

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 District of Columbia Circuit**

**BRIEF IN OPPOSITION FOR
INTERVENOR RESPONDENTS**

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QUESTION PRESENTED

The Energy Policy and Conservation Act (EPCA) requires the Department of Energy to set and periodically amend energy conservation standards for certain appliances. Amended standards must achieve “the maximum improvement in energy efficiency” that is “technologically feasible and economically justified.” 42 U.S.C. § 6295(o)(2)(A). The Department may not prescribe a new standard, however, “if the Secretary finds” that the standard “is likely to result in the unavailability . . . in any covered product type . . . of performance characteristics” that are “substantially the same as those generally available in the United States at the time” of the finding. *Id.* § 6295(o)(4); *see also id.* § 6313(a)(6)(B)(iii)(II)(aa).

This case concerns gas-powered residential furnaces and commercial water heaters and the technology those appliances use to capture heat. Condensing technology enables appliances to capture more heat than non-condensing appliances would otherwise waste—making condensing appliances more efficient, and resulting in cooler exhaust and liquid condensate. As a consequence, condensing units have different venting and drainage requirements, which can affect installation costs in some instances. Regardless of the technology, the unit’s heated air or water is indistinguishable.

The question presented is:

Whether the Department correctly concluded, in the context of gas-powered residential furnaces and commercial water heaters, that non-condensing technology is not a “performance characteristic” that EPCA prohibits the Department from eliminating.

(i)

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, respondents Consumer Federation of America, Massachusetts Union of Public Housing Tenants, Natural Resources Defense Council, and Sierra Club state that they are nonprofit organizations that have no parent corporation and no publicly held company has any ownership interest in them.

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INTRODUCTION

The D.C. Circuit interpreted the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§ 6201 *et seq.*, to authorize the Department of Energy to update its energy-efficiency standards for two products to levels that will complete a shift in the products’ underlying technology. Relying on ordinary tools of statutory construction, the court concluded that the less efficient technology is not a “performance characteristic” of the appliances that EPCA protects from elimination. *See, e.g.*, 42 U.S.C. § 6295(o)(4). That is because the outdated technology does not provide an appreciable benefit to the consumer when the appliance is operational—that is, when the appliance “performs.”

Petitioners now ask this Court to grant certiorari to repudiate a judicial-review methodology that the D.C. Circuit did not adopt. They contend that the court “essentially resurrected *Chevron* deference” in defiance of this Court’s decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). But the D.C. Circuit could not have been clearer that, per *Loper Bright*, the Department’s interpretation of the relevant EPCA provisions did “not bind” the court’s statutory analysis. Pet. App. 14a. And the D.C. Circuit faithfully applied this Court’s guidance by using its “independent judgment” to determine the statute’s meaning, while affording “due respect” to the Department’s technical assessments in an area requiring fact-dependent evaluation of specific products. *Loper Bright*, 603 U.S. at 385-86. Moreover, because the relevant EPCA provisions had required the Department to “find[]” that petitioners

demonstrated the future “unavailability” of their claimed performance characteristic, 42 U.S.C. § 6295(o)(4), the D.C. Circuit correctly recognized that the Department exercised a degree of discretion in resolving that record-based inquiry.

Indeed, even the federal respondents—which have filed a brief before this Court announcing a change of position regarding these EPCA rulemakings—do not join petitioners’ arguments on their first question presented. That telling silence indicates that the federal respondents do not share petitioners’ strained reading of the decision below and do not believe this case presents a dispute over the meaning of *Loper Bright* warranting this Court’s review.

Petitioners’ second question—“[w]hether an appliance’s ability to operate in existing homes and buildings without renovation” is a “performance characteristic” under EPCA (Pet. i)—presents a fact-bound dispute that is not the subject of a circuit split and carries limited significance beyond the efficiency standards at issue. Moreover, the Department rejected the factual premises of petitioners’ arguments on this question. The Department found, contrary to petitioners’ assertions, that switching from a non-condensing to condensing furnace or water heater would not result in a loss of useful space for most consumers; that in most cases, condensing technology does not alter where in a building an appliance can be installed; and that condensing appliances can use existing building vents through modest retrofitting. It is thus not true that “all factual issues” in this case are “undisputed” (Pet. 20)—far from it.

The federal respondents, for their part, do not join petitioners' request for merits review. Instead, they ask the Court to grant the petition, vacate the decision below, and remand (GVR) to allow the D.C. Circuit to take account of the Department's change of position. But they identify no prior instance in which this Court has GVR'd simply because a new administration has switched sides. And although a GVR may be appropriate where a new development "may determine the ultimate outcome of the litigation," *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam), there is no reason to think that the D.C. Circuit would reach a different result in this case based on the views expressed in the federal respondents' brief. The D.C. Circuit owes no deference to the agency's legal views; the statutory-interpretation arguments were thoroughly aired below; and the agency could not substitute new factual findings for those in the record.

In addition, a GVR would not be "appropriate" in light of the "equities of the case." *Lawrence*, 516 U.S. at 167-68. The decision below issued nine months after the presidential transition and the executive order that prompted the Department's reconsideration of these rules. During that period, the federal respondents did nothing to inform the D.C. Circuit that they had changed their position, either before the decision issued or in a petition for rehearing.

The federal respondents also suggest that the D.C. Circuit's analysis may have been premised on a mistaken apprehension of the parties' competing interpretations of the statute. And they assert that

clarifying this aspect of the court’s opinion could be helpful in determining whether certiorari is warranted. But there is no “uncertainty” (U.S. Br. 12) to resolve. The D.C. Circuit plainly understood the Department’s position that only product attributes that provide utility during the product’s operation count as performance characteristics. *See* Pet. App. 15a-16a (quoting the Department). And once again, nothing prevented the federal respondents from asking the D.C. Circuit for any clarification in a rehearing petition.

As the Department previously determined on a robust factual record—after painstaking economic and technical analysis—these updated efficiency standards will provide a net economic benefit to consumers, including low-income families, to the tune of billions of dollars in energy-bill savings. The court of appeals correctly held that EPCA’s unavailability provisions are no bar to the standards’ promulgation. There is no legitimate basis to prolong this litigation, and the petition for a writ of certiorari should be denied.

STATEMENT

A. Statutory Background

1. Congress enacted EPCA in response to the 1973 energy crisis. *See Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 185 (2d Cir. 2004). To reduce the country’s vulnerability to energy shocks, Congress established a series of energy-conservation programs. *See id.* at 185-86. One program covers residential and commercial appliances, such as refrigerators, air conditioners, water heaters, furnaces, and ovens. Pet.

App. 3a.

