No. 25-879

In the Supreme Court of the United States

AMERICAN GAS ASSOCIATION, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

D. JOHN SAUER
Solicitor General
Counsel of Record
ERIC D. MCARTHUR
Deputy Assistant Attorney General
MICHAEL S. RAAB
STEVEN H. HAZEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld Department of Energy rules that were premised on the understanding that non-condensing consumer furnaces and commercial water heaters do not possess distinct "performance characteristics" that condensing consumer furnaces and commercial water heaters lack. 42 U.S.C. 6295(*o*)(4), 6313(a)(6)(B)(iii)(II)(aa).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 25-879

AMERICAN GAS ASSOCIATION, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 157 F.4th 476.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2025. The petition for a writ of certiorari was filed on January 20, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871 (1975) (42 U.S.C. 6201 *et seq.*), prescribes, and authorizes the Department of Energy (Department) to periodically amend, energy-conservation standards for certain consumer and commercial products. 42 U.S.C. 6295(m), 6313(a)(6). The Department may adopt an amended standard if the

agency determines that the new standard is "technologically feasible and economically justified." 42 U.S.C. 6295(*o*)(2)(A), 6313(a)(6)(A)(ii)(II).[1] In determining whether an amended standard is economically justified, the Department must consider various factors, including "the economic impact of the standard on the manufacturers and on the consumers," "savings in operating costs," "any lessening of the utility or the performance of the covered products," and any "other factors the Secretary considers relevant." 42 U.S.C. 6295(*o*)(2)(B)(i)(I), (II), (IV), and (VII), 6313(a)(6)(B)(ii)(I), (II), (IV), and (VII).

In certain circumstances, EPCA bars the Department from adopting particular amended standards. Relevant here, the Department may not promulgate a standard if it "finds * * * that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability" of products with "performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States." 42 U.S.C. 6295(*o*)(4); see 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (similar).

2. Among the products regulated by EPCA are consumer furnaces and commercial water heaters. 42 U.S.C. 6295(f)(1), 6313(a)(6). The statute establishes baseline energy-conservation standards for those appliances, which the Department may update periodically. See *ibid.*

---

[1] Separate EPCA provisions address consumer products (42 U.S.C. 6295) and commercial equipment (42 U.S.C. 6313). Although the wording of those provisions differs slightly, the parties below treated them as materially similar for purposes of this case. Pet. App. 6a n.3.

Gas-powered furnaces and water heaters burn gas to produce heat. Pet. App. 6a. Some of that heat is used to heat the air (in a furnace) or water (in a water heater) that will be used by the consumer. *Ibid.* But some of the heat is wasted and needs to be vented from the building. *Ibid.* In a traditional, "non-condensing" furnace or water heater, the heat is vented in the form of hot gases that can exit via a chimney. *Ibid.* In a "condensing" furnace or water heater, some of the heat that otherwise would be wasted is reused, which causes condensation and requires corrosion-resistant venting materials that may be costly to install. *Id.* at 6a-7a, 21a.

In 2015 and 2016, the Department proposed amended energy-conservation standards for consumer furnaces and commercial water heaters. Pet. App. 7a-8a. If promulgated, those standards would have effectively eliminated the non-condensing versions of those appliances from the market—something the Department could not do if those versions possessed distinct performance characteristics that condensing appliances lack. See 80 Fed. Reg. 13,120, 13,141, 13,185 (Mar. 12, 2015); 81 Fed. Reg. 34,440, 34,503-34,504, 34,525 (May 31, 2016); 81 Fed. Reg. 65,720, 65,753 (Sept. 23, 2016). The Department "tentatively concluded," however, that non-condensing and condensing consumer furnaces and commercial water heaters "provide the same utility to the consumer (*i.e.*, both are vented appliances that provide heat to a consumer)" and therefore do not possess distinct performance characteristics. 80 Fed. Reg. at 13,138; see 81 Fed. Reg. at 34,463; 81 Fed. Reg. at 65,752-65,753. The 2015 and 2016 proposals never resulted in final rules.

