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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Reply Brief 1

I. The D.C. Circuit created an end run around *Loper Bright*. 2

II. The challenged regulations wrongfully interpreted EPCA, as the Department now agrees. 4

III. The D.C. Circuit's opinion warrants plenary review or, at minimum, a GVR. 10

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Cases

Bondi v. VanDerStok,
604 U.S. 458 (2025) 3-4

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 12

Duncan v. Walker,
533 U.S. 167 (2001) 7

Glossip v. Oklahoma,
604 U.S. 226 (2025) 14

Lawrence v. Chater,
516 U.S. 163 (1996) 10-14

Loper Bright Enters. v. Raimondo,
603 U.S. 369 (2024) 1-4, 10, 11

Myers v. United States,
587 U.S. 981 (2019) 14

NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n,
558 U.S. 165 (2010) 10, 11

Nunez v. United States,
554 U.S. 911 (2008) 14

United States v. Marcus,
560 U.S. 258 (2010) 11-12

United States v. Santos,
553 U.S. 507 (2008) 6

Statutes

42 U.S.C. § 6295(*o*) 3-4, 6, 8

42 U.S.C. § 6313..... 3-4, 6, 8

Rules and Regulations

75 Fed. Reg. 20,112 (Apr. 16, 2010) 7, 8

86 Fed. Reg. 73,947 (Dec. 29, 2021) 5, 9, 10

88 Fed. Reg. 87,502 (Dec. 18, 2023) 9

Other

Brief for the United States as Amicus Curiae, *Chase Bank USA, N.A. v. McCoy*, No. 09-329 (May 2010), https://tinyurl.com/4kvumxmc..... 12

Petition for a Writ of Certiorari, *United States v. Marcus*, No. 08-1341 (May 2009), https://tinyurl.com/4hmvrfrh..... 12

Response Brief for the Fed. Energy Regul. Comm'n, *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, No. 08-674 (Jan. 2009), https://tinyurl.com/mscetrha 11

REPLY BRIEF

The Department of Energy agrees that its regulations and the D.C. Circuit majority's decision both rested on a "flawed reading" of EPCA. U.S. Br.8-9. Intervenors attempt to rehabilitate the decision below, but the majority endorsed the flawed statutory interpretation only by invoking "*Loper Bright* avoidance." App.58a (Rao, J., dissenting). The majority acknowledged but declined to apply the plain meaning of "performance characteristic," instead declaring a "case-specific" ambiguity and refusing to second-guess the Department's now-abandoned interpretation. Pet.11-14. Sacrificing a statute's plain meaning to an agency's contrary interpretation violates *Loper Bright*, regardless of how the court labeled its reasoning.

This case asks whether courts may defer to an agency's reading of a statute by invoking a "case-specific" context, even on undisputed facts. App.16a. EPCA forbids standards that eliminate products with distinct performance characteristics. Non-condensing appliances perform with the existing venting systems in millions of American homes and businesses. Condensing appliances do not. They cannot perform in those buildings without renovation, which is sometimes impracticable. So the Department's challenged standards will render the characteristics that make gas appliances function in millions of Americans' existing homes unavailable.

This case is thus important both legally and practically. At minimum, given the Department's confession of error, the Court should grant, vacate, and remand.

I. The D.C. Circuit created an end run around *Loper Bright*.

The D.C. Circuit's majority opinion abandons *Loper Bright*, notwithstanding Intervenors' attempt to rehabilitate the decision below. *See* BIO.14-17.

The majority acknowledged that the Department's interpretation of EPCA's unavailability provision was not binding. App.14a. Yet it still invoked the Department's "expertise" and "discretion" before turning to the statute's text. App.14a. It held that "performance characteristic" has an agreed-upon "plain" and "broad" meaning: "a product attribute that provides utility to consumers desiring to use the product." App.15a-16a. But rather than apply that definition, the majority declared a "case-specific ambiguity" in the statute's meaning as applied to non-condensing appliances. App.16a. It ultimately refused to "second-guess" the Department, even though the relevant facts were undisputed. App.27a. That is *Chevron* deference in substance, regardless of label. Judge Rao identified the same problem: the majority "largely duck[ed]" the legal question, "declar[ed] that EPCA is ambiguous as to the meaning of 'performance characteristic,'" and "t[ook] th[at] ambiguity as a license to defer to the Department." App.57a-58a (Rao, J., dissenting).

