

No. 21A658

**IN THE
SUPREME COURT OF THE UNITED STATES**

STATE OF LOUISIANA, et al.,
Applicants,

v.

JOSEPH R. BIDEN, JR., in his official capacity as
President of the United States, et al.,
Respondents.

ON APPLICATION TO VACATE AN ORDER OF
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT STAYING AN INJUNCTION
ISSUED BY THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
LOUISIANA PENDING APPEAL

**MOTION FOR LEAVE TO FILE AND BRIEF OF
MANUFACTURED HOUSING ASSOCIATION
FOR REGULATORY REFORM AS AMICUS
CURIAE IN SUPPORT OF APPLICANTS**

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**MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE**

Pursuant to Supreme Court Rule 37.2(b), the Manufactured Housing Association for Regulatory Reform (MHARR) moves for leave to file the accompanying brief in support of the application to vacate the United States Court of Appeals for the Fifth Circuit's stay pending appeal of the preliminary injunction entered by the United States District Court for the Western District of Louisiana. Due to the Court's expedited briefing schedule, MHARR asks for leave without the regularly required 10 days' advance notice to the parties, normally required by Supreme Court Rule 37.2(a). Applicants consent to the filing of MHARR's brief. Respondents advised that MHARR should refer its request to the Court for action.

MHARR is a Washington, D.C.-based national trade organization representing the views and interests of producers of manufactured housing regulated by the United States Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (1974 act), as amended by the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401, et seq.) (2000 reform law), and subject to energy-related regulation by the United States Department of Energy (DOE) pursuant to Section 413 of the Energy Independence and Security Act of 2007 (EISA). MHARR was founded in 1985 and its members

include independent producers of manufactured housing from all regions of the United States.

MHARR seeks leave to file the accompanying brief in support of the application because Executive Order 13990 and the Social Cost of Greenhouse Gas Estimates, which are being used by DOE in rulemaking, will impose increased costs for MHARR's members and, as a direct result, low and moderate-income consumers of manufactured homes.

MHARR therefore respectfully requests leave of Court to file the accompanying brief, which it believes will aid the Court in ruling on the application.

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Dated: May 9, 2022

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INTEREST OF AMICUS CURIAE¹

The Manufactured Housing Association for Regulatory Reform (MHARR) is a Washington, D.C.-based national trade organization representing the views and interests of producers of manufactured housing regulated by the United States Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (1974 Act),² as amended by the National Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401, et seq.) (2000 reform law), and subject to energy-related regulation by the United States Department of Energy (DOE) pursuant to Section 413 of the Energy Independence and Security Act of 2007 (EISA). MHARR was founded in 1985 and its members include independent producers of manufactured housing from all regions of the United States.³

¹ No counsel for any party authored this brief in any part, and no person or entity other than amicus made a monetary contribution to fund its preparation or submission.

² The 1974 Act defines a “manufactured home” as “a structure, transportable in one or more sections, which, in travelling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes plumbing, heating, air conditioning and electrical systems contained therein” 42 U.S.C. 5402(6).

³ MHARR’s members include “small businesses” as defined by the United States Small Business Administration and “small entities” for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

MHARR has an interest in the application because Executive Order 13990 (EO13990) and the Social Cost of Greenhouse Gas Estimates (SC-GHG Estimates), which are being used by DOE in rulemaking, will impose increased costs on MHARR's members and, as a direct result, low and moderate-income consumers of manufactured homes.

ARGUMENT

I. DOE has and is Currently Using the SC-GHG Estimates in Rulemaking.

In response to Applicants' challenge of EO13990 and the SC-GHG Estimates in the United States District Court for the Western District of Louisiana, Respondents argued that the SC-GHG Estimates were not being used and, if they were, the SC-GHG Estimates had no material impact on any regulatory process. In other words, Respondents claimed that the SC-GHG Estimates—if used—were for only informational purposes despite EO13990's *use* directive.⁴ Considering, however, that DOE has and is currently using the SC-GHG Estimates in rulemaking, Respondents' previous representations are verifiably false.

