ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-1030; 23-1295; 23-1337

In the United States Court of Appeals for the District of Columbia Circuit

AMERICAN GAS ASSOCIATION, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND JENNIFER M. GRANHOLM, SECRETARY, U.S. DEPARTMENT OF ENERGY,

Respondents.

On Petitions for Review of Final Rules of the U.S. Department of Energy

BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF JOINT PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and *Amici*

Except for *Amici* States Tennessee, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Texas, Virginia, and West Virginia, and *amicus curiae* The Chamber of Commerce of the United States of America, all parties, intervenors, and *amici* are listed in the Joint Petitioners' Brief.

B. Rulings

References to the rulings at issue appear in the certificate to the Joint Petitioners' brief.

C. Related Cases

References to all related cases appear in the certificate to the Joint Petitioners' brief. *Amici* States are unaware of any other related cases within the meaning of Rule 28(a)(1)(C).

Dated: April 16, 2024

/s/ Matthew D. Cloutier
Matthew D. Cloutier

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STATUTES AND REGULATIONS

Amici States incorporate by reference the pertinent statutes set out Joint Petitioners' statutory addendum.

INTEREST OF *AMICI*

The States of Tennessee, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Texas, Virginia, and West Virginia have a long-recognized interest in protecting the proper allocation of governmental power—both between the federal branches and between the federal government and the States. Policing these bounds helps *amici* States protect their citizens and sovereign prerogatives from federal agencies' unlawful arrogation of power.

The Department of Energy's regulations governing residential furnaces and commercial water heaters are just two more examples of an unprecedented effort to drive from the marketplace droves of existing products that are ubiquitous in American homes and businesses. The challenged rules exceed the Department's authority under the Administrative Procedure Act and disturb the Constitution's balance of powers, both vertical and horizontal. Vertical, by dictating the day-to-day purchasing decisions of Americans in every state in violation of longstanding federalism and Commerce Clause constraints. And horizontal, by commandeering core legislative authority that the Constitution reserves for

Congress alone. The *amici* States thus urge this Court to grant the petition for review and to set aside the challenged rules.

INTRODUCTION[1]

Over the past few years, the Department of Energy has promulgated thousands of pages of rules that govern the day-to-day appliance-purchasing decisions of businesses and individual consumers in every State. The three Rules challenged here are the latest chapter in the Department's appliance overreach. In the first Rule, the Department jettisoned its previously held view that non-condensing design is a "feature" entitling non-condensing furnaces and water heaters to their own set of efficiency regulations. *See* Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 86 Fed. Reg. 73,947, 73,951 (Dec. 29, 2021). Now, the Department says non-condensing units should be judged according to the same standards as more efficient condensing units with far different designs. And in the second and third Rules, the Department tightened those standards, effectively pushing non-condensing units out of the market. *See* Energy Conservation

[1] *Amici* States may file this brief without the parties' consent or leave of the Court. Fed. R. App. P. 29(a)(2); D.C. Cir. Rule 29(b).

Standards for Commercial Water Heating Equipment, 88 Fed. Reg. 69,686, 69,709 (Oct. 6, 2023); Energy Conservation Standards for Consumer Furnaces, 88 Fed. Reg. 87,502, 87,535 (Dec. 18, 2023).

While these Rules narrowly focus on furnace and water-heater design, their effects are sweeping. By forcing a huge swath of products off the market, the Rules will strongarm businesses into spending massive sums of money to bring their product lines into compliance, something small businesses may be unable to do. The Rules will naturally affect consumers, too. Non-condensing units are typically cheaper and easier to install, especially in older homes or apartments whose layouts can make condensing units unworkable. But the Rules make no concessions for these realities; they simply leave consumers to fend for themselves. States are left sidelined too, even as the Rules harm States' businesses and consumers, hamper state policy in favor of protecting affordable products that work, and further tax strained electrical grids.

The Department's industry-altering approach suffers several legal defects. The Rules violate both the Energy Policy and Conservation Act and Administrative Procedure Act by resting on dubious cost-benefit accounting and shirking important limits on the Department's authority to

saddle States and consumers with burdensome regulations. What's more, the Department's sweeping reading of its authority to reorder and eliminate entire lines of products would create constitutional problems a proper statutory reading avoids. The Rules should be set aside.