Intervenors ignore these outcome-determinative portions of the decision below. They instead attempt to rewrite it by theorizing that the majority engaged in "independent[]" statutory interpretation relying on "ordinary tools of statutory construction." BIO.1, 14-15.

Intervenors first seek to justify the D.C. Circuit's deference by arguing that "read in context, the court was merely alluding to" EPCA's requirement that the Secretary "find[]" unavailability. BIO.16-17; *see* 42 U.S.C. §§ 6295(*o*)(4), 6313(a)(6)(B)(iii)(II)(aa). But as Judge Rao explained, "[t]he evidentiary burden applies only to the factual question of whether a standard will cause a protected product to become unavailable, not to the legal question of what qualifies as a protected 'performance characteristic.'" App.57a-58a (Rao, J., dissenting). No one contests that the challenged standards will make non-condensing appliances unavailable. App.51a. What remains is a pure question of statutory interpretation—what "performance characteristic" means—and that is "the proper and peculiar province of the courts." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024).

Intervenors next argue that the decision below did not really defer—it merely interpreted the statute in a "case-specific" way. BIO.16. That recharacterization admits no limiting principle. Every regulatory challenge involves interpreting statutory language in specific factual contexts. Under Intervenors' logic, that universal feature of regulatory litigation becomes a license for deference. This Court has never reasoned that way. Pet.17-18.

Intervenors' only response is *Bondi v. VanDerStok*, 604 U.S. 458, 473 (2025), but that case confirms rather than undermines the point. BIO.16. There, this Court determined statutory meaning, decided whether specific products satisfied that statutory definition, and reserved harder applications

for another day. *VanDerStok*, 604 U.S. at 465-76. The D.C. Circuit did something categorically different. It acknowledged a plain meaning, declined to apply it to the undisputed facts, declared ambiguity, and deferred to the agency. App.15a-16a, 27a.

The need for review is heightened because of the division among the circuits about when and how agency views inform statutory interpretation after *Loper Bright*. Pet.19-21. Intervenors argue there is no difference in how courts approach agency statutory interpretation. BIO.17-19. But the question is not whether each cited decision can be distinguished on its facts. It is whether lower courts have a consistent framework for when agency views may inform statutory interpretation after *Loper Bright*. They do not.

That the D.C. Circuit sometimes applies *Loper Bright* correctly, BIO.19, only confirms the problem: regulated parties cannot predict when courts will or will not exercise independent judgment. That uncertainty at the Nation's most influential lower court on administrative law heightens the need for this Court's review.

II. The challenged regulations wrongfully interpreted EPCA, as the Department now agrees.

The Department cannot adopt efficiency standards that "result in the unavailability" of products with unique "performance characteristics." 42 U.S.C. §§ 6295(*o*)(4), 6313(a)(6)(B)(iii)(II)(aa). Non-condensing appliances qualify for protection under

this provision by offering consumers an important characteristic: they perform with the existing venting systems in millions of Americans' homes and businesses. The Department previously interpreted "performance characteristics" to exclude this characteristic, dismissing it as merely a matter of "cost." App.25a-26a. It now agrees that the December 2021 Interpretive Rule rests on a "flawed reading" of EPCA. U.S. Br.8.

All agree that "performance characteristic" means a product attribute providing utility to consumers desiring to use the product. BIO.8, 22; App.15a & n.5; U.S. Br.8. Intervenors argue that "performance" requires a relationship to the "work" or "operation" of an appliance. BIO.22. But how an appliance must be vented *while operating* is part of how it performs. *Contra* BIO.22-23. Non-condensing appliances perform with the unpowered vertical venting (like chimneys) already in millions of American homes and businesses. Pet.2, 26. Condensing appliances do not. Instead they require a dedicated, powered venting system—which in turn requires a new venting configuration that is sometimes "impracticable" due to "safety and building codes," among other things. 86 Fed. Reg. 73,947, 73,962 (Dec. 29, 2021).

