ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN GAS ASSOCIATION, AMERICAN PUBLIC GAS ASSOCIATION, and NATIONAL PROPANE GAS ASSOCIATION

Petitioners,

v.

UNITED STATES DEPARMENT OF ENERGY; OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, DEPARTMENT OF ENERGY; and JENNIFER M. GRANHOLM, SECRETARY, U.S. DEPARTMENT OF ENERGY,

Respondents.

MOTION OF NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB TO INTERVENE IN SUPPORT OF RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, Movants Natural Resources Defense Council ("NRDC") and Sierra Club respectfully request leave to intervene in support of Respondents U.S. Department of Energy; Office of Energy Efficiency and Renewable Energy, Department of Energy; and

Jennifer M. Granholm, Secretary, U.S. Department of Energy (collectively, the "Department") in the above-captioned case challenging the Department's final rule entitled "Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment," 88 Fed. Reg. 69,686 (October 6, 2023).

Counsel for all parties have been contacted for their position on the motion. Counsel for Respondents stated that Respondents take no position on the motion. Counsel for Petitioners stated that Petitioners take no position on the motion at this time.

BACKGROUND

The Energy Policy and Conservation Act (the "Act") requires the Department of Energy to periodically review and update energy conservation standards for certain commercial and consumer appliances. Pursuant to its statutory obligations, the Department issued updated energy conservation standards for commercial water heaters in October 2023, which fossil fuel industry trade associations now challenge. Movants seek leave to intervene on behalf of the Department to protect their interests in the adopted standards.

Congress requires the Department to update energy conservation standards.

The Energy Policy and Conservation Act aims to "conserve energy supplies through energy conservation programs" by, among other things, improving the energy efficiency of certain industrial equipment. 42 U.S.C. § 6201(4); *see also id.*

§§ 6311-6317 (provisions governing the energy efficiency of consumer products and commercial equipment). The Act prescribed initial energy conservation standards for many types of industrial equipment and tasked the Department with keeping these standards up to date. *See id.* § 6313(a)(5) (initial standards for commercial water heaters). The Department must review the existing standards every six years, and it must amend them if doing so is technologically feasible, economically justified, and would result in significant additional energy conservation. *Id.* § 6313(a)(6)(A)(ii)(II), (C)(i)(II). If the Department proposes new standards, it must publish a final rule within two years of issuing the proposal. *Id.* §§ 6295(m)(3)(A), 6313(a)(6)(C)(iii).

In setting out the considerations for amended standards, Congress instructed the Department to balance energy savings and consumer satisfaction. Under the Act, the Department must consider "any lessening of the utility or the performance of the products likely to result from the imposition of the standard," alongside other factors, when determining whether a standard is economically justified. *Id.* § 6313(a)(6)(B)(ii)(IV). In addition, the Department cannot eliminate certain aspects of a product that provide unique performance benefits. Under what is known as the Act's "features" provision, the Department may not establish or amend a standard if it finds that the new standard is "likely to result in the unavailability in the United States . . . of performance characteristics (including reliability, features,

sizes, capacities, and volumes) that are substantially the same as those generally available in the United States." *Id.* § 6313(6)(B)(iii)(II)(aa).

Energy conservation standards for commercial water heaters

Among the industrial equipment covered by the Act are commercial water heaters. These appliances use oil, gas, or electricity to heat potable water for use in commercial buildings such as restaurants, hotels, multi-family housing, and public facilities. 88 Fed. Reg. at 69,692. There are numerous ways to categorize commercial water heaters, but the primary focus of this litigation is gas water heaters using "condensing" and "non-condensing" technology.