On August 26, 2021, DOE published a Supplemental Notice of Proposed Rulemaking (SNPR) in the Federal Register, to establish for the first time, “Energy Conservation Standards for Manufactured Housing” pursuant to Section 413 of the Energy Independence and Security Act of 2007 (EISA). In the SNPR, DOE provides that it “estimates the monetized benefits of the reduction in emissions of CO₂, CH₄, and N₂O by using a measure of the social cost . . . of each pollutant (e.g., SC-CO₂).” See Energy Conservation Program: Energy Conservation Standards for Manufactured Housing,

⁴ It goes without saying that Respondents, which are the source of the SC-GHG Estimates, should know whether the SC-GHG Estimates are being used and, if so, in what way.

Supplemental Notice of Proposed Rulemaking, <https://www.govinfo.gov/content/pkg/FR-2021-08-26/pdf/2021-17684.pdf> (August 26, 2021). DOE writes the following:

DOE *used* the estimates for the social cost of greenhouse gases (SC-GHG) from the most recent update of the Interagency Working Group on Social Cost of Greenhouse Gases, United States Government (IWG) working group from “Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990.” (February 2021 TSD). DOE has determined that the estimates from the February 2021 TSD, as described more [fully] below, are based upon sound analysis and provide well founded estimates for DOE’s analysis of the impacts of the reductions of emissions anticipated from the proposed rule.

The SC-GHG estimates in the February 2021 TSD are interim values developed under Executive Order (E.O.) 13990 for *use* until an improved estimate of the impacts of climate change can be developed based on the best available science and economics. The SC-GHG estimates *used* in this analysis were developed over many years, using a transparent process, peer-reviewed methodologies, the best science

available at the time of that process,
and with input from the public.⁵

Id. at 47815 (emphasis added).

On April 4, 2022, DOE published its *final* environmental impact statement (EIS) analyzing the impacts related to DOE’s proposed energy conservation standards for manufactured homes. *See* Final Environmental Impact Statement for Proposed Energy Conservation Standards for Manufactured Housing, <https://www.energy.gov/sites/default/files/2022-04/final-eis-0550-energy-conservatin-standards-manufactured-housing-2022-04.pdf> (April 2022). In the EIS, DOE writes the following related to greenhouse gases (GHG):

With regard to GHGs, current emissions provided a baseline against which reductions associated with the proposed energy conservation standards

⁵ Notably, DOE does not assert that the SC-GHG Estimates *were subject to public comment*, which is required given that the SC-GHG Estimates constitute a “legislative rule” in that EO13990 directs agencies—such as DOE—to employ specific numerical values (i.e., the SC-GHG Estimates) in rulemaking. *See United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) (action dictating a “specific numeric amount” is a legislative rule) (collecting cases); *see also Children’s Hospital of the King’s Daughters, Inc. v. Azar*, 896 F.3d 615, 623 (4th Cir. 2018) (concluding that “[b]ecause the policy amounts to a legislative rule, the APA required that agency promulgate the policy through notice-and-comment rulemaking”). Rather than comply with the law, EO13990 pulled an “end around” that resulted in the issuance of the SC-GHG Estimates despite no (1) statutory authority, (2) notice-and-comment procedures, or (3) pre-enforcement judicial review.

can be compared. To support such an analysis, the benefits of reducing GHG emissions can be monetized by *using* a measure of the social cost (SC), which represents the monetary value of the net harm to society associated with a marginal increase in GHG-specific emissions in a given year, or the benefit of avoiding that increase. Estimates of the social costs of greenhouse gases (SC-GHG) provide an aggregated monetary measure (in current U.S. dollars) of the future stream of damages associated with an incremental metric ton of emissions and associated physical damages (e.g., temperature increase, sea level rise, infrastructure damage, health effects) in a particular year. *In this way, SC-GHG estimates can help the public and Federal agencies understand or contextualize the potential impacts of GHG emissions and, along with information on other potential environmental impacts, can inform a comparison of alternatives.*

In principle, the SC-GHG includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem

services. The SC-GHG reflects the societal value of reducing emissions of the gas in question by one metric ton. The Interagency Working Group on the Social Cost of Greenhouse Gases (IWG SCGHG 2021) has published estimates of the global social benefits of CO₂, CH₄, and N₂O reductions in its *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates* under Executive Order 13990. The values *used* in DOE's analyses to estimate SC-CO₂, SC-CH₄, and SC-N₂O were generated *using* the values in that report, which represents the latest interagency update.

