ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1068

Consolidated with Nos. 20-1072, 20-1100

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

AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

v.

U.S. DEPARMENT OF ENERGY,

Respondent.

On Petition for Review of a Rule of the
U.S. Department of Energy

UNOPPOSED MOTION OF NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CONSUMER FEDERATION OF AMERICA, AND MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS TO INTERVENE IN SUPPORT OF RESPONDENT

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Movants Natural Resources Defense Council, Inc. (NRDC), Sierra Club, Consumer Federation of America (Consumer Federation), and Massachusetts Union of Public Housing Tenants (MUPHT) respectfully request leave to intervene under Federal Rule of Appellate Procedure 15(d) to defend the energy conservation standards for commercial packaged boilers that have been challenged in these cases. *See* 85 Fed. Reg. 1592 (Jan. 10, 2020). Respondent U.S. Department of Energy published those final standards only after NRDC, Sierra Club, and Consumer Federation successfully sued to enforce the agency's non-discretionary duty to do so. *See NRDC v. Perry*, 940 F.3d 1072 (9th Cir. 2019). Movants have an ongoing interest in ensuring that these important energy conservation standards remain in effect.

Petitioners in each of the three consolidated cases do not oppose Movants' intervention. Respondent Department of Energy takes no position on the motion.

BACKGROUND

Congress requires increasingly stringent efficiency 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 consumer appliances and commercial or industrial equipment. *See* 42 U.S.C. §§ 6201(4)-(5), 6291-6309, 6311-17. In 1987, after NRDC and others successfully sued the Department of Energy for failing to set meaningful energy efficiency standards under the Act, *see NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir.

1985), Congress enacted amendments that directly prescribed energy-efficiency standards for several products and required the Department to review and amend the standards periodically, by set deadlines, *see* Pub. L. No. 100-12, 101 Stat. 103 (1987).

Under the Act, the Department must review its existing efficiency standards for certain commercial equipment at least every six years and either determine that the standards do not need to be amended or propose new ones. *See* 42 U.S.C. § 6313(a)(6)(C)(i). If the Department proposes new standards, it must publish a final rule within two years of issuing the proposal. *Id.* § 6313(a)(6)(C)(iii). The Act also contains anti-backsliding provisions, which prevent the Department from weakening efficiency standards once they are published in the Federal Register. *Id.* §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I). These provisions carry out Congress's "goal of steadily increasing the energy efficiency of covered products" by, among other things, prohibiting new administrations from weakening standards promulgated by their predecessors. *NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004) (rejecting the Department's attempt to suspend and roll back energy-efficiency standards issued by previous administration).

Overall, the Act's energy conservation standards have been extremely effective in improving energy efficiency, saving consumers money, and preventing unnecessary emissions of harmful air pollutants. *See* Decl. of Lauren Urbanek ¶¶ 6-7.

The Department promulgates updated commercial packaged boiler standards

Among the commercial equipment covered by the Act are commercial packaged boilers. 42 U.S.C. § 6311(1)(J). These boilers are used to heat commercial

and multifamily residential buildings. Urbanek Decl. ¶ 10. They are powered by oil or natural gas and are generally used in buildings with central distribution systems that circulate steam or hot water from the boiler to other parts of the building. *Id.* Nearly a quarter of this country's commercial floor space is heated by packaged boilers, and space heating uses more energy than any other activity in these buildings. *Id.*

The Department last amended its energy conservation standards for commercial packaged boilers in 2009. *See* 74 Fed. Reg. 36,312 (July 22, 2009). The Act therefore required the agency to review those standards and either determine that they did not need to be amended, or propose new ones, in 2015. *See* 42 U.S.C. § 6313(a)(6)(C)(i). The Department began that process in 2013. *See, e.g.*, 78 Fed. Reg. 54,197 (Sept. 3, 2013) (inviting comment on existing standards for commercial packaged boilers); 79 Fed. Reg. 69,066 (Nov. 20, 2014) (inviting comment on preliminary technical analysis of potential standards for commercial packaged boilers).

In March 2016, the Department proposed updating the standards to require more efficient commercial packaged boilers. 81 Fed. Reg. 15,836 (Mar. 24, 2016). After accepting public comment, *see* 81 Fed. Reg. 26,747 (May 4, 2016) (extending comment period to 90 days), the Department signed a final rule amending the boiler standards in December 2016. *See* Pre-Publication Final Rule, Energy Conservation Standards for Commercial Packaged Boilers (Dec. 28, 2016), *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/CPB_ECS_Final_Rule.pdf.