"Condensing" gas water heaters are more efficient, and they achieve that efficiency by extracting heat from the appliance's exhaust gases before allowing them to escape. *See* 83 Fed. Reg. 54,883, 54,885 (Nov. 1, 2018). As the exhaust gases transfer their heat to the water supply, they cool off and produce liquid condensate (hence the name, "condensing"). *Id.* Unlike "non-condensing" water heaters that allow hotter exhaust gases to escape upward through a chimney, condensing water heaters produce cooler exhaust that cannot reliably rise out of a chimney on its own. *Id.* Condensing water heaters therefore require the use of compatible venting equipment to expel their exhaust. *Id.*

Because non-condensing gas water heaters cannot achieve the same levels of energy efficiency as condensing models, the Department's adoption of energy

conservation standards above a certain threshold effectively prohibits the sale of non-condensing water heaters. 83 Fed. Reg. At 54,886 Consumers replacing a non-condensing water heater may, in turn, have to pay for building modifications to accommodate the installation of a condensing appliance. *Id.*

Historically, the Department has held that it must consider such installation costs when determining whether a standard is economically justified. *See* 42 U.S.C. § 6313(a)(6)(B)(ii)(II) (requiring agency to consider "any increase in … the initial charges" for products resulting from imposition of an energy conservation standard); 75 Fed. Reg. 20,112, 20,156 (Apr. 16, 2010) (considering installation costs for condensing gas water heaters); 69 Fed. Reg. 45,420, 45,434-35 (July 29, 2004) (installation costs for condensing gas furnaces). In contrast, the Department has construed a "performance characteristic" or "feature" that it may not eliminate from the market under the Act's "features" provision to be a product characteristic that provides unique consumer utility, as determined "through the benefits and usefulness the feature provides to the consumer while interacting with the product." 86 Fed. Reg. 73,947, 73,951 (Dec. 29, 2021); *see also id.* at 73,948-49 (describing the Department's historical interpretation of the "features" provision). Because the relative ease of installation does not impact how a consumer interacts with an appliance (*e.g.*, how they receive hot water), non-condensing technology is not a "performance characteristic" or "feature."

Consistent with that longstanding interpretation, the Department proposed amended energy conservation standards in 2016 that only condensing gas water heaters can achieve. *See* 81 Fed. Reg. 34,439, 34,503-04 (May 31, 2016). However, the Department missed its deadline for final action on the proposal, and Movants—along with other public interest groups—filed suit to force compliance with the Act's deadlines. Complaint for Declaratory and Injunctive Relief, *NRDC v. Granholm*, No. 1:20-cv-09127 (S.D.N.Y. October 30, 2020) (the "deadline litigation"); *see also* 42 U.S.C. § 6313(a)(6)(C)(iii)(I) (requiring the Department to finalize an amended standard for a commercial product within two years of proposing it).

While the deadline litigation was pending, in response to a 2018 rulemaking petition from Petitioners and other gas industry interests, the Department issued an interpretive rule finding that non-condensing technology does provide unique consumer utility and is therefore a "feature" under the Act. 86 Fed. Reg. 4776 (Jan. 15, 2021). In reliance on this new interpretive rule, the Department officially withdrew the proposed energy conservation standards for commercial water heaters. 86 Fed. Reg. 3873 (Jan. 15, 2021).

Shortly thereafter, however, the Department returned to its prior, longstanding view. In December 2021, the Department issued an interpretive rule finding that the Act does not bar the Department from setting energy conservation

standards for gas appliances based on the use of condensing technology. 86 Fed. Reg. at 73,948 (the "December interpretive rule"). Two of the petitioners in this case have also filed a petition for review challenging the December interpretive rule, in which Movants have sought to intervene. Petition for Review, *American Gas Association v. Department of Energy*, No. 22-1030 (D.C. Cir. Feb. 25, 2022); Motion of NRDC, Sierra Club, et al. to Intervene in Support of Respondent, No. 22-1030 (D.C. Cir. Mar. 28, 2022)[1]

The following year, the Department joined a consent decree resolving the deadline litigation, agreeing to make a final determination on energy conservation standards for commercial water heaters by July 30, 2023. Consent Decree, *NRDC v. Granholm*, No. 1:20-cv-09127 (S.D.N.Y. September 20, 2022). The Department subsequently adopted the energy conservation standards at issue in this litigation, effectively prohibiting the sale of non-condensing gas commercial water heaters from 2026 onward. 88 Fed. Reg. 69,686 (Oct. 6, 2023) (the "condensing-level standards"); *see also* 42 U.S.C. § 6313(a)(6)(c)(iv) (compliance date shall be 3 years from final publication of new standards or 6 years from the effective date of current standards, whichever is later).