ARGUMENT

The challenged Rules exceed the Department's lawful authority and stem from an illogical and irrational process. These flaws are also symptoms of deeper constitutional issues with the Department's enabling legislation and structure that likewise support setting aside the challenged Rules.

I. The Challenged Rules Exceed the Department's Lawful Authority and Stem from Illogical and Irrational Processes.

The Administrative Procedure Act "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation omitted). It requires agencies to "'engage in reasoned decisionmaking,'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quotation omitted), and directs that agency actions be "set aside" if they are "arbitrary," "capricious," or "in excess of statutory . . . authority," 5 U.S.C. § 706(2). Courts reviewing an agency's

"decreed result" should assess whether that result was "within the scope of its lawful authority," and must confirm that "the process by which it reache[d] that result" was "logical and rational." *Michigan*, 576 U.S. at 750 (quotation omitted). The Rules challenged here flout these longstanding requirements.

A. The challenged Rules exceed the Department's lawful authority.

The Rules exceed the Department's lawful authority in several ways, any one of which undercuts the validity of the Rules.

1. *Elimination of Performance Characteristics*. The Rules will effectively ban sales of new non-condensing furnaces and water heaters in the name of efficiency. The Energy Policy and Conservation Act, though, "balances energy efficiency with the availability of desirable 'performance characteristics.'" *Louisiana v. DOE*, 90 F.4th 461, 473 (5th Cir. 2024) (quoting 42 U.S.C. § 6295(o)(4)). Under the Act, a wide array of product traits can qualify as performance characteristics—"reliability, features, sizes, capacities, and volumes," for example. 42 U.S.C. §§ 6313(a)(6)(B)(iii)(II)(aa), 6295(o)(4). And the Department, relying on this language, has historically taken an expansive view of what characteristics might qualify. *See* Joint Pet'rs' Br. 64-69 (cataloguing examples).

Non-condensing technology easily fits the bill. As the Joint Petitioners explain (at 49-50), the availability of non-condensing technology matters to consumers because structural constraints can make the use of condensing units costly or even impossible. Indeed, just as the top-loading design of a washing machine might make it an unreasonable option for a consumer with limited space, *see* Energy Conservation Standards for Residential Clothes Washers, 84 Fed. Reg. 37,794, 37,797 (proposed Aug. 2, 2019), the distinct horizontal-venting requirements of condensing units can render those units unattractive for consumers with homes that weren't designed with horizontal venting in mind. Without the ability to choose a non-condensing unit, those consumers may be forced to pay for unwanted and potentially space-limiting home modifications. And for those consumers that can't modify their homes, more expensive electric units may be the only option.

The Energy Policy and Conservation Act does not permit the Department's choice-limiting result. The Department must "*balance*[] energy efficiency with the availability of desirable 'performance characteristics.'" *Louisiana*, 90 F.4th 473 (emphasis added). If this requirement means anything, it means that the Department can't load one side of the

scales in the name of efficiency while ignoring the inevitable, countervailing harm to consumers.

2. *Impermissible Greenhouse-Gas Accounting.* The Joint Petitioners (at 72-88) lay out core flaws that fatally infect the Department's accounting of the Rules' costs. But the Rules' cost-benefit defects do not stop there.

The Rules also wrongly embrace misguided estimates of the social costs of greenhouse gasses. Two of the challenged Rules—88 Fed. Reg. 69,686 and 88 Fed. Reg. 87,502—incorporate estimates of the social costs of three greenhouse gases: carbon, methane, and nitrous oxide. *See, e.g.*, 88 Fed. Reg. 69,686, 69,783-89; 88 Fed. Reg. 87,502, 87,613-19. These estimates were developed by the Interagency Working Group on the Social Cost of Greenhouse Gases at President Obama's direction. *See* Interagency Working Grp., *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990* at 2 (Feb. 2021), https://bit.ly/3UbyORd [hereinafter *2021 Estimates*] (discussing development of the estimates). The estimates saw little use after President Obama left office but were recently

revived by President Biden. *See id.* at 2-3; *see also* Exec. Order 13,990, 86 Fed. Reg. 86,7037, 86,7040.