For such appliances, Congress set a mandatory “energy conservation standard”—*i.e.*, a “performance standard” that prescribes the appliance’s “minimum level of energy efficiency” or “maximum quantity of energy use.” 42 U.S.C. § 6291(6); *see id.* § 6295 (residential appliances); *id.* § 6313 (commercial appliances). And Congress directed the Department of Energy to periodically review and amend each mandatory standard. Pet. App. 3a-4a. An amended standard must “be designed to achieve the maximum improvement” in energy use or efficiency “which the Secretary determines is technologically feasible and economically justified.” 42 U.S.C. § 6295(o)(2)(A); *see id.* § 6313(a)(6)(A)(ii)(II).

To determine whether a proposed standard is economically justified, the Department evaluates whether its “benefits . . . exceed its burdens.” 42 U.S.C. § 6295(o)(2)(B)(i). This evaluation considers the standard’s “economic impact” on manufacturers and consumers. *Id.* § 6295(o)(2)(B)(i)(I). The agency must specifically compare the “savings in operating costs” over a product’s average life against any “increase” in “the price of,” “initial charges for,” or “maintenance expenses of” the product. *Id.* § 6295(o)(2)(B)(i)(II).

2. Achieving the maximum efficiency gains that EPCA mandates necessarily requires changes to the design and mechanics of covered appliances. But Congress distinguished between such inevitable design changes and those that have the effect of eliminating products’ unique “performance characteristics.” 42 U.S.C. § 6295(o)(4); *see also id.*

§ 6295(q)(1)(B). As relevant here, Congress provided a mechanism for “interested persons” to bring such attributes to the Department’s attention. *Id.* § 6295(o)(4). Those entities must show that a proposed standard “is likely to result in the unavailability” of the product’s “performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States.” *Id.* (residential products); *see also id.* § 6313(a)(6)(B)(iii)(II)(aa) (similar for commercial products). If the Department finds “by a preponderance of the evidence” that such a showing has been made, it may not adopt the standard. *Id.* § 6295(o)(4).

B. Regulatory Background

1. Gas-powered residential furnaces (which heat homes and smaller commercial buildings) and commercial water heaters (which heat water for larger commercial buildings and multifamily apartments) fall within EPCA’s energy-efficiency scheme. Pet. App. 3a. Both products burn gas to generate heat. *Id.* at 6a. A heat exchanger uses some of that heat to warm air or water. *Id.* That heat exchanger can be either “non-condensing” or “condensing.” In a non-condensing appliance, much of the heat from the burning gas is wasted; this lost energy is vented outside the building as exhaust. *Id.* Condensing versions, by contrast, capture and use more of that heat from combustion. *Id.* at 6a-7a. Consequently, condensing products generate two byproducts: cooler exhaust and liquid condensate. *Id.* at 7a. The exhaust can be vented horizontally or

vertically (with some modifications to a standard chimney), and the condensate must be drained. *See* 86 Fed. Reg. 73947, 73962 (Dec. 29, 2021).

From the end-user’s perspective, those technical details do not matter. When a consumer turns on the shower faucet or turns up the thermostat, she receives the same output—hot air or hot water—in exactly the same way. *See* 86 Fed. Reg. at 73955.

But when a consumer opens her utility bill, the difference is clear: Non-condensing products consume much more energy. Pet. App. 7a. Whereas a non-condensing furnace wastes roughly 20% of the energy stored in a unit of gas, condensing units waste about 5-10%. 88 Fed. Reg. 87502, 87541 (Dec. 18, 2023); 88 Fed. Reg. 69686, 69716, 69718, 69815-16 (Oct. 6, 2023). Condensing units thus offer considerable cost savings. *See, e.g.*, 88 Fed. Reg. at 69816-17; *id.* at 87642.

2. In 2015, the Department proposed amending its energy conservation standards for residential furnaces to a level that non-condensing appliances cannot meet. Pet. App. 7a-8a. Noting that the Department had historically understood “performance-related feature” to encompass aspects of appliances that are “accessible” to the user during “operation,” the Department initially concluded that a furnace’s reliance on non-condensing technology does not provide “performance-related impacts.” 80 Fed. Reg. 13120, 13137-38 (Mar. 12, 2015); *see also* 81 Fed. Reg. 34440, 34463 (May 31, 2016) (similar for commercial water heaters).

Before those rules were finalized, petitioners (trade associations) asked the Department to reverse

direction. They petitioned the agency to instead issue an interpretive rule concluding that non-condensing technology constitutes a “performance characteristic” that the proposed standards would render unavailable. 83 Fed. Reg. 54883, 54883 (Nov. 1, 2018).

Although the Department acknowledged that petitioners’ proposal presented a “close case,” the agency reconsidered its “historical interpretation” based on factual and policy “factors,” 84 Fed. Reg. 33011, 33020 (July 11, 2019), and issued the requested interpretive rule on January 15, 2021, 86 Fed. Reg. 4776. That rule found “non-condensing technology (and associated venting) to be a [performance-related] ‘feature’ under [EPCA] which cannot be eliminated.” *Id.* at 4802-03, 4816.

3. Later that same year—and after requesting additional comments and data, 86 Fed. Reg. 48049, 48049 (Aug. 27, 2021)—the Department reverted to its original course. It proposed and finalized an interpretive rule determining that, “in the context of residential furnaces, commercial water heaters, and similarly-situated products,” “use of non-condensing technology (and associated venting) is not a performance-related ‘feature.’” 86 Fed. Reg. at 73951 (Dec. 29, 2021).

Consistent with its historical interpretation of the term “performance,” the Department reasoned that EPCA’s unavailability provisions protect only those characteristics that “provide a consumer unique utility during the operation of the appliance in performance of its major function[s].” 86 Fed. Reg. at 73955; *see id.* at 73953. And because there is no

noticeable difference in the appliance's output based on whether it is condensing or non-condensing, the Department concluded that the technological distinction does not qualify as a performance characteristic under EPCA's plain text. *Id.* at 73955.

The Department further determined that its short-lived alternative view lacked robust evidentiary support. The agency explained that the January 2021 rule had given undue weight to petitioners' "qualitative arguments" regarding potential installation difficulties, which "were not accompanied by sufficient evidence to establish the existence or magnitude of the alleged problem." 86 Fed. Reg. at 73960. The agency now credited comments showing that "in all cases" where non-condensing appliances can be installed, so can condensing units. *Id.* at 73962; *see also id.* at 73960 (citing study finding that it is "always possible" to install a condensing appliance). The Department also found that switching to a condensing appliance does not diminish available interior space. *See id.* at 73957 & n.13, 73955. And the Department additionally explained that it would give any incremental installation costs associated with condensing technology due weight in the economic-justification analysis required for the efficiency standards themselves. *Id.* at 73951, 73960, 73967.