In the final rule, the Department found that the updated commercial packaged boiler standards were technologically feasible and economically justified, and would result in significant conservation of energy. *See id.* at 18. It projected that the standards would cut energy use by roughly 0.27 quadrillion British thermal units (BTUs) over a 30-year period and would save customers up to $2 billion. *Id.* at 11. The Department also estimated these savings could avoid emissions of approximately 16 million metric tons of carbon dioxide, 3,100 tons of sulfur dioxide, and 41,000 tons of nitrogen oxides, as well as emissions of methane, nitrous oxide, and mercury. *Id.* at 11-12.

The Department unlawfully fails to publish the updated standards

The signed final rule amending the commercial packaged boiler standards was "issued" on December 28, 2016, and indicated that the "Secretary of Energy has approved publication of this final rule." *Id.* at 315. Before submitting the standards for publication in the Federal Register, however, the Department posted the final rule on its website pursuant to the Department's mandatory "error correction procedures." *See* 10 C.F.R. § 430.5 (2019). Those procedures create a brief period for identifying and correcting inadvertent errors in final energy conservation standards before they are published. During a 45-day error-correction period, interested parties may identify "typographical," "calculation," or "numbering" mistakes and ask the agency to correct them. *Id.* § 430.5(b)-(d). The Department must then submit the final rule for publication within 30 days—either as posted or as corrected. *See id.* § 430.5(e)-(f).

The error-correction period for the commercial packaged boiler final rule ended on February 11, 2017. *See NRDC v. Perry*, 302 F. Supp. 3d 1094, 1096 (N.D. Cal. 2018). Only one error was identified in the pre-publication final rule: a table included the symbol ">" instead of "≥." *Id.*

After a change of administration, however, and contrary to the Department's error correction procedures, the Department did not "submit a corrected rule for publication in the Federal Register within 30 days." 10 C.F.R. § 430.5(f)(3) (2019). Nor did the agency offer any explanation for its failure to do so. The Department's refusal to publish the final rule prevented the new energy conservation standards for commercial packaged boilers from taking effect. *See, e.g.*, *id.* § 430.5(f)(4)-(5).

Movants successfully sue the Department to publish the final standards

NRDC, Sierra Club, Consumer Federation, other nonprofit organizations, and several government entities filed suit to enforce the Department's mandatory duty to publish the final energy conservation standards for commercial packaged boilers.[1] *NRDC v. Perry*, 302 F. Supp. 3d at 1096-97. The Air-Conditioning, Heating, and Refrigeration Institute intervened in support of the Department. *See id.* at 1101.

The district court granted plaintiffs' motions for summary judgment and ordered the Department to publish the final energy conservation standards. *Id.* at

[1] The plaintiffs also sued to compel publication of three other final energy conservation standards that the Department had declined to publish (for portable air conditioners, air compressors, and uninterruptible power supplies), *NRDC v. Perry*, 302 F. Supp. 3d at 1096, but those standards are not at issue in the instant litigation.

1096, 1101. The court concluded that the Department's error correction procedures "create[d] a clear-cut duty for the Department to publish an energy standard in the Federal Register at the end of the error-correction process," and found "no support" for the Department's assertion of "free-standing authority" to withdraw final energy conservation standards publicly posted for error correction. *Id.* at 1097-98.

The Ninth Circuit affirmed, agreeing with the district court's conclusion that the Department's mandatory error correction procedures left the agency "only two options: publish the standard as posted, or correct any errors in the standard and publish it as corrected." *NRDC v. Perry*, 940 F.3d at 1079 (citation omitted).

In January 2020, the Department finally published the updated (and corrected) energy conservation standards for commercial packaged boilers. *See* 85 Fed. Reg. at 1592. The Department acknowledged that it published the standards to "comply with an order from the U.S. District Court for the Northern District of California … as affirmed by the U.S. Court of Appeals for the Ninth Circuit," and that the published standards were "substantively identical to the signed document … previously posted to its website," aside from "revis[ing] two tables in the document" by replacing ">" with "≥." *Id.* at 1681. The final, updated energy conservation standards for commercial packaged boilers became effective on March 10, 2020, and set a compliance deadline of January 10, 2023. *Id.* at 1593. These lawsuits followed.

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 standards 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 standards for both intervention as-of-right and permissive intervention. They also have Article III standing.