The many flaws of these estimates have been well documented. *See, e.g.*, *Louisiana v. Biden*, 585 F. Supp. 3d 840, 862-68 (W.D. La. 2022) (enjoining the federal government's use of the estimates for a host of reasons), *vacated on other grounds*, 64 F.4th 674 (5th Cir. 2023). Indeed, the estimates were on shaky legal and analytical footing from day one. While the estimates set out across-the-board valuations, costs, and accounting practices that bind federal agencies, they were impermissibly implemented without notice and comment. *See id.* at 865-66; *see also Cath. Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) ("When an agency wants to state a principle 'in numerical terms,' terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking" (quotation omitted)).

The estimates also rest on a previously unheard-of analytical approach. The federal government's cost-benefit analyses routinely rely on forward-looking projections to assess likely future costs. But to promote reliability, these analyses "do not typically extend further than fifty years." Arden Rowell, *Foreign Impacts and Climate Change*, 39 Harv.

Envtl. L. Rev. 371, 386 (2015). The estimates here look beyond that by leaps and bounds: They purport to predict costs and benefits over nearly *three hundred* years.[2] To illustrate the absurdity of this prophetic endeavor, consider the realities of life three hundred years in the past. Trains had not yet been invented, nor had cars or planes. The industrial revolution had not begun, and electricity had yet to be discovered. Government regulators then could hardly have predicted what the world looks like now, much less anticipated the types of costs and benefits that matter. The task faced by the members of the Interagency Working Group is just as impossible—and thus legally impermissible.

On top of the estimates' core defects, their use in the challenged Rules also conflicts with federal law. The law that ostensibly authorized the promulgation of the challenged Rules—the Energy Policy and Conservation Act—includes a range of factors for the Department to consider when setting new energy-conservation standards. *See* 42 U.S.C.

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[2] *See 2021 Estimates* at 5 n.3 (noting that "[t]he values reported . . . are identical to those reported in the 2016 [estimates] adjusted for inflation"); *see* Interagency Working Grp., *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866* at 9 (Aug. 2016), https://bit.ly/3TRqggT (identifying the year 2300 as "the end of the [Interagency Working Group] analysis time horizon").

§ 6295(o)(2)(B)(i). Absent from those factors, however, is any consideration of the global effects of greenhouse-gas emissions. In fact, the Act does not contemplate consideration of emissions *at all*, let alone on a global scale. The Act instead directs the Department "to consider the need for *national* energy . . . *conservation*." *See id.* § 6295(o)(2)(B)(i)(VI) (emphasis added).

The Department's invocation of the estimates cannot be reconciled with the clear congressional directives that govern Rules like the ones at issue. The estimates rely extensively on emissions, rather than efficiency, and global, rather than domestic, effects. *See 2021 Estimates* at 14-16 (defending the estimates' consideration of global damages despite longstanding contrary practice); *see also* Exec. Order 13,990, 86 Fed. Reg. 7037, 7040 (expressly directing agencies to "tak[e] global damages into account"). But an agency "literally has no power to act . . . unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 596 U.S. 289, 301 (2022) (cleaned up). Despite all of this, the Department fully embraced the estimates when it implemented the challenged Rules.

3. *Invasion of States' Regulatory Domains.* The Rules moreover threaten to dominate a field that traditionally belonged to the States: the

regulation of consumer goods. The Rules are poised to force a huge swath of products off the market. *See supra* at 5-7. And in doing so, they will limit product choice for Americans in every state and override any differing approaches the States may have taken (or may want to take) to the regulation of this field. The Supreme Court has made clear that States may exercise their "police power to protect consumers," particularly those that "exist on limited fixed incomes," from escalating utility costs. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 417 (1983). But the Rules here tie the States' hands, leaving individual consumers to fend for themselves.

The Rules' choice-limiting effects will not only impair States' regulatory prerogative by harming individual consumers and businesses. They also inflict direct harms on States' purchasing power. The Rules will limit state governments in need of water heaters or furnaces to those units the Department considers efficient enough, no matter what those individual governments' needs or preferences might be. That sort of micromanagement flips "the Tenth Amendment on its head," *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring), and suggests that the Energy Policy and Conservation Act does not provide the

Department with such sweeping authority, *see, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022); *see also infra* at 24-33.