4. The Department subsequently promulgated amended standards for commercial water heaters and residential furnaces. 88 Fed. Reg. at 69686; *id.* at 87502. The Department carefully examined—in over 2,000 pages of modeling and analysis—whether the standards were technologically feasible and

economically justified. That evaluation included research into installation expenses in homes and businesses and the incidence of those costs in different parts of the market. *See id.* at 69739-51; *id.* at 87559-69, 87603-08.¹

Those analyses confirmed the Department’s assessments in the December 2021 interpretive rule. *See, e.g.*, 88 Fed. Reg. at 87536 (“[T]hanks to various technological solutions, virtually all homes can accommodate a condensing furnace.”); *id.* at 87564 (consumer and contractor surveys reflecting no need to place condensing furnaces in different locations than non-condensing ones). And to be doubly sure that it was not discounting installation impacts, the Department used conservative economic assumptions. *See, e.g., id.* at 69743 (including a “significant cost adder”). Even under those assumptions, the Department determined that such costs could not overcome the other statutory factors weighing in favor of the amended standards—including (in the case of residential furnaces) many billions of dollars in operating-cost savings. *Id.* at 87504, 87641-42; *see also id.* at 69691-92.

C. Decision Below

Petitioners filed petitions for review of all three rulemakings. They renewed their argument that

¹ *See also* U.S. Dep’t of Energy, Technical Support Document: Consumer Furnaces 8-15 to 8-18, 8D-1 to 8D-33 (Sept. 2023) (Consumer Furnaces TSD); U.S. Dep’t of Energy, Technical Support Document: Commercial Water Heating Equipment 8-9 to 8-14, 8D-1 to 8D-22 (July 2023) (Commercial Water Heaters TSD).

“[n]oncondensing technology” constitutes a performance characteristic triggering EPCA’s unavailability provisions. Pet. C.A. Br. 44, 50. At times, however, petitioners shifted to a different argument: that the relevant “performance characteristic” is not non-condensing technology itself, but rather “installation and space-related characteristics.” *Id.* at 55.

a. The court of appeals denied the petitions. Pet. App. 1a-43a.

Citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the court of appeals emphasized that the Department’s interpretation of EPCA did “not bind” the court. Pet. App. 14a. The court also noted that, to the extent the Department’s interpretation “rested on factual premises within” its “expertise,” its reasoning could retain the “power to persuade, if lacking power to control.” *Id.* (quoting *Loper Bright*, 603 U.S. at 402). And the court additionally observed that EPCA’s unavailability provisions gave petitioners the burden of proof on certain issues. *Id.* at 14a-15a. Those included the burden to show that the efficiency standards would render unavailable an EPCA-protected performance characteristic that is not “substantially the same” as characteristics that would remain in the marketplace. 42 U.S.C. § 6295(o)(4); *see* Pet. App. 14a-15a.

The court of appeals then turned to the unavailability provisions’ “plain text.” Pet. App. 15a. Relying on dictionaries, *id.*, the court agreed with the Department that a performance characteristic “has to be about using the product.” *Id.* at 16a (ellipsis and citation omitted). The court further reasoned that

consumers do not choose furnaces or water heaters based on how the appliance vents. *Id.* at 18a.

Several other considerations supported the court of appeals' conclusion that non-condensing technology does not trigger EPCA's unavailability bar. Pet. App. 17a-19a, 25a-26a. For instance, the court observed that EPCA requires the Department to account for installation costs in the economic-justification analysis, a more "appropriate[]" home for those kinds of factors. *Id.* at 25a-26a. And the Department's product-specific application of the statutory phrase "performance characteristic" to furnaces and water heaters was consistent with its "historical view." *Id.* at 19a & n.6.

The court of appeals additionally determined that, even if petitioners' proposed performance characteristic were instead described as "space-related attributes" or "installation factors," petitioners did not carry their "heavy" burden to show that the efficiency standards would render those attributes unavailable. Pet. App. 21a-22a, 25a-27a (internal quotation marks and citation omitted). The court credited the Department's findings that condensing appliances do not require a different footprint and do not result in a loss of useful space for most consumers. *Id.* at 22a. The court also relied on the Department's finding that "consumers are able to replace non-condensing appliances with condensing appliances in 'all cases.'" *Id.* at 25a-26a (citation omitted). The record thus did not support petitioners' claim that non-condensing appliances offer product characteristics that are "substantially" unique. *Id.* at 27a.

b. Judge Rao dissented. Pet. App. 44a-69a. She would have held that non-condensing appliances' venting mechanism is a protected performance characteristic. *Id.* at 44a.

c. The decision below issued on November 25, 2025. Petitioners and the federal respondents did not seek rehearing.

REASONS TO DENY THE PETITION

Petitioners' principal question presented depends on the assertion that the D.C. Circuit "resurrected *Chevron* deference" in upholding the amended efficiency standards at issue. Pet. 1. That assertion is wrong, as the federal respondents' conspicuous silence on petitioners' first question presented all but confirms. And petitioners' second question asks the Court to engage in nothing more than error correction in a case where no error occurred. Neither question implicates anything resembling a split of authority for this Court to resolve.

The federal respondents, for their part, essentially admit that this petition fails this Court's traditional test for certiorari. Rather than ask this Court to review petitioners' second question on the merits, they request a GVR largely premised on the Department's interest in reconsidering these rules. But that request falls well below the Court's GVR threshold—not least because the Department failed to present these arguments to the D.C. Circuit when it had the opportunity, and because a remand is highly unlikely to lead to a different outcome. Certiorari should be denied.

I. Petitioners' First Question Is Not Presented Here

A. The Court Of Appeals Interpreted EPCA Independently, Consistent With *Loper Bright*

1. The premise of petitioners' first question presented—that the D.C. Circuit “defer[red] to an agency’s legal interpretation” of EPCA’s unavailability provisions “because [the] agency applied the statute to undisputed facts” (Pet. i)—is wrong. Indeed, the federal respondents do not endorse that reading of the opinion below.

To begin with, the court of appeals did not defer to the Department’s interpretation of what “performance characteristic” means. The court’s reasoning rested on its best reading of the statute. *See infra* at 21-25. The court began by explaining that under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), “DOE’s interpretation of EPCA *does not bind.*” Pet. App. 14a (emphasis added). The court then parsed the unavailability provisions’ text and consulted dictionaries to ascertain the meaning of the key phrase. *Id.* at 15a. From that foundation, the court observed that a performance characteristic “has to be about using the product” and “related to the product’s useful output.” *Id.* at 16a (internal quotation marks, ellipses, brackets, and citation omitted). And the court used that metric to evaluate the specific appliances here, explaining that “consumers do not buy small furnaces or commercial water heaters because of how the appliance vents.” *Id.* at 18a.

