No. 25-879

IN THE

Supreme Court of the United States

AMERICAN GAS ASSOCIATION, ET AL.,

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, AND MANUFACTURED HOUSING INSTITUTE SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are a group of trade associations whose members' interests are threatened by the Consumer Furnace Rule.[2] The National Apartment Association (NAA) is

[1] Pursuant to this Court's Rule 37.2, *amici* provided timely notice of their intention to file this brief to counsel for all parties. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 88 Fed. Reg. 87,502 (Dec. 18, 2023). Two other

the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 139 state and local affiliates, NAA encompasses nearly 113,000 members representing more than 13.5 million apartment homes. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, responsibility, inclusivity, and innovation. NAA and its network of state and local apartment associations work to ensure that public policy does not impede but rather promotes the ability of apartment owners and operators to run their businesses and provide housing to more than 40 million Americans.

Based in Washington, D.C., the National Multifamily Housing Council (NMHC) is where rental housing providers and suppliers come together to help meet America's housing needs by creating inclusive and resilient communities where people build their lives. NMHC advocates for solutions to America's housing challenges, conducts rental-related research, and promotes the desirability of rental living. Over one-third of American households rent, and over 21 million U.S. households live in an apartment home (buildings with five or more units).

The Manufactured Housing Institute (MHI) is the only national trade organization representing all segments of the factory-built housing industry. MHI's members include builders, suppliers, retail sellers, lenders, installers, community owners, community managers, and others who

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rules are also at issue in this case: (1) Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 86 Fed. Reg. 73,947 (Dec. 29, 2021); and (2) Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment, 88 Fed. Reg. 69,686 (Oct. 6, 2023). *Amici* limit their focus to the Consumer Furnace Rule.

serve the manufactured housing industry, as well as 50 affiliated state organizations. MHI's members are responsible for close to 85% of the manufactured homes produced each year. Manufactured housing provides an affordable form of home ownership for more than 22 million people nationwide.

As representatives of a broad range of housing providers, *amici* have much at stake regarding the Consumer Furnace Rule. *Amici* submit this brief to (1) highlight particularly troublesome aspects of the decision below both for administrative law generally and for the Energy Policy and Conservation Act (EPCA) specifically, and (2) emphasize the Consumer Furnace Rule's unintended consequences of making housing less affordable, especially for low-income individuals who are least able to bear the increased costs.

SUMMARY OF ARGUMENT

The decision below has the potential to be a landmark case for all the wrong reasons. In a trailblazing opinion, the D.C. Circuit ran roughshod over this Court's precedents and Congress's statutes. Despite *Loper Bright*'s clear command that courts must exercise their "independent judgment in deciding whether an agency has acted within its statutory authority," *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 412 (2024), the D.C. Circuit instead deferred to DOE's reading of EPCA by declining to "second-guess" the agency's view. Worse yet, it did so on the flimsiest of bases, citing a phantom statutory delegation of discretion and irrelevant agency expertise as support. If that is all it takes to sidestep *Loper Bright* and restore a mode of analysis that looks suspiciously like *Chevron* deference, then the age of near-reflexive agency deference is very much back in full force in the Nation's most influential lower court for administrative law.

The D.C. Circuit also fundamentally transformed EPCA from a statute that places the highest of values on consumer choice into one that is far less concerned with that goal. EPCA plainly states that DOE may not adopt efficiency standards that are "likely to result in the unavailability" of products with "performance characteristics" that are currently available. 42 U.S.C. §§ 6295(o)(4), 6313(a)(6)(B)(iii)(II)(aa). The decision below adopted an unduly narrow view of that provision, and only by doing so was it able to uphold the Consumer Furnace Rule despite its banning of non-condensing furnaces. The upshot is a substantial weakening of EPCA's explicit protection of consumer choice. Now all of the many EPCA-covered products that Americans use and value are at risk of being banned by new efficiency regulations, despite Congress's clear command to the contrary.