The Department's shirking of its obligation to consider state-level effects indicts the Rules' casual approach to States' interests. Executive Order 13,132 requires that agencies consult state and local officials to reduce the intrusive effect of "policies that have federalism implications." Exec. Order 13,132, § 3, 64 Fed. Reg. 43,255, 43,256. Separate from whether Executive Order 13,132 provides a "right to judicial review," *see California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023), the Administrative Procedure Act required the Department to acknowledge and reasonably explain its regulatory approach in light of the federalism implications it presents, *see Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (requiring that agency decisions be "reasonably explained" and result from "consideration of the relevant factors" (quotation omitted)). Yet the Rules offer only silence—highlighting the Department's slapdash approach to implementation challenges.

The challenged Rules claim to comply with Executive Order 13,132 by including boilerplate, one-paragraph federalism analyses. The Rules, the Department says, will "not have a substantial direct effect on the

States, on the relationship between the [n]ational [g]overnment and the States, or on the distribution of power and responsibilities among the various levels of government." 88 Fed. Reg. 69,686, 69,820; 88 Fed. Reg. 87,502, 87,647 (same). This is true, in the Department's view, because (1) the Energy Policy and Conservation Act "governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule" and (2) "States can petition [the Department] for exemption from such preemption." 88 Fed. Reg. 69,686, 69,820; 88 Fed. Reg. 87,502, 87,647 (same). With that perfunctory analysis, the Department dismissed any possibility that the Rules might affect the States; it ignored the ways the rules will limit choice for States as purchasers and disregarded the way they impair the States' ability to regulate consumer goods sold within their borders.

The Department's failure to grapple with the state-level implications of its flawed approach inflicts real harm on States and their citizens. "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (quotation omitted). The Founders intended local governments to oversee local people. *See id.*; *see*

also The Federalist No. 45, at 293 (J. Madison) (Clinton Rossiter ed. 1961). Federalism protects our system of checks and balances by ensuring that voters can hold the correct officials politically accountable for actions that cause harm in daily life—in the Rules' case, making commonly used products less affordable, less effective, or both. Yet by sending down another federal mandate on Tennesseans via unelected federal officials, the Department further harms accountability and the people's ability to pick their preferred policies.

4. *Conflict with Commerce Clause Limitations.* The Rules also disregard longstanding Commerce Clause limits. The Commerce Clause no doubt grants Congress authority to legislate, even in areas traditionally regulated by the States. But that authority "is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000). Rather, it "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557 (quotation omitted). To protect this national-local distinction, the Supreme Court has made clear that Congress has the power

to "regulate purely local activities" only when they are "part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (first citing *Perez v. United States*, 402 U.S. 146, 151 (1971); and then citing *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)).

The challenged Rules ignore this longstanding limit. The Department promulgated the Rules using the authority granted by Congress in the Energy Policy and Conservation Act. *See* 86 Fed. Reg. 73,947, 73,947; 88 Fed. Reg. 69,686, 69,692; 88 Fed. Reg. 87,502, 87,507. And in passing that Act, Congress was of course subject to the Commerce Clause's limits. It follows that those limits apply with equal force to any rules promulgated under that Act. But nothing in the Rules suggests that they apply only to interstate commerce—indeed, the Rules make no attempt to "limit [their] reach" to activities that "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. That is a problem, since the Rules can only apply if the regulated activity "substantially affects interstate commerce." *Id.* at 559. For the Rules to comply with the Commerce Clause, the Department should have at least tried to show that intrastate sales of covered water heaters and furnaces substantially

affect the interstate market for those products. Yet the Rules are silent; they don't suggest that intrastate sales affect interstate commerce at all, much less substantially.

B. The Department's process was neither logical nor rational.

The Department promulgated the challenged Rules despite a host of cautionary comments from interested parties. Many stressed the damaging effects the Rules would have on American manufacturers and consumers. At the same time, many of these comments explained that the Rules were unlikely to lead to increased efficiency or consumer savings. The Administrative Procedure Act, this Court has recognized, requires that agencies "respond to relevant and significant public comments." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (cleaned up). Here, though, the Department merely "nodd[ed] to concerns raised by commenters" and "dismiss[ed] them in a conclusory manner." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *vacated as moot*, 142 S. Ct. 1665 (2022). But the concerns raised in the comments remain real, and the Department's half-hearted efforts to explain them away fall flat.

