

No. 25-879

**In The
Supreme Court of the United States**

AMERICAN GAS ASSOCIATION, ET AL.,

Petitioners,

v.

DEPARTMENT OF ENERGY, ET AL.

Respondents.

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

**BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF HOME
BUILDERS OF THE UNITED STATES AND
NATIONAL ASSOCIATION OF REALTORS IN
SUPPORT OF CERTIORARI**

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INTEREST OF AMICI CURIAE¹

The National Association of Home Builders of the United States (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB’s goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB’s approximately 140,000 members are home builders or remodelers. NAHB’s Multifamily Council represents the specific interests of builders, developers, owners, and managers of all sizes and types of condominiums and rental apartments.

NAHB is a vigilant advocate in the nation’s courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The National Association of REALTORS® is a national trade association, representing 1.4 million members, including its institutes, societies, and councils involved in all aspects of the residential and

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®, and support private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

SUMMARY OF ARGUMENT

Amid a national housing shortage and affordability crisis, the United States Department of Energy (“DOE”) implemented new energy efficiency standards that increase the cost to construct a new home and replace a major appliance in an existing home. These standards will functionally remove non-condensing water heaters and furnaces from the market and replace them with condensing models, which are more costly and often require extensive renovation to fit into existing homes. DOE promulgated these standards despite a restriction in the Energy Policy and Conservation Act (“EPCA”) not to promulgate energy efficiency standards if interested parties prove that they would render a product class which has certain “performance characteristics” unavailable.

Factually, DOE’s standard will render non-condensing water heaters and furnaces unavailable. Condensing water heaters and furnaces are more expensive up front, and existing homes that currently have non-condensing appliances will require expensive modifications to install condensing appliances which comply with DOE’s new standards. Moreover, there is a strong preference for non-condensing water heaters and furnaces among homeowners and consumers. Nonetheless, the D.C. Circuit found that the venting mechanism, i.e. whether a water heater or furnace is condensing or non-condensing, is not a “performance characteristic” that consumers consider when purchasing a water heater or furnace. In rendering that decision, the D.C. Circuit

improperly deferred to DOE's interpretation of EPCA, in violation of this Court's decision in *Loper Bright v. Raimondo*.

This Court should grant a writ of certiorari to correct the D.C. Circuit's erroneous holding. DOE's energy efficiency standards impact housing affordability nationwide, for both prospective and existing homeowners and renters. Moreover, this case presents an opportunity to reinforce *Loper Bright v. Raimondo*, and would clarify how that case impacts statutes like EPCA which impose burdens of proof on the interested parties of the general public.

ARGUMENT

I. DOE APPLIANCE STANDARDS IMPOSE COSTS THAT EXACERBATE AN ONGOING HOUSING AFFORDABILITY CRISIS

The United States is experiencing a severe housing shortage and an ongoing affordability crisis that has left the housing market unable to absorb additional cost burdens. Housing supply remains historically constrained, vacancy rates are near record lows, and a substantial majority of American households are priced out of homeownership. Amid these pressures, policies that raise the cost of constructing, maintaining, or renovating homes have outsized effects on housing affordability and supply.

DOE's appliance standards, promulgated under EPCA, exacerbate these concerns. Across the

Nation, housing affordability has deteriorated sharply. NAHB's latest analysis finds that 74.9 percent of U.S. households are unable to afford a new home at the median price of \$459,826. Na Zhao, NAHB, *Nearly 75% of U.S. Households Cannot Afford a Median-Priced New Home in 2025*, at 1 (Feb. 2025). Moreover, industry data indicates that government regulations across all levels account for an average of 40.6 percent of multifamily development costs. Paul Emrath & Caitlin Sugrue Walter, NAHB & NMHC, *Regulation: 40.6 Percent of the Cost of Multifamily Development*, 1 (June 2022). Similarly, almost a quarter of the cost of a new, single-family home is due to government regulations. See Paul Emrath, NAHB, *Government Regulation in the Price of a New Home: 2021*, at 1 (May 5, 2021) (regulation accounts for \$93,870 of the then-average price of a new home, \$394,300).

Rising housing costs and elevated interest rates have pushed home sales to their lowest level in nearly three decades, directly limiting supply and long-term access to homeownership. Joint Ctr. for Hous. Stud. of Harv. Univ., *The State of the Nation's Housing 2025*, at 3 (June 24, 2025). NAHB data shows that homeowner vacancy rates have fallen below 0.9 percent, while rental vacancy rates have declined to 5.2 percent—the lowest levels recorded since the Census Bureau began tracking this data in 2005. Natalia Siniavskaia, NAHB, *The Size of the Housing Shortage: 2021 Data*, EYE ON HOUSING (Dec. 16, 2022).

