## UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF TEXAS
## TYLER DIVISION

**STATE OF UTAH,**
**STATE OF TEXAS,**
**STATE OF ALABAMA,**
**STATE OF ARKANSAS,**
**STATE OF IDAHO,**
**STATE OF INDIANA,**
**STATE OF IOWA**
**STATE OF KANSAS,**
**STATE OF LOUISIANA,**
**STATE OF MISSOURI,**
**STATE OF MONTANA,**
**STATE OF NEBRASKA,**
**STATE OF SOUTH CAROLINA,**
**STATE OF TENNA**

**Plaintiffs Utah, Texas, Alabama, Arkansas, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia (collectively, "Plaintiff States"), and Plaintiff National Association of Home Builders of the United States bring this civil action for**

excluding real-world overhead and profit and further excluding real-world home designs. The Final Determination accordingly fails under the Administrative Procedure Act.

## PARTIES

6. Plaintiff State of Utah is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Utah is authorized to bring legal actions on behalf of the State and its citizens. Utah Const. art. 7, § 16; Utah Code § 67-5-1.

7. Plaintiff State of Texas is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Texas is authorized to bring legal actions on behalf of the State and its citizens.

8. Plaintiff State of Alabama is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Alabama is authorized to bring legal actions on behalf of the State and its citizens. See Ala. Code § 36-15-1(2).

9. Plaintiff State of Arkansas is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Arkansas is authorized to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." Ark. Code Ann. § 25-16-703.

10. Plaintiff State of Idaho is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Idaho is authorized to bring legal actions on behalf of the State and its citizens. Idaho Code § 67-1401(1), (11).

11. Plaintiff State of Indiana is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Indiana is authorized to "represent the state in any matter involving the rights or interests of the state." Ind. Code §,4-6-1-6.

12. Plaintiff State of Iowa is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Iowa is

**authorized to bring legal actions on behalf of the State and its citizens. *See* Iowa Code § 13.2.**

**13. Plaintiff State of Kansas is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Kansas is authorized to bring legal actions on behalf of the State and its citizens.**

**14. Plaintiff State of Louisiana is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Louisiana is authorized to sue on the State's behalf. La. Const. art. IV, § 8.**

**15. Plaintiff State of Missouri is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Missouri is authorized to "institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved." Mo Rev. Stat. § 27.060; *see also State ex rel. Hawley v. Pilot Travel Centers, LLC*, 558 S.W.3d 22, 30–31 (Mo. 2018).**

**16. Plaintiff State of Montana is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Montana is authorized to bring legal actions on behalf of the State and its citizens.**

**17. Plaintiff State of Nebraska is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General of Nebraska is authorized to bring legal actions on behalf of the State and its citizens. Neb. Rev. Stat. § 84-203.**

**18. Plaintiff South Carolina is a sovereign State of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. The Attorney General of South Carolina is authorized to bring legal actions on behalf of the State and its citizens. *See***

**enforcement of the laws of the State, the preservation of order, and the protection of public rights." (emphasis in original)).**

**19. Plaintiff State of Tennessee is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General and Reporter of Tennessee is authorized by statute to try and direct "all civil litigated matters ... in which the state ... may be interested." Tenn. Code Ann. § 8-6-109(b)(I).**

**20. Plaintiff State of West Virginia is a sovereign state of the United States of America, and it sues to vindicate its sovereign, quasi-sovereign, and pecuniary interests. The Attorney General "is the State's chief legal officer," State ex rel. McGraw v. Burton, 569 S.E.2d 99, 107 (W. Va. 2002), and**

> 3. Are estimated using methods and data that are recent and verifiable via published sources;
> 4. Are estimated to show positive life-cycle metrics; and
> 5. Are based on incremental evaluation of individual measures[.]

23. Plaintiff NAHB has numerous members who would have standing to pursue this suit in their own right. For example, customers of NAHB member Tilson Homes used $8,000,000 - $10,000,000 in FHA financing last year to purchase new homes from Tilson. Tilson has concluded that requiring compliance with the Final Determination will raise the cost of covered homes, reduce the number of affordable homes built by Tilson, and reduce Tilson's profits. Compliance with the Final Determination will also materially impair the ability of many low- and moderate-income home-buyers—including customers of Tilson—to acquire new homes.

24. Defendant Adrianne Todman is the Acting Secretary of the Department of Housing and Urban Development. She is sued in her official capacity. The Secretary of HUD is statutorily tasked with making the determination underlying this suit. *See* 42 U.S.C. § 12709.

25. Defendant U.S. Department of Housing and Urban Development is an agency of the federal government headquartered at 451 7th Street S.W., Washington, DC 20410. HUD operates programs that are subject to the energy efficiency standards underlying this suit. *See* 42 U.S.C. § 12709.

26. Defendant Thomas Vilsack is the Secretary of Agriculture. He is sued in his official capacity. The Secretary of Agriculture is statutorily tasked with making the determination underlying this suit. *See* 42 U.S.C. § 12709.