[1] On November 6, 2023, the parties in the December interpretive rule litigation jointly notified the court of their intent to request that the court consolidate this petition for review with the challenge to the December interpretive rule. Joint Motion to Govern Further Proceedings, *American Gas Association v. Department of Energy*, No. 22-1030 (D.C. Cir. Nov. 6, 2023).

The Department estimates that the condensing-level standards will provide between $0.43 billion and $1.43 billion in consumer savings over a 30-year period and significantly reduce emissions of carbon dioxide, nitrogen oxides, and other harmful air pollutants. 88 Fed. Reg. at 69,688. From 2026-2055, the monetized health benefits of reductions in nitrogen oxides emissions—a precursor to ozone formation—will fall between $1.36 billion and $3.29 billion. *Id.* at 69,809.

The petition for review in this case seeks to overturn the Department's commercial water heater standards, and it notes that this litigation is closely related to the pending challenge filed by two of the petitioners against the Department's December interpretive rule. Litigation over both the December interpretive rule and the commercial water heater standards will likely turn on whether the Act's features provision clearly establishes a per se bar against eliminating non-condensing technology from the market. Overturning the Department's reasonable interpretation to the contrary would starkly limit its authority to improve the efficiency of gas appliances with inefficient designs, including non-condensing commercial water heaters.

ARGUMENT

Under Federal Rule of Appellate Procedure 15(d), a party seeking to intervene in a petition for review proceeding in this Court must file a motion that contains "a concise statement of the interest of the moving party and the grounds

for intervention." Because the appellate rule does not provide standards for intervention, circuit courts often look to the rules governing intervention in the district courts under Federal Rule of Civil Procedure 24. *See Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004); *see also Int'l Union v. Scofield*, 382 U.S. 205, 216-17 n.10 (1965). Here, Movants satisfy the requirements for both intervention as-of-right and permissive intervention.

I. Movants are entitled to intervene as of right.

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as-of-right when: (1) the motion is timely; (2) the movant has an interest relating to the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) the existing parties may not adequately represent the movant's interest. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Movants satisfy each of these elements.

A. The motion is timely.

The motion is timely because the petition for review was filed on October 13, 2023, and this motion was filed on November 13, 2023. *See* Fed. R. App. P. 15(d), 26(a)(1)(C).

B. Movants have an interest in the subject of the action.

Movants have an interest in strong energy conservation standards for gas commercial water heaters and other gas appliances. If Petitioners succeed in this litigation, the Department's condensing-level standards for gas commercial water heaters will be vacated, and the Department's authority to set standards based on the most efficient gas products available may be curtailed significantly. As the Department has explained, being unable to require all gas products to meet standards that are based on the use of condensing technology would mean that "[the Department's] ability to increase efficiencies would be limited, if not forestalled entirely." *See* 86 Fed. Reg. 73,966-67.

Movants are organizations that have long sought to reduce the environmental impacts of energy generation and usage and to advance the interests of consumers, including by promoting federal energy conservation standards because they cost-effectively reduce the need to produce and consume energy. *See, e.g.*, Decl. of Gina Trujillo ¶¶ 4-6; Decl. of Jonathan Levenshus ¶ 3. NRDC, for example, has engaged in legislative, regulatory, and legal actions to support strong energy conservation standards for appliances and commercial equipment including by participating in the rulemaking that led to the Department issuing its condensing-level standards for gas commercial water heaters. Trujillo Decl. ¶ 6.; *see also, e.g.*, *NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985); *NRDC v.*

Abraham, 355 F.3d 179 (2d Cir. 2004); *NRDC v. Perry*, 940 F.3d 1072 (9th Cir. 2019). As mentioned above, the Department was required to establish the standards at issue in response to litigation filed by Movants. Consent Decree, *NRDC v. Granholm*, No. 1:20-cv-09127 (S.D.N.Y. September 20, 2022).