The Nation does not have enough housing, with economists estimating a deficit of at least 1.5 million

units. *Id.* At current building rates, that imbalance is expected to persist for years as regulatory costs, financing conditions, and supply-side constraints continue to suppress new housing production. *Id.* In such a constrained market, even modest increases in construction or maintenance costs can materially affect housing affordability and access.

In a housing market defined by limited supply, cost increases do not operate at the margins. NAHB analysis shows that relatively small increases in the price of a new home are sufficient to price out large numbers of households. Specifically, NAHB estimates that each \$1,000 increase in the median price of a new home eliminates the ability of roughly 156,000 households to qualify for mortgage financing, with first-time buyers and moderate-income families most affected. Na Zhao, NAHB, *Households Priced Out by Higher House Prices and Interest Rates*, NAHB.ORG (Feb. 2, 2026)². When housing costs rise in an already constrained market, fewer homes are built, fewer transactions occur, and access to homeownership and rental housing is further reduced.

Now is not the time to add more regulatory costs to American households. In 2024, approximately 67% of American adults reported that they could pay for an unexpected \$400 expense using cash, savings, or a credit card paid off at the next statement; the remaining 33% reported paying for such an expense

² <https://www.nahb.org/news-and-economics/housing-economics/housings-economic-impact/households-priced-out-by-higher-house-prices-and-interest-rates>

by borrowing money or selling personal belongings. Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2024*, at 41 (May 2025). However, according to a more recent Bankrate survey, only 47% of Americans have sufficient liquidity to cover a \$1,000 emergency expense. Karen Bennett, *Bankrate's 2026 Annual Emergency Savings Report* (Feb. 4, 2026). Additionally, credit card and mortgage payment delinquencies have increased significantly. In the fourth quarter of 2025, U.S. household total debt delinquency rose to 4.8 percent, the highest level since 2017, and credit-card and auto loan delinquencies are at their highest levels since the 2008 financial crisis. Imani Moise, *Americans With Higher Incomes Are Starting to Fall Behind on Payments*, Wall Street J. (Feb. 12, 2026). More disturbing in the housing context is that 13 percent of people with Federal Housing Administration mortgages are not current on their loan payments. *Id.* In short, average American households are less able to absorb additional costs than DOE's analysis suggests.

- a. Condensing Units Cost More Up-Front, Thereby Increasing New Home Prices and Reducing Housing Supply.

DOE's appliance standards introduce significant, unavoidable cost pressures into this already constrained housing market. The Final Rule requires residential gas furnaces manufactured after December 18, 2028, to meet a minimum annual fuel utilization efficiency of 95 percent. Energy Conservation Program: Energy Conservation

Standards for Consumer Furnaces; Final Rule, 88 Fed. Reg. 87,502 (Dec. 18, 2023). DOE explained that the standards are intended to improve energy efficiency and reduce household energy consumption by requiring the use of modern condensing technology. *Id.*

Industry analysis indicates that traditional non-condensing gas furnaces are unable to meet this efficiency threshold and will therefore no longer be available once the standards take effect. As a result, the standards establish minimum efficiency thresholds for residential gas furnaces and certain water heaters that can be met only by condensing technology or electric alternatives.

Condensing gas furnaces generally carry significantly higher upfront equipment costs than traditional non-condensing models, and often require additional installation work, including specialized venting and condensate drainage systems, which increases both labor and material costs. U.S. Dep't of Energy, *Technical Support Document: Energy Conservation Standards for Residential Furnaces*, app. 8D, at 8D-3 (Feb. 10, 2015). Condensing furnaces are more expensive to manufacture because they require heavy-duty hardware that standard models do not, including a secondary heat exchanger to trap heat and motorized power vents to manage exhaust. Alex Lekov et al., Lawrence Berkeley Nat'l Lab., *Economics of Condensing Gas Furnaces and Water Heaters Potential in Residential Single Family Homes*, at 5 (2010).

