes—including costs. *See* Pet.App.18a (listing "serviceability," "safety," and "incidence and cost of repair" as "performance characteristics," plus "size" and "noise levels" as "features" (alteration incorporated) (quoting H.R. Rep. No. 100-11, at 23)). That the legislative history did not expressly "state that venting mechanics were examples of performance characteristics or features" cannot override the plain meaning of the enacted text. *Contra* Pet.App.18a.

3. Given the plain text of the statute, it should come as little surprise that the Department's current view clashes with its longstanding approach. Time and again, the Department has treated venting, space constraints, and similar attributes affecting a consumer's ability to install and use an appliance as

performance characteristics warranting separate standards.

That is why, for example, the Department set separate standards for ventless dryers. A consumer whose building does not currently support a vented dryer could, of course, renovate it to that end. But the Department nonetheless "recogniz[ed] the unique utility that ventless clothes dryers offer to consumers" and thus treated the ability to avoid installing a vent as a protected performance characteristic. 76 Fed. Reg. 22454, 22485 (April 21, 2011). It explained that although it used to call these appliances "condensing dryers," the "new designation" as "ventless" better "reflects the actual consumer utility (that is, no external vent required)," along with "the market availability of vented dryers that also condense." *Id.* at 22485 n.28. In other words, the utility warranting a separate standard was not the condensing technology standing alone, but rather the installation characteristic of not needing external venting.

There is no meaningful distinction between dryers that do not require adding a vent and furnaces that do not require replacing one venting system with another. The best the D.C. Circuit majority could muster was that access to ventless dryers "impacted whether a consumer could use or install the particular appliance at all in a large class of applications." Pet.App.20a. That describes this case. If EPCA does not expect consumers to punch through walls to install venting systems for their dryers, then neither does it expect them to punch through walls to install venting systems that can accommodate condensing furnaces and water heaters.

That is not all. To take just a handful of examples: The Department has recognized separate classes of "space constrained" air conditioning units because their ability to, well, accommodate space constraints qualified as a performance-related feature. 76 Fed. Reg. 37408, 37446 (June 27, 2011). It has recognized separate classes for residential clothes dryers based on installation space constraints and differences in electric power supply. 10 C.F.R. §430.32(h)(3). It has distinguished tabletop water heaters based on their ability to accommodate "strict size limitations." 66 Fed. Reg. 4474, 4478 (Jan. 17, 2001). And it has recognized separate equipment classes for standard and non-standard sizes of packaged terminal air conditioners because it was "concerned that, absent non-standard equipment, commercial customers could be forced to invest in costly building modifications to convert non-standard sleeve openings to standard size dimensions." 73 Fed. Reg. 58772, 58782 (Oct. 7, 2008).

And there is still more. Even for residential furnaces, the Department has distinguished among appliances with the same "primary function," 86 Fed. Reg. at 73958, several times over. It divides standards based on whether furnaces are fueled by oil, gas, or electricity, as §6295(q)(1)(A) commands; whether they are for mobile homes; and whether they are weatherized (for outdoor use) or not (for indoor use). 10 C.F.R. §430.32(e)(1)(ii). None of those distinctions affects what happens when a consumer "adjusts the thermostat," yet all supported separate product classes, and rightly so. *Contra* Pet.App.24a.

Finally, in its January 2021 Interpretive Rule, the Department itself recognized that non-condensing

technology's distinct installation considerations provide utility to consumers and are performance characteristics that cannot be made unavailable. 86 Fed. Reg. at 4816; *see also* Pet.App.48a-49a. The majority simply ignored this rule in favor of deferring to the Department's reversal of its position less than a year later. Pet.App.22a-24a.

The Department's interpretation would not be entitled to deference in any event. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). But its about-face from its longstanding practice and its January 2021 Interpretive Rule underscores that there is no ambiguity here, "specific" or otherwise. *Contra* Pet.App.16a. The Department's previous understanding comported with the statute's plain text; its new one does not.

4. That leaves the Department's and majority's contention that EPCA treats installation considerations as costs to be addressed in the economic analysis under §6295(o)(2)—and nothing else. Pet.App.25a-26a. That misunderstands the statutory scheme. Nobody doubts that increased installation costs should be part of that economic analysis. The Department cannot impose any standard without establishing that it is "technologically feasible and economically justified." §6295(o)(2). But clearing that bar is not enough. Even when a standard passes technical and economic muster under §6295(o)(2), it still cannot run afoul of §6295(o)(4)'s unavailability provision. The whole point of the unavailability provision is to bar economically justifiable standards that would "sacrific[e] the utility or convenience of appliances to co[n]sumers." H.R. Rep. No. 100-11, at 22-23. That a

performance characteristic affects the cost-benefit analysis is no excuse for ignoring Congress's separate protection for consumer choice.

III. The interpretation the D.C. Circuit approved will reach well beyond this case, removing congressional constraints on the Department's standard-setting power.

What the D.C. Circuit allowed the Department to do for furnaces and commercial water heaters, the Department could well do throughout EPCA's appliance-standards program. There is no reason to think the Department's dismissal of installation considerations can be confined to the appliances at issue here or to the distinction between condensing and non-condensing appliances. *See* December 2021 Interpretive Rule, 86 Fed. Reg. at 73951 (concluding that "in the context of residential furnaces, commercial water heaters, and *similarly-situated products or equipment*," non-condensing technology is not a performance characteristic (emphasis added)); *see also id.* (concluding that "utility" does not include "design parameters impacting installation complexity, or costs that anyone, including the consumer, manufacturer, installer, or utility companies, may bear").

To be clear, the challenged rules affect millions of appliances and consumers in their own right. But the view of "performance characteristics" the D.C. Circuit endorsed would free the Department to eliminate far more types of appliances. The Department has already tried to eliminate non-condensing gas tankless water heaters using the same theory from its December 2021 Interpretive Rule; Congress had to step in using the Congressional Review Act. *See* Joint Resolution of

May 9, 2025, Pub. L. No. 119-6, 139 Stat. 49 (disapproving 89 Fed. Reg. 105188 (Dec. 26, 2024)). Other types of appliances, such as commercial gas furnaces and boilers, §6313(a)(4), also have condensing and non-condensing models. And there is no clear distinction between non-condensing features and others that affect installation or suitability for particular buildings. In short, the decision below undermines the unavailability provision as a check on the Department's standard-setting power.

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When it entrusted the Department with the power to set appliance standards, Congress installed guardrails that would preserve its preferred balance between energy conservation and consumer choice. The D.C. Circuit's decision rips out those guardrails, leaving the Department free to remake the appliance industry at the expense of consumer choice—with sweeping effects on manufacturers, distributors, builders, and end users. Certiorari is warranted to restore the statute Congress wrote.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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