Intervenors' interpretation departs from EPCA's text by adding an unwritten requirement that the consumer must "interact with" the performance characteristic "during the operation of the appliance." BIO.22-23; *contra* U.S. Br.9 (acknowledging this limit is "artificial[] and improper[]"). The D.C. Circuit majority endorsed that atextual gloss, App.16a,

despite its earlier acknowledgment of the term's broader "plain" meaning—"a product attribute that provides utility to consumers desiring to use the product." App.15a. The majority treated the narrower "useful output" gloss as specific to condensing and non-condensing furnaces and water heaters, suggesting it might not apply to other appliances. App.16a (calling the inquiry "very case-specific"). But statutes are not "chameleon[s]," and this Court "forcefully reject[s]" the "interpretive contortion" of giving "the same word, in the same statutory provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522 (2008). "Performance characteristic" either includes the utility consumers derive from how a product operates, including at installation, or it does not. And nothing in EPCA imposes the post-installation interactive limit Intervenors and the D.C. Circuit read into it.

Intervenors' reading of "performance characteristic" also ignores that Congress listed "sizes, capacities, and volumes" as examples of performance characteristics. 42 U.S.C. § 6313(a)(6)(B)(iii)(II)(aa); *see id.* § 6295(*o*)(4).[1] The listing of "sizes" as distinct from "capacities" and "volumes" shows "performance characteristics" include physical attributes relevant to installation compatibility. Pet.26; *see* U.S. Br.9-10.

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[1] Intervenors suggest these provisions might carry different meanings. BIO.29 & n.6. But all parties agreed the provisions are "materially similar for the issues raised in this case," and the D.C. Circuit proceeded on that basis. App.5a n.2; App.6a n.3.

Intervenors dismiss EPCA's multiple references to physical attributes by arguing that Congress must have used "capacities," "volumes," and "sizes" all as "near synonyms." BIO.29-30. For example, they view "size[]" as "the appliance's ability to handle tasks of a certain magnitude." BIO.29-30. That reading makes "sizes" redundant of "volumes" and "capacities," violating the "cardinal principle" that courts construe statutes to prevent any "word" from being "superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). "Sizes" most naturally conveys that Congress was concerned with whether an appliance can fit and function within an existing space. Pet.26.

Congressional and agency action confirm this. Congress and the Department have repeatedly treated installation compatibility as a performance characteristic. Pet.27-29. Congress separated through-the-wall air conditioners into their own class based on fixed-size wall openings. Pet.27. The Department did the same for certain air conditioners that would otherwise force building modifications. Pet.28. Intervenors provide no reason why either would have done so if "performance characteristic" carried the narrow operational meaning they now press.

Intervenors' single counterexample misses the mark. Intervenors cite the Department's 2010 decision not to subdivide certain residential water heaters. BIO.31 (citing 75 Fed. Reg. 20,112 (Apr. 16, 2010)). But that rulemaking did not apply the EPCA language at issue here. It further noted that water heaters "can

be divided into various product classes categorized by physical characteristics." 75 Fed. Reg. at 20,131 (differentiating storage and tabletop water heaters).

Congress also listed "reliability" as an example of a performance characteristic, confirming that "performance characteristics" sweeps beyond what a consumer experiences during operation. Pet.26; 42 U.S.C. §§ 6313(a)(6)(B)(iii)(II)(aa), 6295(*o*)(4). Reliability is about whether the appliance *remains* operational, not the "benefit to the consumer when the appliance *is* operational." *Contra* BIO.1, 30 (emphasis added).