This hardware requirement drives the average consumer price of a condensing furnace in a new home to \$1,956, compared to just \$1,481 for a traditional model—a gap of nearly \$500 per unit. *Id.* Similarly, data from the American Gas Association (AGA) indicates that, on average, condensing furnaces cost about \$350 more than non-condensing furnaces, along with an additional \$1,500 to \$2,200 in installation costs. *American Gas Association: Natural Gas Furnace Efficiency Rule* (2017).³

The increased complexity of condensing technology is a primary driver of these costs. Lekov et al., *supra*, at 2. Unlike non-condensing units that vent hot exhaust through standard metal chimneys or B-vent systems, condensing units cool exhaust until water vapor turns into liquid. U.S. Dep't of Energy, *supra*, at 8D-3. This process requires new Category IV venting, typically polymer (PVC or CPVC) routed horizontally through an exterior wall. This switch from vertical metal venting to horizontal plastic venting has been identified as the "main difference in installation cost" between the two technologies. Lekov et al., *supra*, at 5. This new venting often necessitates wall penetrations and the reconfiguration of mechanical spaces. U.S. Dep't of Energy, *supra*, at 8D-4.

Furthermore, because these units generate significant liquid runoff, they require a dedicated condensate drainage system. Richard Valenzuela, *Introduction to Residential HVAC Level 1*, at 56

³ https://www.aga.org/wp-content/uploads/2021/01/2017_furnace_efficiency_rule.pdf

(Dec. 23, 2025). This typically includes a specialized trap and, in many installations, a condensate pump to route the liquid to an appropriate disposal point. *Id.* Because builders operate on thin margins, these mandatory costs are passed directly to homebuyers, making entry-level and moderately priced homes more difficult to build and sell—further constraining housing supply.

As a potential alternative, builders are encouraged to install electric heat pumps. *Id.* at 32. However, heat pumps are much more expensive to buy and install. The primary reason homeowners do not switch to heat pumps is their high cost. Cal. Energy Comm’n, *Affordable Near- and Medium-Term Solutions for Integration of Low-GWP Heat Pumps in Residential Buildings* 4 (June 2025). Replacing an old gas furnace with a new heat pump costs more than simply buying a new version of the same gas furnace and air conditioner. *Id.* In Michigan, shifting from natural gas heating to an electric heat pump would raise the median household energy burden⁴ from about 6 percent of income to 10 percent. Claire McKenna et al., *Heating with Justice: Barriers and Solutions to a Just Energy Transition in Cold Climates*, Resources, Conservation & Recycling at 1 (May 31, 2024).

This price gap is consistent across the country. While a new gas furnace and air conditioning combo typically costs between \$8,000 and \$9,000, a

⁴ Energy burden is defined as a household’s energy expenditures divided by household income. Here, even if the appliance is more energy efficient, the cost of the energy used is higher.

standard centrally ducted heat pump can range from \$10,000 to \$12,000. Raphael Breit, *Lowering the Heat Pump Cost Barrier*, Reg. Assistance Project (Jan. 9, 2025). For homes requiring more complex configurations, such as multi-zone ductless systems, costs often climb to between \$15,000 and \$20,000. *Id.* Beyond the equipment, professional installation labor can vary significantly across the country. Travis Baugh, Carrier, *2026 Heat Pump Cost Guide: Purchase, Installation & Repair* (2026). Even within a location, labor costs can vary significantly depending on a home's size and insulation; one provider in Michigan provides an estimate of \$1,500 to \$5,000 just for labor, with a total cost range of \$4,500 to \$10,000. R&R Heating and Cooling, *Heat Pumps Ada, MI* <https://rrmechanicalsvs.com/heat-pump-system-ada-mi/> (last visited Feb. 13, 2026).

Ultimately, DOE's efficiency mandates are not cost-neutral adjustments but significant structural impediments to housing affordability. By effectively banning traditional furnaces, the rule forces builders to adopt technology that is inherently more expensive to manufacture and more complex to install. In a market where inventory is historically low and prospective buyers are already stretched to their financial limits, every additional dollar in mandated construction costs pushes more households out of the market.

b. Increased Renovation Costs Reduce Reinvestment in Existing Housing and Further Worsen Housing Affordability

DOE's appliance standards impose a severe and disproportionate cost burden on the maintenance and rehabilitation of the Nation's existing housing stock. America's housing stock is aging; the median age of an owner-occupied home is 40 years. Na Zhao, NAHB, *The Age of the U.S. Housing Stock*, EYE ON HOUSING (Feb. 12, 2024). Condensing furnaces were introduced in the 1980s, when the median American home was built, and efficiency standards at that time did not require the new technology. For the many homes that are older than 40 years, condensing furnaces simply were not an option at the time of construction. Yet these older houses remain a critical and indispensable sector of the housing market.