The court of appeals also relied on other “relevant

interpretive tools,” as *Loper Bright* instructs. 603 U.S. at 400-01; *see* Pet. App. 16a. Those included the structural point that installation costs are accounted for in EPCA’s economic-justification provision, Pet. App. at 25a-26a; the Department’s “historic view,” *id.* at 19a; and EPCA’s legislative background, *id.* at 17a-18a.

That statutory analysis was enough for the court of appeals to rule out non-condensing technology (and its venting) as a characteristic “that Congress meant to treat as providing utility to consumers.” Pet. App. 17a. Even so, because petitioners had offered other attributes as potential performance characteristics in their briefing—namely, “installation factors” and “space-related attributes”—the court considered those contentions as well. *Id.* at 21a, 25a (internal quotation marks and citation omitted).

EPCA required petitioners to show that the amended standards would render those proffered performance characteristics unavailable, which included a showing that the eliminated attributes are not “substantially the same” as ones that will remain in the market. 42 U.S.C. § 6295(o)(4); *see* Pet. App. 22a. The court of appeals accordingly focused on that similarity question and concluded that “[s]ubstantial evidence in the record” established that neither of petitioners’ alternative characteristics distinguished the performance of non-condensing appliances from condensing ones. *Id.* at 22a; *see id.* at 22a, 25a-26a. In other words, with respect to *those* proffered performance characteristics, the relevant “facts” were not “undisputed” (Pet. i), and the court found no basis to overturn the Department’s findings rejecting the

factual basis for petitioners' invocation of the unavailability bar. *See also infra* at 25-28.

2. In claiming that this analysis implicitly created a new deference framework, petitioners criticize the D.C. Circuit's opinion in three respects. None of those criticisms is valid.

First, petitioners fault the D.C. Circuit for declining to adopt a definition of performance characteristic that applies across all appliances, in favor of a "case-specific" focus on the two products here. Pet. 17. But that hardly establishes that the court abdicated its post-*Loper* responsibilities. As is often the case, the court took care to resolve the interpretive dispute at hand and go no further. *See, e.g., Bondi v. VanDerStok*, 604 U.S. 458, 473 (2025) (recognizing that deciding whether a product meets a statutory definition "does not require us to untangle exactly how far [the provision] reaches"). That approach was especially prudent here, given that "every appliance offers a unique function to consumers" and a one-size-fits-all definition might confound more than clarify. Pet. App. 16a.

Second, petitioners claim (Pet. 19) that the court of appeals conferred interpretive "discretion" on the agency where the statute provides none. But the D.C. Circuit did not say that the Department enjoys discretion to interpret EPCA's unavailability provisions however it wishes. *See* Pet. App. 14a-15a. Rather, read in context, the court was merely alluding to the somewhat unusual features of these provisions: They require the Secretary of Energy to make a "finding" that interested parties have established that the proposed standard will eliminate a performance

characteristic, which includes a subsidiary finding that no substantially similar characteristics will remain on the market. *E.g.*, 42 U.S.C. § 6295(o)(4); *see* Pet. App. 14a-15a, 22a; *see also Loper Bright*, 603 U.S. at 395 n.6 (listing, among examples of statutes conferring discretion, those that require agency officials to form a “judgment” or “find[]” something (citations omitted)).

It is in the context of evaluating those fact-bound determinations that the D.C. Circuit credited agency “expertise” (petitioner’s third criticism, Pet. 17-18). Pet. App. 14a, 27a. Specifically, the court found no basis to disturb the Department’s assessments—based on the extensive comment record and its own technical analyses—that condensing technology does not entail a loss of physical space, *id.* at 22a, and that condensing appliances can replace non-condensing appliances in all cases, *id.* at 25a-26a. Those are the conclusions that the court describes as “rest[ing] on the agency’s evaluations of scientific data within its area of expertise.” *Id.* at 27a (citation omitted).

B. There Is No Relevant Post-*Loper* Confusion In The Lower Courts

Nor does petitioners’ first question implicate a circuit split. Petitioners note that, post-*Loper*, courts of appeals have declined to interpret an undefined standard in the Immigration and Nationality Act (“extreme and unusual hardship”) as conferring interpretive discretion upon the Board of Immigration Appeals. Pet. 19 (citing *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420-21 (6th Cir. 2024), and *Rangel-Fuentes v. Bondi*, 155 F.4th 1138, 1143 (10th Cir. 2025)). But the D.C. Circuit did not defer to an

agency's interpretation of an undefined standard. Rather, the court located fact-finding discretion in the unavailability provisions' requirement that the Secretary "find" that the characteristics in question will be rendered unavailable in the future. *See supra* at 16-17.

Petitioners also posit that courts disagree about how to implement "this Court's suggestion that 'an agency's interpretation of a statute' may be informative 'to the extent it rests on factual premises within [the agency's] expertise.'" Pet. 20 (quoting *Loper Bright*, 603 U.S. at 402) (brackets in original). But in the decision petitioners cite as reflecting their preferred approach, the Fifth Circuit made essentially the same analytical moves the D.C. Circuit did here. *See Texas v. EPA*, 156 F.4th 523, 550 (5th Cir. 2025) (finding agency views "informative" where they "hinge[d] on scientific knowledge" and "expertise in the factual predicates of administration in this scientifically complex area").

The second decision petitioners cite was equally clear that post-*Loper*, a court's "task is to evaluate the statute independently under *Skidmore*, giving 'due respect,' but not binding deference." *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024) (citation omitted). *Lopez* does not even discuss the portion of *Loper Bright* referring to "factual premises." The same is true of the third decision petitioners invoke, which this Court is currently reviewing to decide a question of criminal sentencing law. *See United States v. Rutherford*, 120 F.4th 360 (3d Cir. 2024), *cert. granted*, 145 S. Ct. 2776 (2025). There, the Third Circuit merely observed that *Loper Bright*

“overturned the long-standing rule that courts must defer to agency interpretations of statutes within an agency’s expertise,” *id.* at 379—something no one disputes, and certainly not the D.C. Circuit.²

II. Petitioners’ Second Question Does Not Warrant Review

In addition to their primary question presented, petitioners ask this Court to decide the merits: whether non-condensing technology constitutes a “performance characteristic” within the meaning of EPCA’s unavailability provisions. Pet. 25-32; *see also* U.S. Br. 8-10. But there is no split of authority on that question, or (as far as intervenors are aware) any other issue arising under EPCA’s unavailability provisions. And even if the Court were inclined to take up this product-specific administrative-law dispute regardless, the D.C. Circuit did not err in upholding the rulemakings here.