27. Defendant U.S. Department of Agriculture is an agency of the federal government headquartered at 1400 Independence Avenue S.W., Washington, DC 20250. USDA operates programs that are subject to the energy efficiency standards underlying this suit. *See* 42 U.S.C. § 12709.

## JURISDICTION AND VENUE

28. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1346.

29. An actual controversy exists between the parties under 28 U.S.C. § 2201(a).

30. This Court has authority to grant Plaintiff States' requested relief and other appropriate relief pursuant to 5 U.S.C. §§ 705-06 (the Administrative Procedure Act), 28 U.S.C. §§ 2201-02 (the

**36. An expert at the Federal Reserve Bank of St. Louis elaborated:**

> **Prior to the creation of the FHA, many banks were highly restricted in the amount of mortgage loans they were allowed to make. Mortgage loans were historically consid-**

**44. The most recent amendment to Section 109 was in the Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492, 1648 ("EISA"), which, as relevant here, replaced "CABO Model Energy Code, 1992" with "2006 International Energy Conservation Code," replaced "1989" with "2004" in the ASHRAE standard, and added new subsection (d).**

**45.**

**that have resulted in an 'energy efficiency gap' between the actual level of investment in energy efficiency and the higher level of investment that would [purportedly] be cost-beneficial from the consumer's … point of view." 79 Fed. Reg. at 21,262. The agencies conceded "the public places a low priority on energy issues and energy efficiency opportunities," and further conceded "[t]he existence of unobserved costs (either upfront or periodic) is a potential explanation for low levels of investment in energy-saving technology." Id.**

**50. Turning to the determinations required by Cranston-Gonzalez Act Section 109, the 2014 Preliminary Determination explained that "[i]n determining the impact that the 2009 IECC will have on HUD- and USDA-assisted or insured new homes, the agencies have relied on a cost-benefit analysis of the 2009 IECC completed by the Pacific Northwest National Laboratory (PNNL) for**

**53. On May 6, 2015, HUD and USDA published a final determination that adoption of**

37% increase in construction costs and higher mortgage rates more in line with real-world economic conditions. HUD and USDA also revised the down payment contribution for home purchases to 3.5% "to better reflect the typical HUD and USDA borrower." 89 Fed. Reg. at 33,120, 121. That's because "[t]he down payment requirement for FHA borrowers is a minimum of 3.5 percent, distinct from a typical 20 percent down payment requirement for conventional mortgage financing … or the 12 percent down payment rate used by DOE-PNNL and utilized by HUD and USDA in the preliminary determination." Id. at 33,121. Finally, HUD and USDA stated that "[c]ost and savings factors have been applied to the affordability analysis to better reflect the typical home [sic] FHA or USDA-sized home." Id.

number of units fundable via HOME or HTF.

73. Some states have chosen to prohibit excessive energy efficiency standards. For example, Tennessee adopted the 2018 ICC as the maximum standard allowable; to the extent localities or cities want to impose more stringent standards, they must obtain approval from the Tennessee General Assembly. 2023 HB 0799. In view of HUD and USDA's role in the housing market, the Final Determination effectively undercuts those prohibitions, and the Final Determination pressures states like Tennessee to change their laws.

## CLAIMS FOR RELIEF

### Count One

### Violation of the Private Non-Delegation Doctrine
### Administrative Procedure Act

74. Plaintiffs re-allege and incorporate by reference the preceding allegations as though fully set out herein.

75. The Administrative Procedure Act requires this Court to "set aside" final agency action that is, *inter alia*, "contrary to constitutional right, power, privilege, or immunity" "or taken "without observance of procedure required by law." 5 U.S. . . aoMR ϟ m ụ ocS ® "

**Power shall be vested in a President of the United States of America."); art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."); Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 67 (2015) (Thomas, J., concurring) ("[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. . . . These grants are exclusive.")**

**79. Where a statute requires an agency to adopt a private entity's proposed rule so long as the proposed rule meets specified criteria, the statute is unconstitutional pursuant to the private non-delegation doctrine. Nat'l Horsemen's,**

**84. Any demand (a) that covered housing comply with any standard other than those specified by Congress, i.e., the 2006 IECC or the ASHRAE Standard 90.1-2004, (b) on the basis of Section 109 of the Cranston-Gonzalez Act, must be set aside.**

## Count Two
## Administrative Procedure Act
## Second Final Determination

**85. Plaintiffs re-allege and incorporate by reference the preceding allegations as though fully set out herein.**

**86. The Administrative Procedure Act requires this Court to "set aside" final agency action that is, inter alia, "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law." 5 U.S.C. § 706(2).**

**87. When Congress amended Section 109 of the Cranston-Gonzalez Act in 1992 to add backstop energy efficiency provisions, Congress stated:**

> **If the requirements of CABO Model Energy Code, 1992, or, in the case of multifamily high rises, ASHRAE Standard 90.1-1989, are revised at any time, the Secretaries shall, not later than 1 year after such revision, amend the standards established under subsection (a) to meet or exceed the requirements of such revised code or standard unless the Secretaries determine that compliance with such revised code or standard would not result in a significant increase in energy efficiency or would not be technologically feasible or economically justified.**

**Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. at 2787.**

**88. In contrast, other portions of the Energy Policy Act of 1992 contemplate revisions to both statutorily-specified codes and "any successor" to those codes:**

> **Whenever CABO Model Energy Code, 1992, (<u>or any successor of such code</u>) is revised, the Secretary shall, not later than 12 months after such revision, determine whether such revision would improve energy efficiency in residential buildings. The Secretary shall publish notice of such determination in the Federal Register.**

**and**

> **Whenever the provisions of ASHRAE Standard 90.1 1989 (<u>or any successor standard</u>) regarding energy efficiency in commercial buildings are revised, the Secretary shall, not**

> later than 12 months after the date of such revision, determine whether such revision will improve energy efficiency in commercial buildings. The Secretary shall publish a notice of such determination in the Federal Register.