In millions of homes, non-condensing gas furnaces and water heaters are integrated into the dwelling's physical structure, relying on established vertical venting systems and specific spatial configurations, such as closet spaces designed specifically for the unit. Replacing non-condensing appliances with compliant condensing alternatives is rarely a simple swap; rather, it frequently requires extensive structural and mechanical modifications. These retrofits often necessitate rerouting venting systems, opening finished walls, installing condensate drainage infrastructure, and, in some cases, relocating appliances entirely to access an exterior wall. 88 Fed. Reg. at 87,537. These retrofit requirements add substantial labor and

material costs that far exceed the price of the appliance itself. DOE acknowledged this disparity, stating that, in contrast to new construction, the incremental retrofit installation cost for existing homes is \$539. *Id.* at 87,560.

This cost differential is driven by necessary upgrades such as vent resizing, chimney relining, the installation of new flue and combustion air venting, and the resolution of complex venting conflicts, such as "orphaned" water heaters that can no longer share a chimney with the updated furnace. *Id.* at 87,560–61. Additional financial burdens include transportation, gas piping modifications, ductwork, electrical hook-ups, and permit fees. *Id.* at 87,605. In multi-family settings, these projects must also navigate rigid building code constraints that make horizontal venting physically impossible in certain interior units. *Id.* at 87,533–34. This comes at a time when homeowners are increasingly cost-burdened, meaning they spend more than 30 percent of their income on housing. Joint Ctr. for Hous. Stud. of Harv. Univ., *supra*, at 26. Many homeowners simply do not have the financial resources to afford the costly renovations required to comply with the Final Rule.

These escalated costs directly threaten housing reinvestment and the preservation of supply. Housing affordability depends not only on new construction but also on the continuous rehabilitation of existing units. *Id.* at 32–33. Across the country, homebuilders and renovators routinely acquire older or underutilized properties, modernize them, and return them to the market. This process

is the primary mechanism for maintaining housing supply in urban and infill markets where developmental land is scarce. *Id.* at 1–2.

Yet rising materials and labor costs challenge the ability of homebuilders to undertake renovation projects. If the cost of a mandated retrofit exceeds a project’s financial ceiling, the renovation does not proceed, and the housing stock is left to deteriorate or is removed from productive use entirely. 88 Fed. Reg. at 87,602.

The resulting reduction in supply falls most heavily on the Nation’s most vulnerable housing markets. As renovation costs rise, fewer older homes are rehabilitated, and a greater share of the housing market becomes unsuitable for occupancy. This inventory loss places immediate upward pressure on both home prices and rents, specifically in communities where housing shortages are already most severe, such as the Los Angeles metro area, South Florida, and the Northeast. Nat’l Low Income Hous. Coal., *The Gap: A Shortage of Affordable Homes* 18–22 (Mar. 2024). By increasing renovation and retrofit costs, DOE’s appliance standards effectively shrink the available housing supply and exacerbate the very affordability crisis that federal housing policy seeks to alleviate.

c. DOE’s Standards Narrow Consumer Choice and Further Constrain Housing Access.

Finally, stringent DOE appliance standards narrow consumer choice and stifle market innovation by effectively removing widely used,

affordable technologies from the market and forcing migration toward a single compliance pathway. Builders, homebuyers, and homeowners value the ability to choose appliances and energy systems that align with their performance, affordability, and household needs.

NAHB survey data confirm that a majority of buyers prefer gas appliances; 51 percent of home buyers prefer cooking with gas, while only 39 percent prefer electricity. Rose Quint, NAHB, *What Home Buyers Really Want* (March 2021). By forcing a single compliance pathway, the regulations effectively disregard the clear preferences of these consumers.

This requirement can slow or derail real estate transactions. As stated, potential buyers have a strong preference for gas appliances and, when due diligence reveals that a non-condensing water heater or furnace needs to be replaced with a condensing unit, they are more likely to demand concessions or price reductions, especially considering the renovations many homes will require to convert from non-condensing to condensing units. Buyers may back out of sales if the renovations required are extensive. This will add new financial and logistical obstacles for home buyers and REALTORS who are already working through a stressed housing market.

Moreover, by mandating compliance with high-efficiency standards, these regulations place gas appliances out of reach for many buyers, particularly in the affordable housing market. As a

result, builders are often forced to opt for electric appliances not because they best meet the needs of the home or its occupants, but because they are the only economically feasible option during construction. This forced migration towards a single compliance pathway reduces energy choice and raises long-term costs for residents. Nat'l Multifamily Hous. Council & Nat'l Apartment Ass'n, Comment on Energy Conservation Standards for Consumer Water Heaters, at 5–6 (Sept. 24, 2023). Given the financial constraints American households currently face, many households may opt to repair their gas appliances longer than they would have simply because they can afford a repair better than a new appliance, which keeps low efficiency appliances functional longer. A standard that improved efficiency but still allowed gas appliances to operate would likely achieve environmental goals faster, if only because it would be more broadly adopted by consumers.