I. Movants are entitled to intervene as of right

A movant is entitled to intervention as-of-right under Federal Rule of Civil Procedure 24(a)(2) when: (1) its 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

Movants' intervention request is timely because it was filed "within 30 days after the petition for review [wa]s filed." Fed. R. App. P. 15(d). The first petition for

review in this litigation was filed on March 9, 2020. Movants filed this intervention motion on April 7, less than 30 days later.

B. Movants have an interest in the subject matter of this litigation

Movants have an interest in ensuring that the updated energy conservation standards for commercial packaged boilers remain in effect.

Movants include organizations that have long sought to reduce the environmental impacts of energy generation and usage, with a special focus on promoting federal efficiency standards because they are a particularly effective tool for reducing energy usage while still providing consumers with reliable and affordable energy services. *See, e.g.*, Urbanek Decl. ¶¶ 5-7. NRDC, for example, has engaged in legislative, regulatory, and legal actions to support strong energy conservation standards for appliances and commercial equipment. *Id.* ¶¶ 8-9; *see, 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); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 499 (9th Cir. 2005) (observing that NRDC "negotiated a compromise solution" with manufacturer trade associations that resulted in the 1987 amendments to the Energy Policy and Conservation Act). NRDC also participated in the 2016 rulemaking to amend the energy conservation standards for commercial packaged boilers and strongly supported the more efficient standards. *See* Urbanek Decl. ¶ 9.

Movants also include organizations that work to protect the interests of consumers. Movant Consumer Federation has long supported the Department's adoption of cost-effective energy efficiency standards like those at issue here. *See* Decl. of Mel Hall-Crawford ¶¶ 3-5. Movant MUPHT has been advocating for strong energy efficiency standards to reduce the burden of utility bills on its low-income members for well over a decade. Decl. of John A. Cooper ¶¶ 3-4.

Movants have an interest in the many significant benefits of the updated energy conservation standards for commercial packaged boilers—including lower heating costs and energy bills, a more reliable electricity grid, and reduced emissions of harmful air pollutants. *See* Urbanek Decl. ¶¶ 13-18; Hall-Crawford Decl. ¶ 6; Cooper Decl. ¶¶ 5-9; *see also* 85 Fed. Reg. at 1595 (projecting the updated standards would save consumers up to $2 billion over 30 years and avoid emissions of roughly 16 million metric tons of carbon dioxide, 3,100 tons of sulfur dioxide, and 41,000 tons of nitrogen oxides). Indeed, Movants and their members include consumers, business owners, and tenants who use, or whose businesses or landlords use, commercial packaged boilers, and who directly benefit from the more efficient standards. *See* Decl. of R.J. Mastic ¶¶ 1-10; Decl. of Anthony Guerrero ¶¶ 6-10; Cooper Decl. ¶¶ 5-9.[2]

[2] As explained further below, Movants also have Article III standing to defend the standards at issue in this litigation, which is "alone sufficient" for establishing the requisite interest for intervention. *Fund for Animals*, 322 F.3d at 731.

Because of their interest in the updated standards, Movants NRDC, Sierra Club, and Consumer Federation sued the Department to ensure that the standards were published in the Federal Register so that they would take effect. *See NRDC v. Perry*, 940 F.3d at 1074; *see also* 85 Fed. Reg. at 1681 (acknowledging the Department published the standards to comply with a court order). Movants' efforts to support promulgation of the standards, and then to compel their publication, demonstrate their continuing interest in defending those standards in the instant litigation. *Cf. Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.").

C. If successful, these challenges would impair Movants' interests

Unless Movants are permitted to intervene in this litigation to defend the energy conservation standards, these cases "*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 "setting aside" the updated standards for commercial packaged boilers, 42 U.S.C. § 6306(b)(3), that would eliminate the standards' many benefits to Movants and their members, and would undermine the years they spent supporting those standards and litigating to ensure that they take effect. *See, e.g.*, *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (granting intervention as-of-right in a case that could "nullif[y]" the

movants' prior efforts). An order setting aside the standards would also make it more "difficult and burdensome" for Movants to advocate for replacement standards, *Fund for Animals*, 322 F.3d at 735, which—even if promulgated and published—would push any compliance obligations further into the future, *see* 42 U.S.C. § 6313(a)(6)(C)(iv)(I).

D. Movants' interests may not be adequately represented

Finally, existing parties to the litigation may not adequately represent Movants' interests. This standard is "not onerous." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (quoting *Fund for Animals*, 322 F.3d at 735). A movant "ordinarily" is allowed to intervene "unless it is clear that [existing parties] will provide adequate representation." *Id.* (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)) (internal quotation marks omitted).