The SC-GHG estimates *used* to contextualize potential impacts of DOE's proposal are presented in Figures 3.2-2, 3.2-3, and 3.2-4.

Id. at 3-13 through 3-14 (emphasis added). DOE also specifically notes in the EIS that “[o]n March 16, 2022, the Fifth Circuit Court of Appeals (No. 22-30087) granted the federal government’s emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana v. Biden*, No. 21-cv-1074-JDC-KK (W.D. La.)” *See Id.* at n. 40. The DOE thereafter writes that it “will revert to its approach prior to the injunction and

*present monetized benefits where appropriate and permissible under law.” Id. (emphasis added).*⁶

Considering the foregoing, DOE, contrary to Respondents’ previous representations, has and is currently using the SC-GHG Estimates in rulemaking.

II. DOE’s Proposed Energy Conservation Standards for Manufactured Housing, Which Rely on the SC-GHG Estimates, Will Impose Increased Costs for MHARR’s Members and, as a Direct Result, Low and Moderate-Income Consumers of Manufactured Homes.

In support of the application, Applicants argue that the SC-GHG Estimates, by design, “drive up the cost side of every regulatory action even touching greenhouse gas emissions” and specifically mention “the design of manufactured housing” as a

⁶ DOE’s use of the SC-GHG Estimates to, in its words, “present monetized benefits,” clearly reflects—contrary to Respondents’ claim—that the SC-GHG Estimates are not merely for informational purposes but are playing a material part in federal agency decision-making. *See Sierra Club v. Sigler*, 695 F.2d 957, n. 16 (5th Cir. 1983) (cost-benefit analysis “has become a common tool in legislative and administrative decision[-]making”) (emphasis added); *see also* Executive Order 12866 at Section I(b)(6) (“Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”).

sector that will experience “new hidden costs.” See Application to Vacate at 18. The argument is absolutely correct. DOE’s proposed energy conservation standards for manufactured housing, which rely on the SC-GHG Estimates, will impose increased costs for MHARR’s members and, as a direct result, low and moderate-income consumers of manufactured homes. So, there is a real “social cost” associated with the SC-GHG Estimates and, absent court intervention, it will be disproportionately paid by millions of America’s working poor and minorities by denying them access to affordable housing.⁷

In developing the proposed energy conservation standards for new manufactured housing, DOE considered three approaches that are referred to as “action alternatives” in the EIS. See Final Environmental Impact Statement for Proposed Energy Conservation Standards for Manufactured Housing, <https://www.energy.gov/sites/default/files/2022-04/final-eis-0550-energy-conservatin-standards-manufactured-housing-2022-04.pdf> (April 2022) at 2-1. Additionally, DOE purportedly evaluated “the alternative of taking no action” only in accordance with National Environmental Policy Act (NEPA). *Id.*⁸ These “action alternatives” are described by DOE as follows:

⁷ MHARR does not necessarily dispute that there is a “cost of carbon.” However, that cost—whatever it may be—should not be recouped in such a way that it disparately impacts low and moderate-income consumers.

⁸ DOE notes that “[i]n accordance with NEPA, [it] is also evaluating the alternative of taking no action, which serves as the baseline against which potential consequences of the action

- **Alternative A:** Tiered standards based on price. Tier 1 standards would apply to homes at or below a manufacturer’s retail list price threshold; Tier 2 standards would apply to homes priced above the threshold.