In a housing market already unable to meet national demand, regulations that impose new, unavoidable costs on the construction and maintenance of homes directly worsen the housing affordability crisis and may even undercut the environmental goals they are trying to achieve.

II. THE D.C. CIRCUIT OPINION VIOLATES *LOPER BRIGHT*

Automatic agency deference ended with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). However, questions remain about how *Loper Bright* applies to agency interpretations of the

statutes which govern them, as seen in the D.C. Circuit’s decision in the instant case. Supreme Court review is warranted to clarify what obligations, if any, courts have to justify any deference they grant to an agency. Supreme Court review is also necessary to interpret how EPCA’s burden-shifting framework works under *Loper Bright*.

a. The D.C. Circuit improperly deferred to DOE.

Under *Loper Bright*, “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. . . . *But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.*” *Id.* at 412-13 (emphasis added). More expressly, the Court limited the impact of how the Executive Branch could influence decisions by saying “The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. . . . Otherwise, judicial judgment would not be independent at all.” *Id.*

The D.C. Circuit does not hide that it defers to DOE. In fact, the Court states “We have no reason to second-guess DOE’s view, especially since it rests on the agency’s evaluations of scientific data within its area of expertise.” *American Gas Ass’n, et al. v. U.S. Dept. of Energy, et al.*, 157 F.4th 476, 492-93 (D.C. Cir. 2025) (quoting *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 766 (D.C. Cir. 2010)) (internal quotations omitted). Crucially, the Court here

expressly stated that it was going to accept DOE's interpretation unless given a reason not to do so, which is improper under *Loper Bright*.

EPCA requires DOE to promulgate updated efficiency standards, based on statutory factors, but stipulates that DOE may not prescribe an efficiency standard if “interested persons” establish “by a preponderance of the evidence that [the standard] is likely to result in the unavailability in the United States in any product type (or class) of performance characteristics (including reliability, features, sizes, capacities, and volumes) that are substantially the same as those generally available in the United States.” 42 U.S.C. § 6313(a)(6)(B)(iii)(II)(aa) (2018). Nobody contests that these new efficiency standards will, as a factual matter, make non-condensing furnaces and commercial water heaters unavailable.

The D.C. Circuit used this burden shifting framework as an excuse to defer wholesale to DOE without any independent evaluation of its own, as required by *Loper Bright*. Instead of answering the legal question presented, which was what “performance characteristic” means, the Court asked a factual question of whether appliances which could meet the new efficiency standards may be substituted for those which could not, then used that finding to define “performance characteristic” in the context of this case. It allowed one party's failure to carry its factual burden to determine a phrase's legal definition, which creates a loophole in *Loper Bright*. The Court must close this loophole, or it will render *Loper Bright* meaningless.

- b. Supreme Court review is warranted to clarify how courts should handle statutes which place a high burden of proof on non-governmental entities.

While federal agencies generally must prove that their actions comply with federal statute, EPCA essentially shifts the burden of proof to the general public to show that a proposed standard would render a class of appliances unavailable, and they must prove unavailability by a preponderance of the evidence. Here, Petitioners' assertion that non-condensing water heaters and furnaces would become unavailable was uncontested, and yet the D.C. Circuit ruled "Petitioners failed to show, by a preponderance of the evidence, that non-condensing consumer furnaces and commercial water heaters offer performance characteristics that are unlike those offered by their condensing counterparts." *American Gas Ass'n* 157 F.4th at 493.

While *Loper Bright* requires courts to render independent judgment, that mandate is less clear when interpreting EPCA simply due to the burden-shifting language present in the statute. This Court's judgment is necessary to clarify how courts should handle statutes like this one, where the boundary between factual findings and legal determinations is unclear. It is absurd to suggest that a legal phrase, such as "performance characteristic," does not have a fixed meaning within a statute, but instead relies upon what a non-governmental entity can prove fits within that phrase. That violates the premise of *Loper Bright*, which is that statutes have a best reading. *Loper*

Bright, 603 U.S. at 400. Even if the result upon review is the same, clarification is needed to help lower courts better evaluate agency actions when the factual and legal determinations overlap.

CONCLUSION

NAHB and NAR strongly urge this Court to grant certiorari to close the loophole the D.C. Circuit Court built into *Loper Bright v. Raimondo*, and to review a finding by the D.C. Circuit upholding a regulation which will exacerbate the ongoing housing crisis.

Dated: February 23, 2026

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