In October 2018, representatives of the gas industry, including three of the petitioners here, petitioned the

Department to adopt an interpretive rule that would treat non-condensing technology as a "performance characteristic[]" that the Department could not eliminate via an energy-conservation standard. See 83 Fed. Reg. 54,883, 54,883 (Nov. 1, 2018). In January 2021, the Department issued an interpretive rule to that effect. 86 Fed. Reg. 4776 (Jan. 15, 2021). The Department explained that EPCA "accords the Secretary of Energy considerable discretion" in identifying performance characteristics, *id.* at 4816, and that the agency had long defined performance characteristics with reference to "consumer utility" on a "case-by-case basis," *id.* at 4780.

The January 2021 interpretive rule concluded that "non-condensing technology (and associated venting) constitutes a performance-related feature" of consumer furnaces and commercial water heaters. 86 Fed. Reg. at 4816 (internal quotation marks omitted). The Department expressed the view that, as a factual matter, condensing technology may not be feasible to install in all buildings. *Ibid.* The agency also found that condensing technology "may necessitate significant and unwelcome physical modifications to a home or business" that decrease "consumer utility." *Ibid.* In light of those conclusions, the Department withdrew its 2015 and 2016 proposed standards. *Id.* at 4817.

In December 2021, following the change in Administration, the Department undertook "a reexamination of the record" and issued a new interpretive rule concluding that non-condensing technology is *not* a performance characteristic under EPCA. 86 Fed. Reg. 73,947, 73,952 (Dec. 29, 2021); see *id.* at 73,968. The Department reiterated that what constitutes a performance characteristic is "very case-specific." *Id.* at 73,968. And the Department maintained that the ultimate touch-

stone is whether a feature offers "utility to consumers." *Id.* at 73,951.

On both the law and the facts, however, the December 2021 rule revisited the agency views reflected in the January 2021 rule. As a legal matter, the Department in December 2021 limited its assessment of utility to "those aspects of the appliance with which the consumer interacts during the operation of the product (*i.e.*, when the product is providing its 'useful output')," not "differences in cost or complexity of installation." 86 Fed. Reg. at 73,955, 73,958. As a factual matter, the agency concluded that "installation of a condensing appliance would not result in a loss of useful space for most consumers" and that consumers have options to address the "potentially difficult installation situations" that had previously troubled the Department. *Id.* at 73,955, 73,960.

In October and December 2023, the Department issued amended energy-conservation standards for consumer furnaces and commercial water heaters that relied on the December 2021 interpretive rule. 88 Fed. Reg. 69,686, 69,710 (Oct. 6, 2023); 88 Fed. Reg. 87,502, 87,511-87,512, 87,535 (Dec. 18, 2023).

3. Petitioners and others filed petitions for review in the United States Court of Appeals for the D.C. Circuit to challenge the December 2021 interpretive rule and the resulting energy-conservation standards. Pet. App. 11a; see 42 U.S.C. 6306(b)(1), 6316(a). As relevant here, petitioners argued that, by eliminating non-condensing consumer furnaces and commercial water heaters from the market, the rules would render unavailable performance characteristics associated with those appliances, in violation of EPCA. Pet. C.A. Br. 44-77. The state and private respondents intervened in support of the rules. 12/21/2023 C.A. Order.

A divided panel of the court of appeals denied the petitions for review. Pet. App. 1a-69a. The court began by observing that the Department's "interpretation of EPCA does not bind us, but 'it may be especially informative "to the extent it rests on factual premises within . . . [the Department's] expertise."'" *Id.* at 14a (quoting *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 402 (2024)). The court understood the parties to "agree[] that the plain text of 'performance characteristic' means a product attribute that provides utility to consumers desiring to use the product." *Id.* at 15a (citation omitted). And the court understood the dissent to "also agree with this definition." *Id.* at 15a n.5. The court therefore focused on whether the relevant attributes of non-condensing appliances provide "utility to consumers." *Id.* at 17a.