Start with the harms to American businesses. The Department acknowledges that the Rules will require American water-heater and

furnace manufacturers—some of which have built their businesses around non-condensing models, *see* 88 Fed. Reg. 69,686, 69,819; 88 Fed. Reg. 87,502, 87,644-45—to spend vast sums of money to shift to production of compliant, condensing models. The Department predicts that manufacturers of residential furnaces will face an 81% reduction in their annual cash flow. 88 Fed. Reg. 87,502, 87,627. And for commercial-water-heater manufacturers, things look even worse. These businesses will see their cash flow drop by an average of 130% while they try to comply with the Department's unilateral restructuring of the water-heater market.[3]

That sort of dramatic drop in cash flow would be challenging for any business, no matter the size. But because conversion costs like these are (theoretically at least) one-time expenses, large businesses with sizable cash reserves should survive. Small manufacturers, though, may not be so lucky. The Department identified three American manufacturers of commercial units, *see* 88 Fed. Reg. 69,686, 69,818-19, and four

[3] 88 Fed. Reg. 69,686, 69,797 (-90.6% for commercial-unit manufacturers); *id.* at 69,799 (-125.6% for residential-duty-unit manufacturers); *id.* at 69,800 (-146.0% for instantaneous-tankless-unit manufacturers); *id.* at 69,801 (-161.3% for circulating- and hot-water-supply-unit manufacturers).

manufacturers of consumer units that satisfied the small-business criteria, *see* 88 Fed. Reg. 87,502, 87,644-45. Most of these small manufacturers will incur significant conversion costs. *See generally* 88 Fed. Reg. 69,686, 69,818-19; 87,502, 87,644-45; *see also* Cmt. of Air-Conditioning, Heating & Refrigeration Inst., CF.CI-0303 at 12-13[4] (pointing out that small businesses "bear a disproportionate burden of capital conversion costs primarily because of smaller sales volume," a fact the Department has recognized in other rulemakings but ignored here). And for at least one small manufacturer, the Department concedes, those conversion costs might force it "leave the . . . business" altogether. 88 Fed. Reg. 87,502, 87,645. But acknowledging "the economic impact of the [Rules] on . . . manufacturers," 42 U.S.C. § 6295(o)(2)(B)(i)(I), is a far cry from "explain[ing]" why that impact is "reasonable," *Nat'l Tel. Co-op. Ass'n*, 563 F.3d at 540.

[4] *Amici* States adopt Joint Petitioners' record-citation format. *See* Joint Pet'rs' Br. at 4 n.2. So here, as in their brief, "CI" refers to the certified index, documents are referred to by the document-ID numbers in the index, and the three rules are referred to as "IR," "CWH," and "CF," representing the interpretive rule, commercial-water-heater rule, and consumer-furnace rule, respectively.

The challenged Rules' detrimental effects will reach consumers too. The Rules severely limit consumers' ability to choose the products that best fit their budget and lifestyle. Indeed, the Department does not even try to hide the fact that these Rules will push non-condensing furnaces off the market entirely. *See* 88 Fed. Reg. 69,686, 69,709 ("As a general matter, energy conservation standards save energy by removing the least-efficient technologies and designs from the market."); 88 Fed. Reg. 87,502, 87,535 (same). The Department's efficiency-above-all approach, whatever its merits in the abstract, runs into trouble in reality, where many American homes were designed to accommodate only non-condensing furnaces. Many commenters pointed this out. They explained that installation of condensing units would require expensive and unwanted home modifications, s*ee, e.g.*, Cmt. of Atmos Energy, CF.CI-0415 at 2-4; Cmt. of Am. Gas Ass'n, CF.CI-0118 at 35-36, effectively requiring residents to sacrifice money and living space for meager efficiency gains.

The Department dismissed these sorts of concerns as matters of "cost." 88 Fed. Reg. 87,502, 87,565-66. That is wrong, of course; unwanted home modifications and lost living space are not easily monetized. *See* Joint Pet'rs' Br. 64-69. But even if it were fair to focus purely

on monetary costs, efficiency doesn't come cheap. By the Department's own estimation, as many as 39% of residential installations of condensing units "could be labeled as 'difficult,'" and those installations will cost, on average, three and a half times more than installations of older non-condensing units. *See* 88 Fed. Reg. 87,502, 87,564. The predictable result? Many Americans in need of water heaters and furnaces will face a choice: spend large amounts of time and money modifying the structure of their home or business to fit a more expensive condensing model, or give up on gas-fired models altogether. *See id.* at 87,590 (recognizing that "fuel switching occurs frequently and most certainly in the context of new energy conservation standards" (quotation omitted)). And for other groups of Americans—those living in older buildings or rental properties that cannot be modified, for example—there may be no choice at all.