² *E.g.*, *Solar Energy Indus. Ass’n v. FERC*, 154 F.4th 863, 867 (D.C. Cir. 2025) (“apply[ing] [this] Court’s directive to ‘exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority’ ” (citation omitted)); *Jazz Pharm. Inc. v. Kennedy*, 141 F.4th 254, 266 (D.C. Cir. 2025) (noting that “the FDA’s longstanding view” “is, at most, only persuasive authority”); *United States Sugar Corp. v. EPA*, 113 F.4th 984, 991 (D.C. Cir. 2024) (per curiam) (“Instead of deferring to EPA’s interpretation,” “we must apply what we regard as the statute’s ‘best’ reading.”).

**A. There Is No Split Of Authority
Regarding EPCA’s Unavailability
Provisions**

Neither petitioners nor the federal respondents claim a lower-court conflict over the meaning of “performance characteristic” in EPCA’s unavailability provisions. None exists.

That is not because the D.C. Circuit has a monopoly over review of EPCA rulemakings. Such cases can be and are filed elsewhere. *See* 42 U.S.C. §§ 6306(b)(1) and 6316; *see also, e.g., Zodiac Pool Sys. LLC v. U.S. Department of Energy*, No. 23-3094, 2025 WL 325750 (3d Cir. Jan. 29, 2025); *Louisiana v. U.S. Department of Energy*, 90 F.4th 461 (5th Cir. 2024); *Zero Zone, Inc. v. U.S. Department of Energy*, 832 F.3d 654 (7th Cir. 2016).

There is no indication, moreover, that any other court of appeals would reach a different conclusion with respect to non-condensing technology or products raising a similar controversy. To the contrary, the Fifth Circuit recently relied on the Department’s “longstanding view” that “performance is ‘utility’ ‘accessible to the layperson *and based on user operation*’” in reviewing another EPCA rulemaking. *Louisiana*, 90 F.4th at 474 (Oldham, J.) (emphasis added; citation omitted); *see* Pet. App. 19a.

Further, even if petitioners or the federal respondents could credibly claim that the dispute here implicates a larger EPCA debate worthy of this Court’s attention, these rulemakings would not be the last opportunity to weigh in. As petitioners note (Pet. 23), the condensing/non-condensing distinction may arise in products other than residential furnaces and

commercial water heaters. *See* 88 Fed. Reg. 34624, 34637 (May 30, 2023) (residential pool heaters); 88 Fed. Reg. 55128, 55142-43 (Aug. 14, 2023) (residential boilers). Thus, to the extent it is necessary, further percolation on the unavailability provisions' meaning can occur in the lower courts in due course.

B. The Court Of Appeals Correctly Ruled That Non-Condensing Technology Is Not A Performance Characteristic

1. On the merits, the court of appeals correctly concluded that non-condensing technology does not qualify as a “performance characteristic” of furnaces and water heaters.

a. EPCA bars the Department from prescribing an amended energy conservation standard 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 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) (residential appliances); *see also id.* § 6313(a)(6)(B)(iii)(II)(aa) (commercial appliances).³

³ Before this Court, petitioners rely only on “performance characteristic,” not other terms in the provisions. *E.g.*, Pet. i.

Courts “interpret statutory terms according to the ordinary meanings they had when [the statutes] were enacted.” *USPS v. Konan*, 146 S. Ct. 736, 742 (2026); see National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, § 5, 101 Stat. 103, 115 (enacting the unavailability provisions). The ordinary meaning of “performance” refers to “[t]he accomplishment, execution, carrying out, [or] working out of anything ordered or undertaken; the doing of any action or work.” Performance, XI *Oxford English Dictionary* 544 (1989); accord Performance, *The American Heritage Dictionary* 922 (2d College ed. 1982) (“[t]he way in which someone or something functions”). The word is thus commonly understood to connote work and operation.

Consistent with the phrase’s natural meaning, the Department has long understood “performance characteristic” to encompass product attributes that “provide a consumer unique utility *during the operation of the appliance*.” 86 Fed. Reg. at 73954-55 (emphasis added); see also *Louisiana*, 90 F.4th at 474. For instance, oven-door windows qualify because they improve an oven’s functionality by allowing cooks to “gauge the progress of food undergoing baking.” 86 Fed. Reg. at 73953. In-door refrigerator icemakers count because they provide consumers “with an additional benefit during [the refrigerator’s] operation.” 88 Fed. Reg. at 87535. And the Department concluded that a clothes washer’s cycle time counts because users “value” the “option” of having their laundry done in less time. Pet. App. 19a n.6.

Non-condensing technology does not provide a user

with any comparable benefit as part of a furnace's or water heater's operation. Pet. App. 18a-19a. As the Department explained, when “interacting with a residential furnace or commercial water heater during operation,” “a consumer discerns no unique utility resulting from the specific heat exchanger technology,” as “the heated air or water” is “indistinguishable.” 86 Fed. Reg. at 73955.

Instead, non-condensing technology at most provides *installation* benefits for some consumers replacing a non-condensing unit. *But see infra* at 26-27. Yet lower installation costs are not a feature of the product's operation and are thus not naturally understood as characterizing the product's performance. If someone asked her neighbor about the “performance” of his new car, and the neighbor responded by explaining how well the car fit in the family garage, the inquirer would be perplexed.

b. Context and statutory structure reinforce that plain reading of the text. *See Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (statutory interpretation must “account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole’” (citation omitted)). For one thing, EPCA elsewhere equates the word “performance” with how an appliance operates. The statute defines “energy conservation standard” to mean “a *performance* standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use”—that is, a standard dictating how much energy appliances consume when running. *See* 42 U.S.C. § 6291(6)(A); *see also Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017)

(presuming that “identical words used in different parts of the same statute carry the same meaning” (internal quotation marks and citation omitted)).

In addition, EPCA elsewhere deals with installation costs as part of the required economic-justification analysis. *See* Pet. App. 4a, 26a. Before the Department can prescribe an efficiency standard, it must determine whether the standard’s “benefits” exceed its “burdens”—the latter of which include “any increase in the price of, or in *the initial charges* for, or maintenance expenses of, the covered products which are likely to result from the [standard’s] imposition.” 42 U.S.C. § 6295(o)(2)(B)(i)(II) (emphasis added). The Department must also consider any “economic impact of the standard . . . on the consumers.” *Id.* § 6295(o)(2)(B)(i)(I).