- **Alternative B:** Tiered standards based on size. Tier 1 standards would apply to single-section homes; Tier 2 standards would apply to multi-section homes.

- **Alternative C:** Untiered standards. These standards would apply to all homes regardless of price or size.

- **Alternative D:** No action. No change from the existing HUD Code.

Id. Under “action alternatives” A, B, and C, DOE would establish energy conservation standards that are specific to, *inter alia*, the following climate zones:

alternatives can be compared.” *See id.* at 2-1. NEPA requires that federal agencies consider alternatives to recommended actions, including “no action” at all. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (citing *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). Compared to the other alternatives, DOE appears to have given little, if any, actual consideration to Alternative D, which, as noted *infra* at n. 9, is admittedly the *only* approach that does not result in a cost increase for purchasers of manufactured homes.

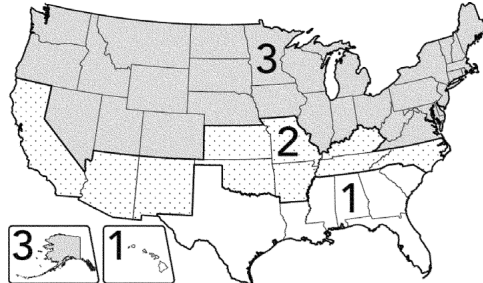


Figure 460.101 Climate Zones

Id. While DOE allegedly evaluated all of the alternative actions, it has identified Alternative C (the untiered standards) as the *preferred* alternative. *See id.* at C-6.⁹ Assuming DOE adopts Alternative C, MHARR’s members and consequently low and moderate-income consumers of manufactured homes will be directly harmed by way of price increases that will exclude *millions* of households from the

⁹ Alternative A and B would likewise result in cost increases for MHARR’s members and low and moderate-income consumers of manufactured homes. The cost increases would only be less depending on the purchase price of the manufactured home (under Alternative A) or whether the manufactured home is a single section or double section (under Alternative B). Only under Alternative D (no action) would the purchase price not increase for manufacture homes. *See* Final Environmental Impact Statement for Proposed Energy Conservation Standards for Manufactured Housing, <https://www.energy.gov/sites/default/files/2022-04/final-eis-0550-energy-conservatin-standards-manufactured-housing-2022-04.pdf> (April 2022) at 4-64 (noting that under Alternative D, “[t]he purchase price for manufacture homes *would not increase* because of energy conservation standards, and the availability and demand for manufactured homes would not decrease due to energy conservation standards”) (emphasis added).

manufactured housing market and thus from homeownership altogether. Indeed, based on DOE’s August 26, 2021 Supplemental Notice of Proposed Rulemaking (SNPR) in the Federal Register, a consumer can expect the following purchase price increases for a manufactured home under Alternative C, depending on his or her climate zone:¹⁰

ZONE 1:	\$4,143.00
ZONE 2:	\$6,167.00
ZONE 3:	\$5,839.00
NATIONAL AVERAGE	\$5,289.00

Based on the DOE’s October 26, 2021 Notice of Data Availability (NODA) in the Federal Register, a consumer can expect the following purchase price increases for a manufactured home under Alternative C, depending on his or her climate zone:¹¹

¹⁰ The amounts calculated by DOE are attributable to the alleged retail level purchase price impact of the proposed standards themselves. They do not include and do not attempt to estimate either: (1) the cost and purchase price impact of regulatory compliance costs resulting from the amended energy standards, including but not limited to costs of testing, enforcement and other regulatory compliance expenses; or (2) the increased cost of financing all such additional costs. Increased financing costs will fluctuate, but generally will be highest for lower-income/higher-risk borrowers.

¹¹ See Energy Conservation Program: Energy Conservation Standards for Manufactured Housing, Notice of Data Availability, <https://www.govinfo.gov/content/pkg/FR-2021-10-26/pdf/2021-23188.pdf> (October 26, 2021).