Intervenors next argue that installation costs belong exclusively in EPCA's economic-justification analysis because that provision references "initial charges for" covered products. BIO.24, 30 (citing 42 U.S.C. § 6295(*o*)(2)(B)(i)(II)). But the economic-justification provision also requires the Department to consider lessening of "utility or . . . performance"—the same concepts at the core of the unavailability provision. 42 U.S.C. §§ 6295(*o*)(2)(B)(i)(IV), 6313(a)(6)(B)(ii)(IV). This confirms that Congress created two independent constraints. The economic-justification provision asks whether a standard's benefits exceed its burdens. The unavailability provision asks whether the standard eliminates a distinct performance characteristic. Pet.30-31. Under Intervenors' reading, few features could trigger the unavailability bar because almost any consumer impact can be reframed as a cost. Pet.31.

Intervenors next try to distort this question of statutory interpretation into a factual dispute.

BIO.25-28. Even the D.C. Circuit majority, while disagreeing on the statutory meaning of "performance characteristic," did not identify any relevant dispute about how gas appliances perform (or are unable to perform) in people's homes and businesses. The relevant facts are clear and undisputed. *See* Pet.7. The challenged standards eliminate non-condensing appliances from the market, leaving property owners to choose between condensing appliances or abandoning gas by switching to electric appliances. Retrofitting a property built for non-condensing appliances to use condensing appliances requires a new venting system and renovation. *See* 86 Fed. Reg. at 73,960. These renovations are "impracticable" for some consumers. *Id.* at 73,962. They can include "wall penetrations," "concealing of flue vents," "orphaned water heaters," "interior wall displacement," and "vent or equipment relocation." 88 Fed. Reg. 87,502, 87,563-65 (Dec. 18, 2023); *see* 86 Fed. Reg. at 73,954 (acknowledging "changes to the living space").

The Department found "difficult installation situations" in roughly 40 percent of retrofits. 88 Fed. Reg. at 87,564 & n.127. Intervenors try to obfuscate these undisputed facts by emphasizing "most cases" and "most consumers." BIO.2, 12, 26-27, 36-37. That framing erases the substantial portion of consumers who will encounter real difficulties. Congress imposed the unavailability provision to protect precisely these consumers.

Ultimately, this case centers on an "interpretive rule"—presenting a question of statutory interpretation, not a factual dispute. 86 Fed. Reg. at

73,947, 73,951. Intervenors' attempts to reframe that question fail.

III. The D.C. Circuit's opinion warrants plenary review or, at minimum, a GVR.

A. Plenary review is appropriate to address the "legal error" the Department concedes. U.S. Br.14. When deciding between plenary review and a GVR, this Court has considered "the importance of the issue." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010) (granting plenary review despite federal respondent's request for a GVR). And whether a GVR is "appropriate depends further on the equities of the case." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996). Both factors strongly favor plenary review here.

First, each question presented is purely legal and critically "importan[t]." *NRG*, 558 U.S. at 171. Question one asks whether lower courts can circumvent *Loper Bright* by treating ordinary statutory interpretation as a "case-specific" inquiry that defers to agency views. App.16a. The answer will govern how courts review agency statutory interpretation in every circuit. The second question asks whether EPCA allows the Department to eliminate everyday appliances that function in millions of existing homes and businesses. The answer has substantial practical consequences for consumer choice, housing, and energy nationwide.

Second, "the equities" strongly favor plenary review because a precedential decision from this Court would resolve the controlling legal questions now

rather than prolonging uncertainty through further litigation. *Lawrence*, 516 U.S. at 168. The Department agrees that a "key premise of the decision below is incorrect." U.S. Br.11. A GVR would return the case to the same court whose published opinion diluted *Loper Bright* and credited arguments that even the Department now rejects. By contrast, plenary review would give immediate guidance to courts, the Department, regulated entities, and consumers regarding *Loper Bright*'s scope and EPCA's unavailability provision. Plenary review would conserve judicial and party resources by resolving the issues rather than inviting renewed litigation.

The Department's request for a GVR does not make a GVR the maximum appropriate relief. This Court has repeatedly decided cases on plenary review despite the government's request for a GVR where the issue warranted resolution on the merits. *E.g.*, *NRG*, 558 U.S. at 171;[2] *United States v. Marcus*, 560 U.S. 258, 261 (2010);[3] *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 203 (2011).[4]

B. At minimum, this case warrants a GVR. *Lawrence* held that a GVR is appropriate to address

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[2] Response Brief for the Fed. Energy Regul. Comm'n at 12, *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, No. 08-674 (Jan. 2009), https://tinyurl.com/mscetrha.