The practical consequences of the decision below are no less dire. The Consumer Furnace Rule will add substantial new costs to housing. These added financial burdens come at the worst possible time, as the Nation is already in the midst of a housing affordability crisis. Further exacerbating the situation is that these new costs fall disproportionately on those least able to bear them. These real consequences for real people further underscore the importance of this case and serve as an additional reason for this Court to grant certiorari.

ARGUMENT

I. THE DECISION BELOW UNDERMINES BOTH *LOPER BRIGHT* AND EPCA'S PROHIBITION AGAINST BANNING ENTIRE CATEGORIES OF APPLIANCES

The D.C. Circuit did violence to both *Loper Bright* and EPCA in the decision below. It provided a blueprint for evading the key features of both. Without this Court's intervention, the decision below will usher in a new age of

agency deference and the trouncing of Congress's clearly expressed protection of consumer choice.

A. The D.C. Circuit circumvented *Loper Bright*.

The D.C. Circuit's decision effectively rolls back the clock to the days of *Chevron* deference. Although the opinion's statutory analysis began with the correct statement that "DOE's interpretation of EPCA does not bind us," Pet. App. 14a, it gradually backtracks and by the end effectively accords DOE significant deference on the core statutory interpretation question in the case—the meaning of "performance characteristic" in EPCA.

The D.C. Circuit accomplished this maneuver by making a series of interpretive moves that eventually escalate to something resembling full-blown *Chevron* deference. The court started off by holding that "Congress gave DOE 'a degree of discretion' to decide what constitutes a performance characteristic." *Ibid.* (quoting *Loper Bright*, 603 U.S. at 394). Yet one searches EPCA in vain for any of the hallmarks of interpretive delegation that the Court identified in *Loper Bright*. EPCA contains no "express[] delegat[ion]" to DOE "to give meaning to [this] particular statutory term." *Loper Bright*, 603 U.S. at 394. Nor does the statute employ delegative terms such "appropriate" or "reasonable" when it comes to defining a "performance characteristic." *Id.* at 395.

Instead, the D.C. Circuit's basis for this finding of delegation of discretion appears to rest on its view that the definition of the term "performance characteristic" is "case-specific." Pet. App. 16a. But by "case-specific," the court seemingly referred to the routine scenario in which a statutory term is applied to a specific set of facts, as the definition of "performance characteristic" is both "plain" and "broad," Pet. App. 15a, and there is no dispute about the relevant facts of condensing and non-condensing furnaces. Needless to say, this routine presentation of a legal

question provides no basis for surrendering interpretive authority to an agency. Rather, all a court must do is take the definition of the statutory term "performance characteristic" and apply it to the undisputed facts regarding condensing and non-condensing furnaces. That lies at the core of the judiciary's foundational duty to "say what the law is." *Loper Bright*, 603 U.S. at 385 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)).

The D.C. Circuit's claim of agency "expertise" is another miscue. Pet. App. 27a. To be sure, an agency's view of a statute "may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Loper Bright*, 603 U.S. at 402. But the decision below takes that a step further and credits DOE's technical expertise despite the fact that it is irrelevant to the question at hand. Whether a product's compatibility with existing infrastructure qualifies as a "performance characteristic" is a not a technical question, and it certainly does not implicate DOE's expertise. Yet the D.C. Circuit invoked that expertise as a basis for agency deference nevertheless. That marks a departure from this Court's admonition in *Loper Bright* that deference to an agency's view has never made sense when the interpretive question has "little to do with an agency's technical subject matter expertise." *Ibid.* Moreover, even if this issue were a technical one, "it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions." *Ibid.*

The D.C. Circuit concluded its analysis by professing that it "ha[d] no reason to *second-guess* DOE's view." Pet. App. 27a (emphasis added). That statement harkens back to a bygone era where courts reviewed agency statutory interpretations merely for a baseline level of reasonableness. See *Chevron, U.S.A.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). It is difficult to square with this