106 Stat. at 2783, 2784 (codified as amended at 42 U.S.C. § 6833).

89. The canons of statutory construction require giving meaning to the omission of "or any successor standard" from the Energy Policy Act of 1992. "[W]here Congress includes particular

**not peer reviewed nor do they follow a federally approved methodology." 89 Fed. Reg. at 33,134.**

**105. That was both a reversal in position and reflective of a schizophrenic approach to data and analyses supplied by HIRL. For example, in the 2015 Final Determination, the agencies favorably cited HIRL's analysis that calculated payback periods similar to DOE's, 80 Fed. Reg. at 25,906. The agencies then noted that PNNL's methodology incorporates data from HIRL. Id. Similarly, in the 2024 Final Determination, the agencies found it "important to note" that HIRL's energy savings analysis "show[s] consensus with the PNNL energy savings estimates used by HUD and USDA in their determination," and again noted that PNNL's methodology incorporates data from HIRL. Id. The inference is that the agencies were cherry-picking to justify a predetermined outcome. Cf. Chamber of Commerce v. U.S.D.O.L.**

108. The PNNL methodology, in contrast, is based on costs to the builder instead of costs to homebuyer consumer. The 15% overhead and profit assumed by PNNL, 89 Fed. Reg. at 33,135, is intended to account only for the overhead and profit of the sub-contractor and ignores the portion of the costs associated with the profit margin by the general contractor (i.e., builder) that get passed on to the consumer. PNNL's analysis fails to account for the business arrangement commonly used in real-world home construction. Cf. Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 923 (D.C. Cir. 1998) (an agency "retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule"). Moreover, the PNNL overhead and profit is less than the 19.0% industry average for builders

109. With respect to real-world home design, the HIRL report referenced in NAHB's comment and discussed in the 2024 Final Determination uses a Standard Reference House by Home Innovation "was originally developed using Home Innovation's 2009 Annual Builder Practices Survey (ABPS) for a representative single-family detached home," but "[t]he geometry [was] updated based on Home Innovation's 2019 ABPS." "The parameters represent the average values from the ABPS for building areas and features not dictated by the IECC."

110. The underlying Methodology Paper explains that "[m]ost houses are irregular in shape (i.e., not rectangles). Consequently, houses have a higher ratio of wall to floor area as compared to a simpletangles ȳ ] ! ] ! D } m

## Count Four
## Administrative Procedure Act
## Availability

**116. Plaintiffs re-allege and incorporate by reference the preceding allegations as though fully set out herein.**

**117. The Administrative Procedure Act requires this Court to "set aside" final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" "or taken "without observance of procedure required by law." 5 U.S.C. § 706(2).**

**118. Section 109 of the Cranston-Gonzalez Act conditions application of revised codes on the Secretary of HUD and the Secretary of Agriculture "mak[ing] a determination that the revised codes do not negatively affect the availability or affordability of new construction of assisted housing and single family and multifamily residential housing (other than manufactured homes) subject to mortgages insured under the National Housing Act (12 U.S.C. 1701 et seq.) or insured, guaranteed, or made by the Secretary of Agriculture under title V of the Housing Act of 1949 (42 U.S.C. 1471 et seq.), respectively."**

**119. In their Regulatory Impact Analysis, HUD and USDA used an estimate of the price elasticity of demand applicable "for low-income households" and "estimate[d] … that the quantity in an affected submarket will decline by 1.5 percent of the pre notice market activity" as a result of applying the 2021 IECC. RIA at 80. In the 2024 Final Determination, the agencies try to minimize that calculation as their "most cautious estimate," 89 Fed. Reg. at 33,177, but it's the only estimate in the RIA. The agencies then concede adopting the 2021 IECC "would reduce the production of homes for FHA-insured borrowers by 1.5 percent, which represents a 0.2 percent reduction of all homes available to FHA-insured homebuyers." Id. In short, the agencies concede the availability of new construction of covered housing will be negatively affected by application of the 2021 IECC.**

**120. The RIA then states that "[i]ncluding the benefits imparted by the Notice will <u>diminish</u>, and <u>maybe even reverse</u>, the contraction of new construction from higher minimum energy**

**the Cranston-Gonzalez Act;**

**e. An order awarding Plaintiffs attorneys' fees and costs to the extent provided by law; and**

**f. Any further relief as the Court may deem just and proper.**

Dated: January 2, 2025

Respectfully submitted:

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