No. 21-1839

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILD VIRGINIA, et al.,
Plaintiffs/Appellants,

v.

COUNCIL ON ENVIRONMENTAL QUALITY, et al.,
Defendants/Appellees,

&

AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenors/Defendants/Appellees.

Appeal from the United States District Court for the Western District of Virginia
No. 3:20-cv-00045 (Hon. James P. Jones)

APPELLEES' FINAL ANSWERING BRIEF

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INTRODUCTION

In 2020, the Council for Environmental Quality ("CEQ") issued a rule revising its 1978 regulations instructing agencies how to implement the National Environmental Policy Act ("NEPA"). *See* 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule"). Plaintiffs filed suit bringing a facial challenge to the 2020 Rule before it went into effect. The district court concluded that it lacked subject matter jurisdiction because the lawsuit was not ripe and Plaintiffs lacked standing. Plaintiffs should have challenged a concrete application of the 2020 Rule that threatens imminent harm to Plaintiffs' interests—but they did not. The district court's judgment dismissing the suit was correct and should be affirmed.

In fact, judicial review of the 2020 Rule makes even less sense now than when Plaintiffs filed suit because CEQ is working on two rulemakings that could address many or all of Plaintiffs' concerns with the challenged Rule. *See* 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021). Thus, even if the case is justiciable, the Court should exercise its discretion to dismiss it.

STATEMENT OF JURISDICTION

For the reasons stated herein, this Court lacks Article III jurisdiction.

STATEMENT OF THE ISSUES

I. Whether, at time of the Complaint's filing, Plaintiffs' facial challenge to the 2020 Rule was justiciable under Article III of the United States Constitution

and the Administrative Procedure Act (APA) in the absence of an application of the 2020 Rule that threatened Plaintiffs with imminent, concrete harm.

II. Even assuming Plaintiffs' challenge to the 2020 Rule is justiciable, whether it is prudentially moot now that CEQ is working on two rulemakings that could address many or all of Plaintiffs' concerns with the challenged Rule.

STATEMENT OF THE CASE

A. National Environmental Policy Act

Enacted in 1969, NEPA is considered the first major environmental law in the United States. Unlike many of its successor statutes, NEPA does not mandate particular results or substantive standards but rather requires federal agencies to go through an analytical process before taking a major action that will significantly affect the environment. *See Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 418 (4th Cir. 2012) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). The core element of that process is the requirement to prepare a "detailed statement," which under CEQ regulations has come to be known as an "environmental impact statement" or EIS for short, "on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS generally describes, among other items, the purpose and need for the proposed action, the alternatives to the action,

the affected environment, and the environmental consequences of alternatives. *See id.*; 40 C.F.R. § 1502.10.

B. CEQ and the 1978 Regulations

NEPA also established CEQ—an agency within the Executive Office of the President—"with authority to issue regulations interpreting" the statute. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004); *see also* 42 U.S.C. §§ 4332(2)(B), (C), (I), 4342, 4344. Although CEQ issued guidelines to federal agencies before 1978, it issued its first set of NEPA regulations instructing agencies on how to comply with the statute in that year. *See* 43 Fed. Reg. 55,978 (Nov. 29, 1978) (1978 Rule). The 1978 regulations, among other things, expounded on the structure and requirements for EISs; defined terms such as "cumulative impact," "effects," "major Federal action," and "significantly"; and provided provisions for public comment and agency planning and decision-making. *See* 40 C.F.R. pts. 1500-08 (2019) (1978 regulations).

In addition, the 1978 regulations directed federal agencies, in consultation with CEQ, to adopt their own implementing procedures to supplement CEQ's procedures and integrate the NEPA process into the agencies' specific programs and processes. *See* 40 C.F.R. § 1507.3. Over 85 federal agencies and their subunits developed such procedures. *See, e.g.*, 23 C.F.R. pt. 771. (Federal Highway Administration/Federal Railroad Administration/ Federal Transit

Administration); 33 C.F.R. pt. 230 (U.S. Army Corps of Engineers—Civil Works); 36 C.F.R. pt. 220 (U.S. Forest Service).