Here, Movants satisfy the "minimal" requirement that representation of their interests by existing parties "'may be' inadequate." *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Petitioners are directly adverse to Movants in this litigation, as they are trying to undo the energy conservation standards that Movants seek to defend. 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 736-37 & n.9 (collecting cases); *Crossroads*, 788 F.3d at 321.

Of course, 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); *see also NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (a "possibility of disparate interests" suffices, even if one "cannot predict now the specific instances" in which conflicts will arise).

Nonetheless, given the current administration's failure to publish the updated commercial packaged boiler standards until Movants NRDC, Sierra Club, and Consumer Federation sued to compel the Department to do so, it is "not hard to imagine how the interests" of Movants and the Department "might diverge during the course of [this] litigation." *Fund for Animals*, 322 F.3d at 736. As this Court has previously observed, "doubtful friends may provide dubious representation." *Crossroads*, 788 F.3d at 314. In any event, even if the Department defends the standards in these cases, Movants will "serve as a vigorous and helpful supplement to [the Department's] defense." *Costle*, 561 F.2d at 912-13.

In short, Movants have "easily met the minimal burden of showing inadequacy of representation and should be allowed to intervene as of right." *Crossroads*, 788 F.3d at 321.

II. Alternatively, Movants merit permissive intervention

At minimum, 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 the requirements for permissive intervention. These cases are at a preliminary stage and no briefing schedule has yet been set, so this timely motion will not unduly delay or prejudice any other party's rights. Moreover, Movants do not bring new claims, but rather intend to offer defensive arguments, all of which necessarily share questions of law and fact in common with the underlying action. Movants' long history with the federal energy conservation standards program—and the updated commercial packaged boiler standards, in particular—also give them a perspective that may aid the Court's consideration of issues in this litigation.

III. Movants have standing

Because Movants seek to intervene in support of Respondent, 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 … Defendants," or "as an appellee" on appeal, "[b]ecause neither role entailed invoking a court's jurisdiction"). Nevertheless, for avoidance of doubt, *cf. Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 & n.2 (D.C. Cir. 2018), 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. This is true even where the agency action benefits the movant only "tangentially" or "indirectly." *Id.* at 318. The "'threatened loss' of th[e] favorable action constitutes a 'concrete and imminent injury.'" *Id.* (quoting *Fund For Animals*, 322 F.3d at 733). And given the pending litigation seeking to overturn that action, causation and redressability "rationally follow[]." *Id.* at 316.

Here, as noted above, the updated energy conservation standards at issue in these cases benefit Movants and their members who use, or whose businesses use, commercial packaged boilers, and who wish to purchase the most efficient boilers possible. *See, e.g.*, Mastic Decl. ¶¶ 1-10; Guerrero Decl. ¶¶ 3-10. By removing the least efficient commercial packaged boilers from the market, the cost-effective updated standards also benefit Movant MUPHT's tenant members as the boilers heating their apartments are replaced. Cooper Decl. ¶¶ 8-9. If Petitioners succeeded in setting aside those standards, the availability of more efficient boilers would decrease, 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 Orangeburg v. FERC*, 862 F.3d 1071, 1077-78 (D.C. Cir. 2017) (collecting similar cases).[3] 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 foregoing reasons, the Court should grant Movants leave to intervene.

Dated: April 7, 2020

Respectfully submitted,

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[3] In addition, the interests at stake in this litigation are germane to Movants' purposes, *see, e.g.*, Urbanek Decl. ¶ 2, and neither the claims asserted nor relief requested requires the participation of individual members in the lawsuit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, Movant-Intervenor Natural Resources Defense Council, Inc., Sierra Club, Consumer Federation of America, and Massachusetts Union of Public Housing Tenants state that they are non-profit advocacy organizations dedicated to the protection of public health, the environment, and the consumer interest. 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

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CERTIFICATE OF PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), I certify that the parties, intervenors, and amici in these consolidated cases are:

Petitioners: American Public Gas Association; Air-Conditioning, Heating, & Refrigeration Institute; Spire, Inc.; Spire Missouri, Inc.

Respondent: U.S. Department of Energy

Movant-Intervenor in Support of Petitioners: American Gas Association

Movants-Intervenors in Support of Respondent: Natural Resources Defense Council, Inc.; Sierra Club; Consumer Federation of America; Massachusetts Union of Public Housing Tenants

Amici: There are no amici curiae at the time of this filing.

Dated: April 7, 2020

/s/ Aaron Colangelo
Aaron Colangelo

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Aaron Colangelo
Aaron Colangelo