Petitioners' challenge focused on three attributes of non-condensing consumer furnaces and commercial water heaters—venting mechanisms, space, and installation—that the court of appeals considered in turn. Pet. App. 17a. As to venting, the court recognized that venting may be a performance characteristic and that the Department had previously treated venting as such in the context of dryers. *Id.* at 20a. But the court understood that agency decision to rest on the fact that the alternative venting mechanism there would have prevented many consumers from using dryers at all. *Ibid.* Here, the court credited the Department's December 2021 finding that consumers have available alternatives "[i]n all cases." *Id.* at 21a (quoting 86 Fed. Reg. at 73,957) (brackets in original). As to space, the court also rejected petitioners' challenge, see *id.* at 21a-25a, crediting the Department's finding that "non-condensing residential furnaces and commercial water heaters are

not significantly different in overall footprint[or] size," *id.* at 22a (quoting 86 Fed. Reg. at 73,957). And as to installation, the court again accepted the Department's finding that consumers could "replace non-condensing appliances with condensing appliances in 'all cases.'" *Id.* at 25a-26a (quoting 86 Fed. Reg. at 73,957).

The court of appeals concluded that, because "the record fail[ed] to support Petitioners' claim that condensing consumer furnaces and commercial water heaters are not 'substantially the same' as their non-condensing counterparts," the court would not "second-guess" the Department's view of "'scientific data within its area of expertise.'" Pet. App. 27a (citation omitted).

Judge Rao dissented. Pet. App. 44a-59a. She faulted the majority for "largely duck[ing]" the "legal question of what counts as a 'performance characteristic' under EPCA." *Id.* at 57a. In her view, a performance characteristic is "any product attribute that provides 'utility' to the consumer," even if that utility comes during installation, not during the product's operation. *Id.* at 53a; see *id.* at 53a-55a. "The ability to vent through a traditional chimney," she explained, provides utility to consumers and "is exactly the kind of real-world feature Congress protected from elimination in the marketplace." *Id.* at 45a. She viewed the majority as improperly "defer[ring] to the Department" and rendering "EPCA's unavailability provision" "a dead letter." *Id.* at 58a-59a. Judge Rao also stated that the majority's analysis disregarded EPCA's "critical" goal of "preserving consumer choice" and that the court's decision could deprive "[m]illions of homes and commercial buildings" of "common and affordable gas-powered appliances." *Id.* at 44a.

DISCUSSION

Petitioners contend (Pet. 25-30) that the Department's December 2021 interpretive rule and resulting energy-conservation standards reflect an unduly narrow understanding of what constitutes a "performance characteristic[]" under EPCA. Following the change in Administration, the government agrees with that contention. The Court should accordingly grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings (GVR) in light of the government's position in this brief.

1. As Judge Rao explained in her cogent dissent, the rules at issue here rest on a flawed reading of EPCA's unavailability provision. See Pet. App. 50a-59a. Under EPCA, the Department may not adopt standards that effectively eliminate from the market products that have distinct "performance characteristics." 42 U.S.C. 6295(*o*)(4), 6313(a)(6)(B)(iii)(II)(aa). All agree that the touchstone for identifying a "performance characteristic[]" is whether a product attribute provides utility to consumers. See Pet. 25; Pet. App. 15a-17a (majority opinion); *id.* at 50a (Rao, J., dissenting); 86 Fed. Reg. at 4780 (January 2021 interpretive rule); *id.* at 73,948 (December 2021 interpretive rule).

EPCA "repeatedly uses 'utility' and 'performance' in tandem, treating them as related concepts that capture a product's overall value and usefulness to the consumer." Pet. App. 53a (Rao, J., dissenting). For example, in deciding whether to promulgate a new efficiency standard, the Department must weigh "any lessening of the utility or the performance of the covered products." 42 U.S.C. 6295(*o*)(2)(B)(i)(IV), 6313(a)(6)(B)(ii)(IV). And for consumer products, the Department must consider "utility to the consumer" in deciding "whether a

performance-related feature justifies the establishment of a higher or lower standard." 42 U.S.C. 6295(q)(1).