Moreover, Movants' members include individuals who will directly benefit from the adopted energy conservation standards for gas commercial water heaters. First, members include consumers and business owners who use and purchase gas commercial water heaters and wish to lower their energy bills and make fiscally responsible investments in energy-efficient equipment. *See* Decl. of Milton Pinsky ¶¶ 6-10, 14. Such investments are made more feasible when strong efficiency standards reduce the cost of efficient appliances through economies of scale. *Id.* ¶ 9. Second, the Department's condensing-level efficiency standards would significantly reduce levels of nitrogen oxides and associated ozone pollution, benefitting members living in areas where ozone levels already exceed the National Ambient Air Quality Standards—air pollution limits promulgated under the Clean Air Act to protect public health and welfare. *See* 42 U.S.C. § 7409 (directing the Environmental Protection Agency to promulgate National Ambient Air Quality Standards); Decl. of Maurena Grossman ¶¶ 2, 7-14, 17; Decl. of Ruth Hund ¶¶ 2, 9-17, 20, 23; Levenshus Decl. ¶ 4-7; 88 Fed. Reg. at 69, 688 (discussing the health benefits of the adopted standards). Movants therefore have

an interest in ensuring that their members can enjoy the economic and environmental benefits—including lower costs and lower emissions—provided by the adopted energy conservation standards for gas commercial water heaters.

C. If successful, Petitioners' challenge would impair Movants' interests.

Unless Movants are permitted to intervene in this litigation to defend the adopted energy conservation standards for commercial water heaters, the disposition of this case "*may* as a practical matter impair or impede [Movants'] ability to protect th[eir] interest." Fed. R. Civ. P 24(a)(2) (emphasis added); *see Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (observing that a "possibility" of impairment is a "sufficient showing" for intervention). If Petitioners succeed in their challenge, Movants will lose the above-described benefits of strengthened standards for commercial water heaters. In addition, the Department's ability to improve the efficiency of other gas appliances will be greatly constrained, as non-condensing products simply cannot achieve comparable levels of efficiency. *See* 86 Fed. Reg. at 73,966 (explaining that requiring improved efficiency of non-condensing products at levels approaching those of condensing products would "require upgrades similar to what is required for condensing systems").

D. Movants' interests may not be adequately represented by existing parties.

Movants need only satisfy the "minimal" requirement that representation of its interests by existing parties "'may be' inadequate," a requirement that is easily met here. *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538 n.10 (1972)). Petitioners are directly adverse to Movants in this litigation, as they are trying to prevent the Department's adoption of condensing-level energy conservation standards that movants are advocating. And while movants wish to intervene in support of the Department, this Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* at 736; *see also, e.g.*, *id.* at 736 n.9 (collecting cases); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015); *see also NRDC v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (holding that industry intervenors' interests may not be adequately represented by EPA and that intervention as a matter of right is thus justified). In this case, the Department represents the interests of the national public, while Movants represent specific stakeholder groups that will benefit from the imposition of the adopted standards. *See Fund for Animals*, 322 F.3d at 736 (intervenor not adequately represented by federal agency because agency had obligation "to represent the interests of the American people," while intervenor represented "Mongolia's people and natural resources"). Although the Department must consider energy savings and

environmental benefits alongside other factors in setting energy conservation standards, taking such factors "'into account' does not mean giving them the kind of primacy that [Movants] would give them." *Id.*

Further, Movants "need not prove that representation by the [Department] *is* inadequate but need show merely that it *may* be." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). A "potential conflict … is sufficient to satisfy a proposed intervenor's 'minimal' burden." *Dimond v. Dist. Of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986). And even if the Department does fully defend its rule, Movants will still "serve as a vigorous and helpful supplement to [the Department's] defense." *Costle*, 561 F.2d at 912-13.

II. In the alternative, Movants should be granted permissive intervention.

In the alternative, Movants merit permissive intervention under Federal Rule of Civil Procedure 24(b). Permissive intervention—an "inherently discretionary enterprise," *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)—is typically appropriate where an applicant's defense "shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

Movants easily meet that threshold here. The case is still at a preliminary stage, and a briefing schedule has not been set. Movants seek to buttress the defense of the Department's recently adopted energy conservation standards for commercial water heaters, so its arguments will by necessity share questions of law and fact with this case. In addition, Movants' deep experience with the Department's efficiency standards program, including participation in the rulemaking leading to both the Department's December interpretive rule and the standards at issue, may be of use to the Court as it considers the issues in this case.