Court's command in *Loper Bright* that "courts use every tool at their disposal to determine the best reading of the statute." *Loper Bright*, 603 U.S. at 400. Determining the *best* reading requires more than reviewing the agency's interpretation and finding no great fault that warrants second-guessing. After all, "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Ibid.*

Anything short of full fidelity to *Loper Bright* from the D.C. Circuit, the most influential lower court in this critical area, portends further harm to administrative law writ large. It takes no great imagination to see how this will play out. The barriers to entry are minimal—merely finding some "case-specific" aspect of the question and perhaps also invoking general agency expertise. Once that is done, then courts will shift from "exercis[ing] their independent judgment in deciding whether an agency has acted within its statutory authority," *id.* at 412, to the much more deferential mode of determining whether an agency's interpretation should be "second-guess[ed]," Pet. App. 27a. This Court's intervention is required to nip this dangerous deviation in the bud and ensure that *Loper Bright*'s core holding remains the guiding force in administrative law.

B. The D.C. Circuit provided a roadmap for evading EPCA's prohibition against banning entire categories of appliances.

The decision below also significantly weakened EPCA's prohibition against DOE adopting efficiency standards that are "likely to result in the unavailability" of products with "performance characteristics" that are currently available. 42 U.S.C. §§ 6295(o)(4), 6313(a)(6)(B)(iii)(II)(aa). As Judge Rao explained in her dissent, the "unavailability" limitation "balances the regulatory promotion of greater energy efficiency with the preservation of products that have features that provide

utility to consumers." Pet. App. 46a; see also H.R. Rep. No. 100-11, at 22-23 (1987) (explaining that the unavailability provision "ensures that energy savings are not achieved through the loss of significant consumer features" and prohibits a standard from making a product with a particular feature "prohibitively expensive"). "Non-condensing appliances," she continued, have a "unique venting method, which allows for direct integration into many existing exhaust systems without cumbersome and costly retrofits. This integration capability is a 'performance characteristic' of non-condensing appliances that EPCA protects from regulatory elimination." Pet. App. 56a-57a.

The majority cast aside that straightforward reasoning. Although "[n]o one doubts that the challenged regulations make non-condensing appliances unavailable," Pet. App. 44a, the D.C. Circuit managed to uphold the Consumer Furnace Rule nonetheless by denying that "non-condensing consumer furnaces * * * offer performance characteristics that are unlike those offered by their condensing counterparts," Pet. App. 27a. Petitioners and Judge Rao have chronicled the myriad missteps the D.C. Circuit made along the way. See Pet. 25-32; Pet. App. 50a-59a. The bottom line is that the D.C. Circuit's cramped view of the "unavailability" provision undermines EPCA's explicit protection of consumer choice.

Absent this Court's intervention, this will be only the first chapter in this story. The D.C. Circuit has provided DOE the playbook for eliminating entire categories of products despite EPCA's explicit prohibition against doing so. Today the casualties are non-condensing consumer furnaces. Tomorrow it could be any of the many other appliances that Americans use, depend on, and value in their daily lives. Congress carefully crafted EPCA to prevent precisely this result. But its plainly expressed intent will be thwarted if the decision below stands.

II. THE CONSUMER FURNACE RULE WILL EXACERBATE THE HOUSING AFFORDABILITY CRISIS

The importance of this case extends beyond the doctrinal consequences of the D.C. Circuit's opinion. While those are certainly disruptive, the immediate practical effects of upholding the Consumer Furnace Rule warrant discussion as well. Put plainly, the Consumer Furnace Rule will impose steep new costs on housing, with lower-income individuals bearing the brunt of the added expenses.

A. The Consumer Furnace Rule will add these new cost burdens in myriad ways. Because only condensing furnace technology can meet the Consumer Furnace Rule's 95 annual fuel utilization efficiency ("AFUE") standard, it effectively eliminates non-condensing furnaces as an option for home heating. That directly translates into an increase in the cost of furnaces for many owners and developers of housing. For starters, condensing furnaces cost approximately $1,300 more than non-condensing furnaces. *Amici* Joint Comments, J.A.600. That represents a substantial additional cost that will find its way into home prices and rents.