[3] Petition for a Writ of Certiorari at 19, *United States v. Marcus*, No. 08-1341 (May 2009), https://tinyurl.com/4hmvrfrh.

[4] Brief for the United States as Amicus Curiae at 11, *Chase Bank USA, N.A. v. McCoy*, No. 09-329 (May 2010), https://tinyurl.com/4kvumxmc.

"confessions of error or other positions newly taken by the Solicitor General." 516 U.S. at 167. The Department now agrees the decision below is "incorrect" and turned on a mistaken interpretation of EPCA. U.S. Br.11.

Lawrence requires only a "reasonable probability" that the decision below rests on a premise the lower court would reject after further consideration, and that such reconsideration "may determine the ultimate outcome of the litigation." 516 U.S. at 167. The Court rejected attempts to convert "may" into a certainty requirement, explaining that "[i]t is precisely because of uncertainty that" the Court GVRs. *Id.* at 172. That standard is satisfied here. The D.C. Circuit repeatedly relied on the Department's "case-specific" interpretation of "performance characteristic," App.16a, and refused to "second-guess" the Department's view because it supposedly rested on scientific data within the agency's expertise, App.27a. The Department now agrees that the December 2021 Interpretive Rule reflected an "unduly narrow understanding" of EPCA and that the interpretation underlying the decision below was wrong. U.S. Br.8, 10. Those new positions directly undermine key premises of the judgment below.

Intervenors' procedural objection fares no better. They fault the Department for not immediately seeking rehearing or abeyance below after the Department began the process of reviewing prior rulemakings, BIO.32, but *Lawrence* imposes neither requirement. The point of a GVR is to allow the court below to address developments that previously went

unconsidered. *Lawrence*, 516 U.S. at 167-68. Indeed, *Lawrence* itself involved a GVR in light of a position announced to this Court after the court of appeals had ruled. *Id.* at 165-66.

Nor is a new rulemaking a substitute for a GVR. A future rulemaking would not erase the legal error in the judgment below. Denying review now would force the agency and regulated entities to proceed under the shadow of a decision the Department now agrees misconstrued EPCA. U.S. Br.12. If the Department later revises the rules, the same legal dispute will likely return with an erroneous D.C. Circuit decision being cited by any challengers. A GVR would allow the D.C. Circuit to address the controlling statutory question afresh, with the benefit of the Department's current position. U.S. Br.11.

Intervenors' equitable objections likewise fail. Denial would leave in place a judgment resting on an interpretation that the Department now rejects as legally erroneous. A GVR, by contrast, would advance fairness and efficiency by allowing the court below to decide whether its judgment survives once the Department's previous legal theory is withdrawn. This would "improve the fairness and accuracy of . . . outcomes," as *Lawrence* contemplates. 516 U.S. at 168.

Also misplaced is Intervenors' reliance on EPCA's anti-backsliding provision. BIO.35. That issue is not presented here, and, if anything, it strengthens the case for review. If Intervenors are right that the anti-backsliding provision bars repeal or revision of the challenged regulations, no future rulemaking can remedy the error below, making this Court's review all

the more necessary. In any event, if a later rulemaking raises questions about the Department's authority to revise existing standards, that rulemaking would be the appropriate occasion to address them.

Finally, Intervenors' efforts to narrow *Lawrence* do not help them. BIO.33. Even under the separate opinions Intervenors cite, BIO.33, this case qualifies for a GVR because the federal respondents correctly confess that the judgment below is "in error," *Nunez v. United States*, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting); *see Glossip v. Oklahoma*, 604 U.S. 226, 285 (2025) (Thomas, J., dissenting) (similar). That is a "new development." *Myers v. United States*, 587 U.S. 981, 982 (2019) (Roberts, C.J., dissenting). So even crediting any alternative views of GVR practice, the Court should still GVR if it does not grant plenary review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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