Worse still, for many consumers, these downsides may not come with any upsides. The Department projects that buyers of compliant condensing furnaces will save an average of $483 over the lifetime of their furnaces. *See* 88 Fed. Reg. 87,502, 87,623 ($350 for non-weatherized gas furnaces); *id.* at 87,624 ($616 for mobile-home gas furnaces). But the lifetime of a furnace is more than twenty years. *Id.* at 87,571. So many

consumers will never see those full savings. Others will see none. Imagine a customer who pays the higher up-front cost to buy a condensing unit and covers the added installation expenses but moves after only a few years. That customer will see no savings at all. The consequences of this limitation in consumer choice and attendant cost increase will, predictably, fall most heavily on lower-income households, *see, e.g.*, Cmt. of Atmos Energy, CF.CI-0415 at 2-4 (highlighting the "significant adverse impacts" the then-proposed rule would have "on low-income households"), a fact the Department makes no real attempt to dispute.

Finally, the Rules are likely to strain the nation's power grid. Contrary to the Department's hopes, shutting off consumers' access to non-condensing units may not in fact drive them to more efficient condensing units, but to purely electrical units. *See* Cmt. of Spire, Inc., CF.CI-0413 at 3-9 (pointing out that the then-proposed Rule would force fuel switching); *see also* 88 Fed. Reg. 87,502, 87,590 (recognizing that "fuel switching occurs frequently and most certainly in the context of new energy conservation standards" (quotation omitted)). This shift will increase the drain on the nation's power grid at a time when "[e]lectric shortages have become more acute." Milton Ezrati, *America's Electric Grid Is Weakening*,

Forbes (Mar. 24, 2023), https://bit.ly/43mDHd2. Given this reality, the Department should have carefully analyzed the cumulative effect of these Rules alongside the many others—both existing and proposed—that will likewise place demands on the already overworked energy grid. Among them:

- The Environmental Protection Agency's recently finalized rule setting standards for light- and medium-duty vehicles which aim to reduce emissions through heavy reliance on electric vehicles. *See* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184, 29,184-446 (May 5, 2023).

- The Department of Energy's recently finalized rule tightening efficiency standards on gas-powered ovens, cooking tops, and other cooking products. *See* Energy Conservation Standards for Consumer Conventional Cooking Products, 89 Fed. Reg. 11,434, 11,434-547 (Feb. 14, 2024).

- The Department of Energy's proposed rule imposing stricter standards for consumer water heaters. *See* Energy Conservation Standards for Consumer Water Heaters, 88 Fed. Reg. 49,058, 49,058-177 (proposed July 28, 2023).

The Department instead opted for a siloed approach that ignores the way these mandates will interact. It thus failed to demonstrate that it can implement these changes without exacerbating the "looming reliability crisis in our electricity markets" and subjecting Americans to skyrocketing electric costs and rolling blackouts. *E.g.*, *FERC Commissioners Tell*

Senators of Major Grid Reliability Challenges, with Some Blaming Markets, Utility Dive (May 5, 2023), https://bit.ly/3Vmbmle. For this reason, too, the Rules' approach is arbitrary and capricious.

* * *

The bottom line: the Rules challenged here should be set aside. On the one hand, the Rules exceed the Department's lawful authority. They impermissibly rely on dubious estimates of the social costs of greenhouse gasses, trample long-recognized federalism principles by intruding into historically state-governed domains, and disregard well-established Commerce Clause limits on federal authority. And on the other hand, the Rules result from an illogical and irrational promulgation process. The Department relied on cherry-picked comments and data to support the Rules while downplaying or ignoring the steep costs the Rules will impose on consumers, businesses, and the nation's power grid. But it is not "rational, never mind appropriate, to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 576 U.S. at 752 (cleaned up).

II. The Flaws of the Challenged Rules are Symptoms of Broader Constitutional Problems.

The many flaws of the challenged Rules should come as no surprise. Indeed, those flaws follow predictably from the deeper constitutional issues inherent in the Department's sweeping reading of its enabling legislation: the Energy Policy and Conservation Act. This Court should interpret that Act in line with Petitioners' limits to avoid generating "constitutional problems" by licensing the Department's undue interference with States' traditional regulatory authority. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *see also Comcast Cable Comms. LLC v. FCC*, 717 F.3d 982, 992 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (similar).