While the December 2021 interpretive rule correctly focused on consumer utility, that rule artificially and improperly limited the utility inquiry to "those aspects of the appliance with which the consumer interacts during the operation of the product (*i.e.*, when the product is providing its 'useful output')." 86 Fed. Reg. at 73,955. As Judge Rao observed, "[t]he plain meaning of the[statutory] terms is exceptionally broad." Pet. App. 53a. Nothing in the term "performance characteristics" suggests that the term is limited to features with which a consumer "interacts" while a product is producing its "'useful output.'" 86 Fed. Reg. at 73,955. Instead, the term encompasses "*any* product attribute that provides 'utility' to the consumer." Pet. App. 53a (Rao, J., dissenting) (emphasis added). And features with which a consumer does not interact during operation could easily bear on consumer utility. For example, obtrusive plastic pipes running through one's living room would surely produce disutility for the average consumer, even though the consumer might not interact with the pipes while operating the appliance and the disutility might come even when the appliance is not generating its useful output. See *id.* at 50a.

Moreover, EPCA treats performance characteristics in tandem with attributes like "reliability, features, sizes, capacities, and volumes," which are not naturally limited to the product's operation either. 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); see 42 U.S.C. 6295(*o*)(4). For example, air conditioners of a size that can be installed in existing wall openings provide utility to consumers—who do not have to punch new holes in their walls—even though consumers do not interact with those openings

while operating their appliances. See Pet. App. 55a (Rao, J., dissenting); Pet. 28. The Department's December 2021 effort to limit "performance characteristics" to those features with which a consumer interacts during the product's operation is atextual and unsound. And it carries substantial consequences, constricting the meaning of "performance characteristics" and undermining the consumer choice at EPCA's core.

2. Because the government agrees that the rules at issue rest on a legal error, the appropriate disposition is to GVR. The Court has "broad power" to vacate "'any judgment, decree, or order'" and remand for such proceedings "'as may be just under the circumstances.'" *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. 2106). This Court has accordingly "GVR'd in light of a wide range of developments," including agency "reinterpretations of federal statutes" and "confessions of error or other positions newly taken by the Solicitor General." *Id.* at 166-167. That approach assists both the lower courts—by flagging issues that they might not have "fully considered"—and this Court—"by procuring the benefit of the lower court's insight before [it] rule[s] on the merits." *Id.* at 167.

Such a course is appropriate here. Under the current Administration, the Department is committed to protecting consumers' "freedom to choose from a variety of goods and appliances." Exec. Order No. 14,154 § 2(f), 90 Fed. Reg. 8353, 8353 (Jan. 29, 2025). The Department is therefore reviewing existing rules—including the ones at issue here—to determine whether they pose "an undue burden on the * * * use of domestic energy resources" or otherwise conflict with the Administration's policy priorities. *Id.* § 3(a), 90 Fed. Reg.

at 8354. The Department has determined that the rules at issue are factually and legally flawed, and the agency is considering a new rulemaking in which it would correct those errors. A GVR would permit the court of appeals to take account of those developments and the Department's revised position in the first instance, including by potentially holding this case in abeyance pending a new rulemaking.

3. A GVR would also permit the court of appeals to clarify its holding in a way that could bear on whether this case warrants review—another accepted basis for a GVR. *E.g.*, *Hamm* v. *Smith*, 604 U.S. 1, 2-3 (2024) (per curiam); *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006) (per curiam); *Stutson* v. *United States*, 516 U.S. 193, 196 (1996) (per curiam).

As Judge Rao observed, the majority "largely duck[ed]" "the legal question of what counts as a 'performance characteristic' under EPCA." Pet. App. 57a. Instead, the court of appeals analyzed the specific features at issue based on the premise that the parties and the dissent "agree[d]" on the meaning of that statutory term. *Id.* at 15a.