Equally troubling is that the need to use condensing furnaces will require physical changes in the design of some types of housing. See *ibid.* Condensing furnaces typically require not only larger cabinets but also substantially different (and larger) venting/combustion air intake systems and the addition of condensate drain systems. While these larger units can generally be accommodated in more spacious, higher-end homes, these physical differences can become more problematic in multifamily dwelling units and entry-level homes.

These problems can be particularly acute for housing providers and homeowners who need to replace their furnaces. See *ibid.* For example, replacing non-condensing units located in attics with condensing units

could require a substantial retrofit of the dwelling unit. That is because the purchase of a condensing furnace, often with a larger cabinet and different ductwork requirements, may require modifications to the property to accommodate the larger cabinet, new ductwork for venting, and new plumbing for drainage.

All these issues are, if anything, magnified for owners of existing multifamily properties. J.A.600-01. Replacing a gas furnace in an individual apartment home now may require the construction of an entirely new ventilation system within that apartment to meet the venting requirements of the condensing furnace unit. This poses significant constructability challenges given the typical size and configuration of apartment buildings and dwelling units. In many properties, this would create a serious obstacle because there is insufficient clearance on the exterior wall of the property to locate a ventilation pipe due to existing windows and doors. Eliminating windows or limiting their operability is likely not an option for overcoming this barrier given existing requirements for egress, fire safety, ventilation, and light. All of that construction will also come with an added financial burden that many apartment owners will be hard-pressed to cover given their tight margins.[3]

These issues are also heightened for homeowners faced with replacing their broken or outdated furnace. On top of the approximately $1,300 additional cost to replace a non-condensing furnace with a condensing furnace, these residents may be faced with a home renovation

[3] See *Dollar of Rent Tool*, NAA (2026) (breaking down the various expenses that rent payments go to), https://naahq.org/research/dollar-rent-tool.

costing several thousand additional dollars.[4] The median annual household income of the typical manufactured home homeowner is approximately $35,000, so the average manufactured homeowner may be unable to afford this expense that will reduce the livable space in their home.[5] Those residents who cannot afford such a renovation may turn to alternative heating sources such as space heaters, which are both not energy efficient and, in many instances, dangerous.

Depending on the property and the equipment in use, altering the venting for the furnace may also necessitate replacement of the gas hot water heater. J.A.601. In addition to the ventilation requirements, the plumbing issues associated with this technology would also lead to considerable expense for owners seeking to replace an old or malfunctioning furnace with a new, efficient gas

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[4] Manufactured homes are constructed according to a federal, performance-based construction code known as the HUD Code. 24 C.F.R. § 3280, *et seq*. Any modifications to a manufactured home once constructed require approval of the manufacturer and its approved Design Approval Primary Inspection Agency. Therefore, owners of manufactured homes will have to undertake additional time and expense obtaining this approval for any renovations necessitated by a replacement furnace.

[5] DOE's original cost analysis assumed limited impact on the manufactured home replacement market because furnaces generally will not be replaced, arguing that "the lifetime of a mobile home is often similar to that of a [mobile home gas furnace]." 81 Fed. Reg. 65,720, 65,795 (Sept. 23, 2016). However, the useful life of today's properly maintained manufactured homes are equivalent to site-built housing. Further, a recent survey of manufactured home homeowners conducted by MHI indicates that many homeowners enjoy living in manufactured housing and plan to stay in their homes indefinitely. Thus, contrary to DOE's assumptions, there will be a significant price impact for homeowners when they must face the costly process of retrofitting their manufactured homes to replace an old furnace with newer, more efficient technology.

furnace. The cost impact of changing out flues and adding combustion air ducts to existing buildings would also impact fire-rated floor assemblies. These constructability issues would result in a potentially prolonged displacement of residents, extensive disruption to property operations, interruption of resident quality of life, and significant costs.