In this case, for instance, the Department completed extensive technical and cost analyses of many installation scenarios as part of the economic-justification analysis for each amended standard. *See supra* at 9-10.⁴ The fact that EPCA captures installation costs as part of the required cost-benefit analysis further establishes that Congress did not intend for such costs to *also* constitute a protected “performance characteristic.”

Petitioners’ interpretation of the unavailability provisions, on the other hand, would thwart EPCA’s purpose of “improv[ing]” appliances’ “energy

⁴ *See also* 88 Fed. Reg. at 69739-51, 69791-96; *id.* at 87550-57, 87559-68; Consumer Furnaces TSD 2-10, 8-15 to 8-18, 8-42 to 8-46, 8-48 to 8-54, App. 8D; Commercial Water Heaters TSD 2-3, 2-11 to 2-12, 8-1 to 8-5, 8-9 to 8-14, 8-36 to 8-49, App. 8D.

efficiency.” 42 U.S.C. § 6201(5). Few product designs improve efficiency without producing some increase in price, installation costs, or maintenance expenses. *See id.* § 6295(o)(2)(B)(i). Interpreting performance characteristic to include such things “would effectively lock-in the currently existing technology as the ceiling for product efficiency,” eliminating the Department’s ability to require improvements that “could yield significant consumer benefits in the form of lower energy costs while providing the same functionality for the consumer.” 80 Fed. Reg. at 13138.

2. Petitioners’ and the federal respondents’ counterarguments fail.

a. As an initial matter, petitioners continue to rely on inconsistent descriptions of the “performance characteristic” that they contend would be rendered unavailable by the challenged efficiency standards. They now ask this Court to decide whether “an appliance’s ability to operate in existing homes and buildings without renovation” is a performance characteristic. Pet. i; *see, e.g.*, Pet. 3. But their 2017 rulemaking petition identified the relevant performance characteristic differently, as “non-condensing technology” and its associated venting. 83 Fed. Reg. at 54883. And that is precisely the framing used by the Department in the challenged interpretative rule. 86 Fed. Reg. at 73951.

Petitioners’ shift matters because their factual case for unavailability-provision protection falls apart if the relevant performance characteristic is redefined in this way. Again, EPCA’s unavailability provisions require interested persons to demonstrate, and the

Department to find, that the proposed efficiency standard will render a *performance characteristic* “unavailab[le].” 42 U.S.C. § 6295(o)(4). There was no factual dispute that the efficiency standards here will phase out *non-condensing technology*. See Pet. 10. But there *was* a factual dispute over whether the standards will render unavailable furnaces’ and water heaters’ “ability to operate in existing homes and buildings without renovation,” Pet. i—a dispute that the Department resolved against petitioners. See U.S. Br. 5-7 (noting the Department’s findings).

Specifically, the Department observed, based on the rulemaking record, that:

- Non-condensing and condensing units have a similar footprint and a switch “would not result in a loss of useful space for most consumers.” 86 Fed. Reg. at 73955 & n.10; Pet. App. 22a.
- Both condensing and non-condensing appliances produce exhaust that must be vented. 88 Fed. Reg. at 69709; *id.* at 87535. Condensing units can use vertical vents originally meant for non-condensing units if the vents are retrofitted using technological solutions. See 86 Fed. Reg. at 73960-62; 88 Fed. Reg. at 69742-43; *id.* at 87536.
- In most cases, condensing technology does not alter where a unit can be installed and installation costs will be reasonable. See 88 Fed. Reg. at 69742-44; *id.* at 87536. Switching from a non-condensing to a condensing furnace will cost only about \$490 more on average, with “difficult” installations costing about \$870. 88 Fed. Reg. at 87559, 87564 & n.127. Any

disruptions to the home during installation “are likely to be temporary and of limited duration.” *Id.* at 87565.

- The Department is not aware of any building codes that would prohibit replacing a non-condensing unit with a condensing one. 86 Fed. Reg. at 73962.
- Those consumers facing potentially difficult installations have the option of switching to an electric unit, which would also meet the amended efficiency standards and requires no venting. 86 Fed. Reg. at 73960. Thus, in all cases, consumers have means “to avoid loss of usable space, extensive building modifications, or extreme installation costs.” *Id.*; *see* Pet. App. 21a.
- Canada, which has required use of condensing technology since 2009, did not experience “significant implementation issues,” 88 Fed. Reg. at 87641, including in multifamily homes, rowhouses, and townhouses, *id.* at 87562.

Rehashing their comments, petitioners offer a different factual picture. *E.g.*, Pet. 7.⁵ But even putting aside whether substantial evidence supported the Department’s contrary conclusions (an issue on which petitioners have not sought this Court’s review), the Department certainly did not find that its

⁵ Although the federal respondents’ brief vaguely describes these rulemakings as “factually . . . flawed,” U.S. Br. 11, they do not identify a Department finding with which they now disagree, let alone establish that such a finding lacked substantial evidence in the rulemaking records.

standards would fully eliminate furnaces’ and water heaters’ ability to operate in existing homes and businesses without renovation. *See* 42 U.S.C. § 6295(o)(4) (if characteristics remaining in the market are “substantially the same” as those rendered unavailable, the unavailability bar does not apply); H.R. Rep. No. 100-11, at 23 (1987) (“A valid standard may entail some minor loss of characteristics, features, sizes, etc.; for this reason, the Act requires that ‘substantially the same,’ though not necessarily identical, characteristics or features should continue to be available.”). As a result, based on how petitioners frame their second question presented, the relevant facts are not “undisputed.” Pet. 20.

b. More generally—and regardless of whether petitioners characterize the relevant characteristic as non-condensing technology or something else—petitioners (and now the federal respondents) fail to reconcile their policy position with the statutory text. They entirely ignore the ordinary meaning of the word “performance” and its operational connotation. *See supra* at 22-23. Instead, they swap in the term “utility.” *See* Pet. 25-26; U.S. Br. 8. But that is “not the word[] that Congress wrote.” *National Ass’n of Mfrs. v. Department of Defense*, 583 U.S. 109, 123 (2018). And while petitioners suggest the Department agreed that any kind of “utility” qualifies, *see* Pet. 25 (citing Pet. App. 15a), as the citations in the D.C. Circuit’s opinion make clear, the Department in fact adhered to its historical position that only “utility *during the operation of the appliance*” counts. Pet. App. 15a-16a (emphasis added; citations omitted); *see also* U.S. Br. 11.