A. The Department's reading of the Energy Policy and Conservation Act generates nondelegation problems.

To the framers, the greatest threat to liberty was governmental power. They believed that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" was tyranny. The Federalist No. 47 (James Madison) (Clinton Rossiter ed. 1961). To guard against that threat, they carefully defined the federal government's powers and then divided them among three co-equal branches. Divided power, the

framers said, would force one branch's ambition "to counteract" another's. The Federalist No. 51 (James Madison) (Jacob Cooke ed. 1961).

But even that division was not enough. The framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (citing The Federalist No. 48, at 309-312 (James Madison) (Jacob Cooke ed. 1961)). So to further restrict that power, the framers "went to great lengths to make lawmaking difficult." *Id.* They sought to "'promote deliberation and circumspection' and 'check excesses in the majority,'" by requiring that any legislation survive bicameralism and presentment. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting The Federalist No. 70, at 475 (Alexander Hamilton) (Jacob Cooke ed. 1961)).

The framers also made clear that the legislative power cannot be passed off to the other branches. It "would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649,

692 (1892)). As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). This is because "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018).

The Energy Policy and Conservation Act upsets the careful balance the framers struck. The Act exists to "provide Federal energy conservation standards" for certain "covered products." *See* 42 U.S.C. § 6295(a)(1). The Act then sets out the "maximum energy use" for a wide array of consumer products. *See generally id.* If that were all the Act did, there would likely be no problem—the Act would be yet another example of Congress legislating just as the framers intended. But the Act does not stop there: it "authorize[s] the Secretary" of the Department "to prescribe amended or new energy conservation standards" for these products. *Id.* § 6295(a)(2). Congress, in other words, drafted the Act's baseline standards and then handed the pen to the Department.

That handoff cannot be squared with our constitutional design. Congress can, of course, delegate some authority to executive-branch agencies. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 69-70 (2015) (Thomas, J., concurring in the judgment) (explaining that "it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself," but recognizing that "there are certain core functions that require the exercise of legislative power and that only Congress can perform"). Congress, for example, can enact a "general provision" and grant an agency the power to "fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43.

But the Act here goes well beyond that—it expressly confers authority to "prescribe amended or new energy conservation standards." 42 U.S.C. § 6295(a)(2). That isn't "fill[ing] up" details—it's making and amending law. And "[t]here is no provision in the Constitution that authorizes the President"—or any executive-branch agency or official—"to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). "Congress alone," the Supreme Court has made clear, has the "constitutional authority to revise statutes." *Wis. Cent. Ltd.*, 585 U.S. at 284.

True, the Supreme Court has allowed delegations where Congress has given the agency an "intelligible principle" to go by. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *but see Gundy*, 139 S. Ct. at 2139 (Gorsuch, J. dissenting) (suggesting that the current, "mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked"); *id.* at 2130-31 (Alito, J., concurring) (signaling "support" for reconsidering the Court's non-delegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (same). But the delegation here flunks even that "notoriously lax" standard. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

In the Energy Policy and Conservation Act, Congress set out various factors that the Department must consider when implementing new standards or amending existing ones. *See* 42 U.S.C. § 6295(o)(2)(B)(i). It should consider the "economic impact of the standard" on manufacturers and consumers, the "savings in operating costs" throughout the product's estimated life compared to any increase in purchase price or maintenance costs, the "total projected amount of energy" savings, any "lessening of

utility or . . . performance," the "impact of any lessening of competition," the "need for national energy . . . conservation," and any "other factors the Secretary considers relevant." *Id.*

Even if those statutory factors constrain the Department's authority—and were violated here, *see generally* Joint Pet'rs' Br. 72-100 (arguing that the Department failed to show that and that the Rules were "economically justified")—the final factor invites the Secretary to weigh any "other factors" he or she "considers relevant." 42 U.S.C. § 6295(o)(2)(B)(i)(VII). The statute thus contemplates that the Department will balance efficiency and long-term savings against utility and short-term costs. Yet this very act of "balancing" entails policy judgments—there's no objective way to balance "the need for national energy . . . conservation" with "the economic impact" of a new emissions standard, for example. One administration might believe that the need for energy conservation is paramount, a life-or-death matter, even. The next, though, might view the economy and its here-and-now effects on Americans' lives as more important. To the extent the Department is claiming authority to resolve these issues apart from the statutory limiters, the scheme set out by Congress would offer no real "intelligible

principle," *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409. To ensure that the Department is not simply imposing its own policy preferences contrary to nondelegation limits, this Court should require the Department to hew to the enumerated factors Congress set. Applying those factors, the Rules cannot survive. *See* Joint Pet'rs' Br. 72-100.