That key premise of the decision below is incorrect. Petitioners argued that "[t]he plain meaning of 'performance characteristics' spans *all* product attributes that provide utility to a consumer that desires to use the product." Pet. C.A. Br. 45-46 (emphasis added). By contrast, in July 2024 the government argued below that the term encompasses only those features that provide "utility during the *operation* of the appliance," not those that relate to installation. Gov't C.A. Br. 26 (quoting 86 Fed. Reg. at 73,955) (emphasis added). The parties thus agreed that the "performance characteristics" inquiry focuses on consumer utility. But they disagreed

about *when* the appliance must provide that utility: at any point, or just during operation. Because this case involves installation-related features like venting with which the consumer does not necessarily interact during operation, the court's acceptance of the government's prior legal interpretation would have been outcome-determinative. But the court simply quoted the parties' competing formulations before inexplicably conflating them. Pet. App. 15a-16a.

That apparent misunderstanding of the parties' arguments has generated uncertainty about the basis for the court of appeals' ruling. Petitioners understand (Pet. 10-13) the court to have answered the legal question before it, and to have necessarily endorsed the interpretation of EPCA that the Department had advanced in its December 2021 interpretive rule. Under that interpretation, performance characteristics include only "those aspects of the appliance with which the consumer interacts during the operation of the product (*i.e.*, when the product is providing its 'useful output')." 86 Fed. Reg. at 73,955.

To the extent the court of appeals adopted that interpretation, that ruling would warrant this Court's review. As Judge Rao observed, the rules at issue impact "[m]illions of homes and commercial buildings" and may require "disruptive and expensive renovations" in many cases. Pet. App. 44a. A D.C. Circuit decision endorsing the Department's December 2021 interpretation would constrain the agency in a future rulemaking and carry significant implications for the Nation's economy.

The court of appeals' opinion, however, could also be read as an exceedingly narrow, fact-bound ruling predicated upon specific findings in the December 2021 interpretive rule. The court repeatedly invoked the De-

partment's December 2021 findings, accepting for purposes of this case that consumers have options to address difficult installation issues "[i]n all cases"; that condensing technology "would not result in a loss of useful space for most consumers"; and that "non-condensing residential furnaces and commercial water heaters are not significantly different in overall footprint, size, or heating capacity from their condensing counterparts." Pet. App. 21a-22a (quoting 86 Fed. Reg. at 73,955, 73,957) (brackets in original). And because the court "largely duck[ed]" the parties' interpretive dispute, *id.* at 57a (Rao, J., dissenting), the panel opinion could be understood not to resolve the legal meaning of "performance characteristics." Were the panel opinion read to depend on the December 2021 rule's specific findings, not its legal interpretation, the Department could revisit those findings in a future rulemaking.[2]

A GVR would permit the court of appeals to clarify the scope of its holding and, accordingly, whether this case warrants further review. In the specific context of consumer furnaces and commercial water heaters, the last four Administrations have adopted alternating positions on the meaning of "performance characteristics." See pp. 3-5, *supra*. Were the D.C. Circuit to settle

---

[2] Petitioners note (Pet. 24) that EPCA bars "any amended standard which increases the maximum allowable energy use * * * of a covered product." 42 U.S.C. 6295(*o*)(1). In a May 2025 notice of proposed rulemaking, the Department "tentatively determined" that Section 6295(*o*)(1) forbids the Department only from promulgating amended standards that fall below those initially set by Congress, not from rescinding or relaxing more stringent standards previously set by the agency itself. 90 Fed. Reg. 20,899, 20,901 (May 16, 2025). To the extent petitioners are concerned about the Department's authority to issue new standards, those concerns could be addressed in the context of a new rulemaking or any subsequent litigation.

that important debate by squarely endorsing the previous Administration's interpretation, the government could at that juncture seek this Court's review in a cleaner posture, with the current Administration's legal and factual views fully set forth.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
ERIC D. MCARTHUR
Deputy Assistant Attorney General
MICHAEL S. RAAB
STEVEN H. HAZEL
Attorneys

APRIL 2026