ZONE 1:	\$4,131.00
ZONE 2:	\$6,149.00
ZONE 3:	\$5,822.00
NATIONAL AVERAGE	\$5,267.00

Importantly, because of these crippling price increases, millions of low to moderate-income consumers will be unable to afford a manufactured home and presumably homeownership all together. To be sure, as recently as August 2014, the National Association of Home Builders (NAHB) estimated that increasing the price of a single section manufactured home by \$1,000 would “price out” 347,901 households. NAHB further estimated that increasing the price of a double section manufactured home by \$1,000 would “price out” 315,585 households. *Id.*¹² Applying these numbers

¹² This price increase will impact minority communities the hardest. May 2021 data published by the Consumer Financial Protection Bureau (CFPB) shows that “only a minority (27 percent) of consumers who applied for a loan to purchase a manufactured home succeeded in obtaining financing” and that 50 percent of chattel (i.e., manufactured home titled as personal property) purchase loan applications “were denied.” See Consumer Financial Protection Bureau’s Office of Research and Mortgage Markets, *Manufactured Housing Finance – New Insights from the Home Mortgage Disclosure Act Data*, https://files.consumerfinance.gov/f/documents/cfpb_manufactured-housing-finance-new-insights-hmda_report_2021-05.pdf (May 2021). Moreover, the 50 percent rejection level for manufactured home personal property loans – representing nearly 80 percent of the entire manufactured housing new home market according to the United States Census Bureau statistics – *disproportionately* affected minority communities. As noted by CFPB, “Black and African American borrowers are the only racial group that are . . . overrepresented in chattel lending compared to site-built.” *Id.* With “Black and African

to the price increase imposed under Alternative C, the number of households that will be excluded from purchasing a manufactured home is staggering.

Based on DOE’s August 26, 2021 SNPR, the following number of households will be excluded from purchasing a manufacturing home (either single section or double section) based on the price increases imposed under Alternative C, depending on his or her climate zone:

	<i>Single</i>	<i>Double</i>
ZONE 1	895,497	1,306,640
ZONE 2	1,676,883	1,944,979
ZONE 3	1,620,871	1,841,533
NATIONAL AVERAGE	1,361,684	1,668,071

Based on DOE’s October 26, 2021 NODA, the following number of households would be excluded from purchasing a manufacturing home (either single section or double section) based on the price increases imposed under Alternative C, depending on his or her climate zone:¹³

American borrowers” already subject to disproportionately-high purchase loan rejection rates within the manufacturing housing market, purchase price increases will inevitably result in (1) even higher loan rejection rates for personal property loans; (2) even greater disproportion in loan rejection rates for minority communities and specifically Black and African Americans; and (3) a corresponding decrease in homeownership for minority communities and particularly Black and African Americans.

¹³ There will undoubtedly be societal and other “downstream”

	<i>Single</i>	<i>Double</i>
ZONE 1	893,062	1,302,855
ZONE 2	1,672,012	1,939,302
ZONE 3	1,616,000	1,836,171
NATIONAL AVERAGE	1,357,510	1,661,133

Considering the foregoing, the proposed energy conservation standards for manufactured housing, which rely on the SC-GHG Estimates, will impose increased costs on MHARR's members and, as a direct result, low and moderate-income consumers of manufactured homes. Additionally, due to the increased costs, millions of consumers will be denied access to affordable housing.

CONCLUSION

For the reasons set forth in the application and those stated herein, the Court should grant the application and vacate the United States Court of Appeals for the Fifth Circuit's stay pending appeal of the preliminary injunction entered by the United

consequences of the proposed energy conservation standards, which, again, rely on the SC-GHG Estimates, including (but not limited to) a higher degree of homelessness in the United States. In this regard, HUD has previously estimated the cost of homelessness to taxpayers to be approximately \$40,000 per homeless person, per year. *See* Politifact, HUD Secretary Says a Homeless Person Costs Taxpayers \$40,000 a Year, <https://www.politifact.com/factchecks/2012/mar/12/shaun-donovan/hud-secretary-says-homeless-person-costs-taxpayers/> (March 12, 2012).

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