These additional costs will, in turn, lead to higher home prices and higher rents. J.A.599-600. Whether that occurs through passing the costs on to the buyers or renters or due to price increases following housing underproduction caused by these heightened costs, the result will be that Americans will have to pay more for their housing. The most vulnerable among us will be hardest hit, as low-income individuals are not well positioned to absorb the higher costs for the largest line-item in their budget. These Americans are already struggling to make ends meet. Yet the Consumer Furnace Rule ratchets up the pressure on their precarious finances.

Contrary to DOE's claims, these costs will not be offset by savings on operating costs. In some areas (particularly the South), owners will not easily be able to recoup the added costs of 95 AFUE units in new housing. J.A.601. In many Southern climates, furnaces run for a maximum of three months a year, and usually only in response to temperatures that are relatively mild by the standards of New England or the Upper Midwest. For these owners, it will take years if not decades to recoup the cost of a more expensive furnace through long-term energy savings. For existing housing, even owners in cooler climates may have difficulty recouping the cost of a retrofit in a reasonable period of time depending on the extent of the work required to install a condensing furnace. See *ibid.* These calculations are even more complex in the rental housing environment where there can be a disconnect between who bears the high, upfront costs of the proposed

equipment and the party responsible for utility expenses. But the result is the same—a less than sanguine outlook on the prospects for energy savings to offset the high up-front costs of the 95 AFUE units mandated by the Consumer Furnace Rule.

B. In the current housing market, the Consumer Furnace Rule's addition to housing costs is a burden that many households cannot bear. Housing prices have risen precipitously in recent years. Median home sale prices have risen by double digits. J.A.599. As a result, seven out of ten households cannot afford a median-priced home, and affordability is deteriorating further due to significant increases in mortgage rates. *Ibid.* Entry-level homes (including manufactured homes) have not been immune to these market forces. If anything, the situation is worse in that critical market segment due to a supply crunch. A generation ago nearly half of new home construction was devoted to entry-level homes; now their share has plummeted to the single digits. *Ibid.*

It is no better for America's renters. Rents have increased significantly, resulting in a rise of cost-burdened apartment households from 42.4% in 1985 to 54.7% in 2019. *Ibid.* The number of affordable apartments (monthly rents below $1,000) declined by 4.7 million between 2015 and 2020 alone. *Ibid.*

Regulations that add to the cost of housing are a key factor contributing to the affordability crisis. Even when the individual costs of compliance with these requirements seem relatively modest, added regulatory burdens collectively create a substantial financial burden for the development and rehabilitation of housing. Indeed, regulatory requirements account for almost a quarter of the average cost of a new single-family home. See *Government Regulation in the Price of a New Home: 2021*,

NAHB (May 5, 2021), at 2.[6] And they account for nearly half of the total development costs of new multifamily communities. See *NMHC-NAHB Cost of Regulations Report* (2022) (June 9, 2022), at 3.[7] Whether that manifests in the form of higher rents and sales prices or the underproduction of housing due to high construction costs, the result is the same—making a bad housing climate even worse for millions of Americans.

Every added dollar of expense makes a real difference. A price increase of even just $1,000 will price out over 140,000 households from the market. See *NAHB Priced-Out Estimates for 2023*, NAHB (March 2023), at 1.[8] In context, this prevents over 9,000 households in a state like Texas from being able to afford a home. *Id.* at 4. The Consumer Furnace Rule is worsening the housing affordability problem and putting safe and adequate housing beyond the reach of many Americans.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf?rev=29975254e5d5423791d6b3558881227b.

[7] https://www.nmhc.org/research-insight/research-report/nmhc-nahb-cost-of-regulations-report/.

[8] https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2023/special-study-nahb-priced-out-estimates-for-2023-march-2023.pdf.

Respectfully Submitted.

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