Petitioners and the federal respondents also offer *noscitur a sociis* theories to argue that “performance characteristics” include installation-related attributes. Pet. 26; U.S. Br. 9. That canon teaches that a word can be given more precise content “by the neighboring words with which it is associated.” *United States v. Williams*, 553 U.S. 285, 294 (2008). But here, that guidance is muddled because the unavailability provisions arrange the relevant nouns in distinct grammatical ways; the commercial version nests all of the nouns under the “performance characteristic” label, and the residential provision separates most of them out. See U.S. Br. 2 n.1.⁶

In any event, the other nouns do not justify expanding “performance characteristic” beyond its natural meaning. The word “feature” *can* be broad (Pet. 26). But in the appliance context, “feature” can also refer more narrowly to “[a]n item advertised or offered as particularly attractive or as an inducement,” as in, “a washing machine with many features.” *The American Heritage Dictionary of the English Language* 2694 (3d ed. 1992) (emphasis omitted). Petitioners likewise offer no reason to believe that the presence of the word “size” establishes that *any* physical characteristic of a product should qualify (Pet. 26). Rather, the fact that the list also includes “capacity” and “volume”—two near synonyms—indicates that “size” similarly refers to

⁶ Compare 42 U.S.C. § 6295(o)(4) (“performance characteristics (including reliability), features, sizes, capacities, and volumes”), with *id.* § 6313(a)(6)(B)(iii)(II)(aa) (“performance characteristics (including reliability, features, sizes, capacities, and volumes”).

the appliance’s ability to handle tasks of a certain magnitude. Finally, the inclusion of “reliability” (Pet. 26) *reinforces* the provision’s focus on the product’s operation; it says nothing about the installation context at all.

Petitioners’ attempt to dismiss the significance of EPCA’s economic-justification provisions is equally unpersuasive. Neither petitioners nor the federal government dispute that the provisions’ reference to “initial charges,” *e.g.*, 42 U.S.C. § 6295(o)(2)(B)(i)(II), includes installation and renovation costs. Instead, petitioners observe (at 30) that the economic-justification provisions also direct the Department to consider “any lessening of . . . the performance of the covered products,” 42 U.S.C. § 6295(o)(2)(B)(i)(IV), suggesting that there is some overlap between the economic-justification and unavailability inquiries. But the point is that Congress “knew how” to refer to installation costs with a straightforward phrase, but did not use that phrase in the unavailability provisions. *Polselli v. IRS*, 598 U.S. 432, 439 (2023). And reading the phrase “lessening of . . . the performance of the [] products” to describe increased installation costs is just as strained as reading “performance characteristics” to include those costs.

c. With little support in the text, petitioners rely (Pet. 28-30) on past Department determinations regarding other appliance types. At most, this attempt to demonstrate the agency’s inconsistency in reasoning over time would amount to an arbitrary-and-capricious argument, not one establishing that the agency exceeded its statutory authority. *See* Pet. 30 (asserting that the Department departed from past

practice “arbitrarily”); Pet. App. 56a (Rao, J., dissenting) (calling the Department’s action “an unexplained and arbitrary departure from the agency’s long-standing practice”). But petitioners did not challenge the unavailability determination on arbitrary-and-capricious grounds below, and such a claim is not fairly included within the questions presented. *See* Sup. Ct. R. 14.1(a).

Regardless, the court of appeals correctly recognized that the Department’s determinations for those prior products each rested on circumstances not present here. *See* Pet. App. 19a-21a & n.7, 23a-25a. Moreover, petitioners omit the most closely analogous precedent: the Department’s treatment of residential large-storage water heaters. *See* 75 Fed. Reg. 20112 (Apr. 16, 2010). There, like here, the Department declined to separate out non-condensing appliances into their own class for efficiency-standard purposes, notwithstanding commentors’ concerns about condensing technology’s installation costs. *See id.* at 20138, 20156-57.

III. There Is No Basis For A GVR

The Court should also reject the federal respondents’ request (Br. 10-14) for a GVR. If the federal respondents had wanted the D.C. Circuit to address the Department’s change of position or refine the majority opinion, they should have directed those requests to that court. Having instead waited to ask *this* Court to require the D.C. Circuit to do so, the federal respondents must meet the Court’s threshold for a GVR, and they fall far short. If the Department wishes to advance “the current Administration’s legal and factual views” on the efficiency standards at

issue, U.S. Br. 14, it can attempt new rulemakings, as it claims the ability to do. But because a GVR is not appropriate, and because the federal respondents do not make an alternative request for plenary review, the petition for certiorari should be denied.

a. The federal respondents offer two rationales for a GVR. First, they cite the “change in Administration” and the Department’s “review[]” of these rules and current belief that they are “flawed.” U.S. Br. 8, 10-11. Second, they argue that the D.C. Circuit’s decision was based on a mistaken “premise” regarding the extent to which the parties agreed upon the meaning of performance characteristic. U.S. Br. 11. They contend that this supposed mistake renders the court’s reasoning “uncertain[]” (albeit not in a way relevant to petitioners’ first question presented). U.S. Br. 12.

Nothing prevented the federal respondents from raising either point in a petition for rehearing. The decision below issued over nine months after the presidential transition and the executive order that the Department says catalyzed its change of position. *See* U.S. Br. 10-11; Pet. App. 1a. Indeed, the federal respondents could have sought to hold the case in abeyance even before the D.C. Circuit expended considerable resources to issue a decision. As for the supposed ambiguity in the majority opinion, if the federal respondents had wanted to “assist[] . . . the lower court[]” by “flagging issues” the court “might not have fully considered” and “procuring the benefit of [that] court’s insight,” they should have sought rehearing in that court. U.S. Br. 10 (internal quotation marks and citation omitted).

b. Without explaining why they waited until now, the federal respondents assert (Br. 10) that a GVR is appropriate under the principles set forth in *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam). Members of this Court have criticized *Lawrence*'s relatively broad articulation of the GVR standard. See, e.g., *Myers v. United States*, 587 U.S. 981, 982 (2019) (Roberts, C.J., dissenting) (absent a "new development," the Court should vacate a lower court's judgment only after "reviewing the case on the merits," should it "warrant" review); *Nunez v. United States*, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting) ("[W]e have no power to set aside (vacate) another court's judgment unless we find it to be in error."). And it is unclear whether the Court's current GVR practices fully align with *Lawrence*. See *Grzegorzcyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (statement of Kavanaugh, J.); *id.* at 2582 (Sotomayor, J., dissenting); *Glossip v. Oklahoma*, 604 U.S. 226, 285 (2025) (Thomas, J., dissenting) ("This Court follows the [] rule, derived from early English practice, that it must 'examine independently' confessions of error before reversing." (citation omitted)); cf. *Louisiana v. American Rivers*, 142 S. Ct. 1347, 1347 (2022) (staying district-court order that had vacated an agency rule, without a merits ruling, based on a post-transition change in position).