III. Movants have standing.

Because Movants seek to intervene in support of Respondents, and are thus not affirmatively invoking the Court's jurisdiction, they do not separately need standing to sue. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (explaining that "it was not … incumbent on [a party] to demonstrate its standing" when it participated "as an intervenor in support of the … Defendant," or "as an appellee" on appeal, "[b]ecause neither role entailed invoking a court's jurisdiction"). Nevertheless, to avoid all doubt, Movants have Article III standing.

A movant has standing in circumstances like these where it "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the [movant's] benefit." *Crossroads*, 788 F.3d at 317. Here, as noted above, the Department's condensing-level standards for gas commercial water

heaters would benefit Movants, as well as their members who use and purchase commercial water heaters, and who wish to access the most energy-efficient versions of these products possible. *See* Pinsky Decl. ¶¶ 6-10, 14. If Petitioners succeed in setting aside the condensing-level standards, the Department would again be prohibited from adopting standards that increase the availability of the most efficient commercial water heaters, which would injure Movants and their members by giving them "less opportunity to purchase fuel-efficient [products] than would otherwise be available to them." *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986); *see also Orangebury v. FERC*, 862 F.3d 1071, 1077-78 (D.C. Cir. 2017) (collecting cases).

In addition, the Department's condensing-level standards would significantly reduce levels of nitrogen oxides and associated ozone pollution, benefitting Movants' members living in areas where ozone levels already exceed the National Ambient Air Quality Standards—air pollution limits promulgated under the Clean Air Act to protect public health and welfare. *See* 42 U.S.C. § 7409 (directing the Environmental Protection Agency to promulgate National Ambient Air Quality Standards); *see also* Levenshus Decl. ¶ 6; Hund Decl.¶¶ 2, 9; Grossman Decl. ¶¶ 2, 14. Ozone levels exceeding the National Ambient Air Quality Standards are known to harm human health. *See id.* § 7409(b)(1) (National Ambient Air Quality Standards set pollution limits necessary to "protect the public health" with "an

adequate margin of safety"). If implemented, the adopted energy conservation standards for commercial water heaters would therefore reduce members' risk of experiencing known adverse health effects. *See* Hund Decl. ¶¶ 10-17 (describing personal experience with health impacts of ozone pollution); Grossman Decl.¶ ¶ 8-12 (same); Levenshus Decl. ¶¶ 4-5 (describing adverse health effects of ozone pollution to Sierra Club members). If the Department does not implement the adopted standards, Movants' members will continue to suffer under the status quo. *See Clean Wisconsin v. Environmental Protection Agency*, 964 F.3d 1145, 1157 (D.C. Cir. 2020) (public health and environmental groups have standing to challenge EPA action preserving "status quo" rather than imposing stricter ozone limits in areas where members live); *WildEarth Guardians v. Environmental Protection Agency*, 830 F.3d 529, 536 (D.C. Cir. 2016) ("The health and economic costs of increased … pollution for individuals" living in areas with pollution exceeding the National Ambient Air Quality Standards "constitute injuries in fact that are fairly traceable to EPA's challenged rule.").

Movants therefore have standing to intervene because Petitioners "seek[] relief, which, if granted, would injure" Movants and their members. *Crossroads*, 788 F.3d at 318.

CONCLUSION

For the reasons above, the Court should grant Movants leave to intervene in support of Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Motion to Intervene in Support of Respondents** on all parties through the Court's electronic case filing system.

/s/ Timothy D. Ballo
Timothy D. Ballo

Dated: November 13, 2023

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, Movant-Intervenors Sierra Club and Natural Resources Defense Council state that they are non-profit advocacy organizations dedicated to the protection of public health and the environment. They have no outstanding shares or debt securities in the hands of the public, nor any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Dated: November 13, 2023

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), counsel hereby certifies that the foregoing Motion Sierra Club to Intervene in Support of Respondents contains 3,567 words, as counted by counsel's word processing system, and thus complies with the 5,200-word limit. *See* Fed. R. App. P. 27(d)(2)(A).

Further, this document complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure, 32(a)(5) and (a)(6), because this document has been prepared in a proportionally spaced typeface using **Microsoft Word for Microsoft 365** using **size 14 Times New Roman** font.

Dated: November 13, 2023

/s/ Timothy D. Ballo
Timothy D. Ballo