B. The Department's structure makes matters worse.

The Department's reading of the Act would allow it to pick and choose what sorts of product classes are covered, *see generally* 86 Fed. Reg. 73,947, and set ever-more-stringent efficiency standards for those products, *see generally* 88 Fed. Reg. 69,686; 88 Fed. Reg. 87,502. The Act's rebalancing of federal power, then, is not an abstract problem, and its detrimental effects are exacerbated by two realities of the Department's structure.

First, because the Department's leadership can change whenever a new president is elected, the Department's legal positions can shift dramatically with administration changes, reducing regulatory stability for businesses and consumers alike. That possibility of flip-flopping is precisely why the framers placed the legislative power in the hands of Congress and "went to great lengths to make lawmaking difficult." *Gundy*,

139 S. Ct. at 2134 (Gorsuch, J. dissenting). They understood that "[r]estricting the task of legislating to [a] branch characterized by difficult and deliberative processes . . . promote[s] fair notice and the rule of law, ensuring the people w[ill] be subject to a relatively stable and predictable set of rules." *Id.* (citing The Federalist No. 62, at 378-80 (Alexander Hamilton) (Jacob Cooke ed. 1961)). But when lawmaking power changes hands—from the legislative to the executive—it "risk[s] becoming nothing more than the will of the current President." *Id.* at 2135. "And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice." *Id.*

The history of the challenged Rules illustrates the problem. On January 15, 2021, the Department responded to input from businesses and consumers by concluding that non-condensing design is a performance-related feature that cannot be eliminated by adopting new or revised energy-conservation standards. Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 86 Fed. Reg. 4,776, 4,776 (Jan. 15, 2021). But almost immediately after President Biden took office, the Department made an abrupt about-face. Now, with

the promulgation of the interpretive Rule challenged here, non-condensing design is not a "feature," 86 Fed. Reg. 73,947, 73,951, and with the promulgation of the two challenged legislative Rules, it is effectively illegal, *see* 88 Fed. Reg. 69,686, 69,709 ("As a general matter, energy conservation standards save energy by removing the least-efficient technologies and designs from the market."); 88 Fed. Reg. 87,502, 87,535 (same). This series of events evidences neither stability nor anything resembling the careful deliberation involved in the legislative process.

Second, the Department's byzantine structure makes it difficult for regulated parties to know who or what to blame, reducing accountability for regulatory action. Again, this outcome is exactly what the framers sought to avoid by "directing that legislating be done only by elected representatives in a public process." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J. dissenting). By keeping "the lines of accountability . . . clear," the theory goes, "[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Id.*; *see also Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (observing that, "[o]f the three branches, Congress is the most responsive to the will of the people" and

noting that when it "misuse[s] [its] power, the people [can] respond, and respond swiftly").

The Energy Policy and Conservation Act's delegation scrambles the lines of accountability. By "[d]elegat[ing] discretion" the Act gave the Department "wide scope to craft rules and exceptions to those rules." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1512 (2015). And with that "broad legislative mandate" secured, the Department has "relatively few constraints to expand [its] reach." *Id.* But "[f]unctional lawmaking by the executive branch undermines democratic accountability and the lawmaking procedures of Article I, Section 7." *Id.* Congress can "take credit for addressing a pressing social problem by sending it to the executive for resolution," and at the same time, "the executive might point to Congress as the source of the problem." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). The result: while all this "finger-pointing" is going on, *id.*, the Department can continue its micromanagement of Americans' daily lives, largely free from public supervision or meaningful accountability.

CONCLUSION

This Court should grant the petition for review and should set aside the challenged Rules.

Dated: April 16, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned counsel, Matthew D. Cloutier, hereby certifies that:

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Dated: April 16, 2024

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CERTIFICATE OF SERVICE

The undersigned counsel, Matthew D. Cloutier, hereby certifies that a copy of the foregoing brief was filed on April 16, 2024 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by that system.

Dated: April 16, 2024

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