Regardless, the federal respondents' request does not meet the *Lawrence* standard either. *Lawrence* explained that a GVR is "potentially appropriate" where there is an intervening development for the lower court to consider that "may determine the ultimate outcome of the litigation." 516 U.S. at 167.

Here, there is no reason to believe that the Department's change in position will make a difference to the outcome of petitioners' challenges. As discussed, the D.C. Circuit owes no deference to the agency's legal interpretations. *See supra* at 14. The statutory-interpretation arguments the federal respondents now seek to advance (U.S. Br. 8-10) have already been thoroughly aired by petitioners and by Judge Rao in her dissent. And the Department's only factual findings are the ones in the rulemaking record, *see supra* at 26-27 & n.5—so the D.C. Circuit could not defer to any new factual assessments presented in further briefing. The federal respondents speculate (at 11) that the D.C. Circuit might instead hold this case in abeyance pending the possibility of new rulemakings. But that is extremely unlikely given the judicial resources the court has already expended to decide the case and the federal respondents' failure to bring the Department's reconsideration of these rules to the court's attention in a timely manner.

Lawrence additionally holds that a GVR's propriety "depends" on "the equities of the case," including whether "the delay and further cost entailed in a remand are [] justified by the potential benefits of further consideration by the lower court." 516 U.S. at 167-68. The equities do not favor a GVR here either.

As noted, the federal respondents cite the benefit of clarifying the D.C. Circuit's decision. But they exaggerate the court's "apparent misunderstanding." U.S. Br. 12. According to the federal respondents, because the court mistakenly understood the parties to agree on the meaning of "performance characteristic," the court may have declined to take a

side. *See* U.S. Br. 11-13; *see also* Pet. App. 15a-16a. But even petitioners do not share that interpretation of the opinion below. *See* U.S. Br. 12. In fact, as the court’s citations and quotations in the relevant passage show, it perfectly understood the Department’s position that a performance characteristic must provide utility to the user during the product’s operation. *See* Pet. App. 15a-16a; *see also* U.S. Br. 12 (acknowledging that the court’s quotations captured the parties’ “competing formulations”).

Even if the D.C. Circuit was imprecise in describing the scope of the parties’ agreement, its description was at most dicta. Any marginal clarity that could be gained by forcing the court “to do [its] homework again” is not sufficient reason for a GVR. *Stutson v. United States*, 516 U.S. 163, 185-86 (1996) (Scalia, J., dissenting); *see also id.* at 185 (deeming it “quite improper to vacate merely in order to get a better idea of whether the case is ‘worth’ granting full review”). And as discussed, a GVR would be highly inequitable in light of the federal respondents’ unexplained failure to bring these two matters to the court of appeals’ attention when it had the opportunity. *See supra* at 32.

c. EPCA has an anti-backsliding provision that, in intervenor respondents’ view, would prevent the Department from repealing these efficiency standards. *See* 42 U.S.C. § 6295(o)(1); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004). The federal respondents nonetheless represent that the Department “could revisit” the standards “in a future rulemaking.” U.S. Br. 13 & n.2 (citing 90 Fed.

Reg. 20899, 20901 (May 16, 2025)). At the same time, they urge (Br. 13 n.2) that any disputes regarding the anti-backsliding provision be resolved “in the context of a new rulemaking or any subsequent litigation,” not by this Court or the court below.

Given those positions, the federal respondents have no justification for prolonging *this* litigation—where the agency’s latest legal and factual views would be provided only in lawyer briefs—in lieu of requiring the Department to pursue new notice-and-comment rulemakings should it wish to repeal the current standards. *Cf. Arizona v. City & County of San Francisco*, 596 U.S. 763, 765-66 (2022) (Roberts, C.J., concurring) (questioning whether an agency’s attempt to “circumvent” repeal through notice-and-comment rulemaking by acquiescing in the rule’s judicial vacatur “comport[s] with the principles of administrative law”). While the interpretation of EPCA in the decision below would bind a future D.C. Circuit panel, the Department would be free to seek en banc or certiorari review afterward.

d. Notably, the federal respondents do not alternatively request that the Court grant the present petition and hear the case on the merits. *Cf. U.S. Br. 13-14* (indicating that merits review would need a “cleaner posture”).

And both petitioners’ and the federal respondents’ assertions about the practical importance of this dispute (Pet. 1; U.S. Br. 12) conflict with the Department’s contrary factual findings. *See supra* at 26-27 & n.5; *see also* U.S. Br. 5-7 (noting these findings). Again, the Department determined that switching to a condensing appliance does not alter

where the unit can be installed in most cases; that technological solutions exist to address potentially difficult installations; and that in “all cases,” consumers have options “to avoid loss of usable space, extensive building modifications, or extreme installation costs.” 86 Fed. Reg. at 73960, 73963; *see also* 86 Fed. Reg. at 73955, 73957; 88 Fed. Reg. at 69743; *id.* at 87536.⁷

Thus, the federal respondents’ new suggestion that these efficiency standards could negatively affect “[m]illions of homes and commercial buildings” is contrary to the record and unsubstantiated. U.S. Br. 12 (citation omitted). Even assuming it is true that millions of structures currently contain non-condensing gas appliances, Pet. App. 44a (Rao, J., dissenting), the Department found no basis to conclude that a meaningful portion of those consumers will face significant difficulties when they eventually replace their appliances.

On the other side of the ledger, the Department projected that these updated standards will save consumers between \$4 and \$16 billion in residential heating costs between 2029 and 2058. 88 Fed. Reg. at 87504; *see also id.* at 69688 (up to \$1.43 billion for commercial water heaters). The standards will also drive down appliance prices through economies of scale in manufacturing. *See id.* at 87539. And low-

⁷ Petitioners object (at 21-22) to the Department’s reasoning that the small number of consumers facing difficult installations can switch to an electric appliance. But they locate nothing in the unavailability provisions (or EPCA writ large) precluding the Department from taking account of that alternative. *See* 86 Fed. Reg. at 73962.

income residents in particular stand to benefit from a full transition to condensing technology, as they are more likely to be renters who have no say in a furnace's selection but often must pay its utility costs. *Id.* at 87605-06; *see also id.* (families at the poverty line spend as much as 29% of income on utility bills).⁸

In short, this case does not warrant this Court's intervention, and a remand would not change that.

⁸ The Department found no evidence that landlords will pass along any costs of condensing-furnace installations to low-income renters. 88 Fed. Reg. at 87607.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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