C. The 2020 Rule

The 1978 regulations remained largely unchanged for over 40 years.[1] Then, in 2017, President Trump directed CEQ to lead an interagency working group to identify and propose changes to the 1978 regulations. 82 Fed. Reg. 40,463 § 5(e)(iii) (Aug. 24, 2017). In response, CEQ published a notice of proposed rulemaking proposing broad revisions to the 1978 regulations. 85 Fed. Reg. 1,684 (Jan. 10, 2020). A range of stakeholders submitted more than 1.1 million comments on the proposed rule. 85 Fed. Reg. at 43,306. In keeping with the proposed rule, the final rule promulgated on July 16, 2020, made wholesale revisions to the regulations and took effect on September 14, 2020. *Id.* at 43,304.

D. The Current Lawsuit

On July 29, 2020, Plaintiffs brought a facial challenge to the 2020 Rule. Complaint, ECF No. 1 [JA 29]. The Complaint alleges that the 2020 Rule violates the APA in various ways, *id.* ¶¶ 560-656 [JA 185-207], and that federal agencies may apply the 2020 Rule to future NEPA reviews in a manner that might harm Plaintiffs' interests. *Id.* ¶¶ 21-410 [JA 34-143]. But the Complaint does not tie its

[1] CEQ made technical amendments to the 1978 regulations in 1979, 44 Fed. Reg. 873 (Jan. 3, 1979), and amended one provision in 1986, 51 Fed Reg. 15,618 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22).

allegations of legal violations or harm to any concrete, real-world application of the 2020 Rule. Nor could it have because Plaintiffs filed their Complaint before the 2020 Rule took effect. Notwithstanding that omission, the Complaint asks the court to vacate and set aside the 2020 Rule and reinstate the 1978 regulations. *Id.* ¶¶ A-G [JA 207-08].

Even though Plaintiffs could point to no imminent application of the 2020 Rule by any federal agency that threatened their interests with concrete harm, they moved for a preliminary injunction to enjoin federal agencies from applying its provisions. ECF 30. CEQ opposed the injunction in part because Plaintiffs could not demonstrate irreparable harm in the absence of a concrete application of the 2020 Rule. ECF 31, 75. CEQ also filed a motion to dismiss because, in the absence of a concrete application of the 2020 Rule, the suit was not ripe and Plaintiffs lacked standing. ECF 52-53, 59. Defendant-Intervenors also filed a motion to dismiss limited to the issue of standing. ECF 56-57. The court held oral argument on the motions on September 4, 2020. ECF 87, 84 (Transcript) [JA 715-803].

On September 11, 2020, the district court denied the motion for preliminary injunction, explaining that Plaintiffs failed to make a clear showing that their claims are likely to succeed. Order, ECF No. 92 at 11 [JA 814]. A few days later, the district court also denied CEQ's and Defendant-Intervenors' motions to dismiss

because "it wanted benefit of a more complete record, including additional briefing and oral argument by the parties." Opinion, ECF 155 at 20 n.4 [JA 941]; *see also* Order, ECF No. 98 [JA 816-18].

The parties filed cross-motions for summary judgment. ECF 105, 128-29. Following the change in Administration, however, CEQ opted not to further respond to Plaintiffs' motion for summary judgment on the merits because CEQ wished to reconsider the 2020 Rule, and instead moved for remand without vacatur. Motion, ECF 145 at 4 ("In lieu of a filing a reply, Defendants submit this motion for remand.").[2] CEQ did maintain its argument that Plaintiffs' facial challenge to the 2020 Rule was not justiciable in the absence of a concrete application of its provisions. Transcript, ECF 154 at 44-45 [JA 873-74]. The district court held oral argument on the motions on April 21, 2021. ECF 151, 154 (Transcript) [JA 830].

On June 21, 2021, the district court issued an order dismissing the lawsuit because Plaintiffs' challenge to the 2020 Rule was not justiciable in the absence of a concrete application of its provisions. Opinion, ECF 155 [JA 922-63]. This result, the district court found, was required under Article III and straight-forward applications of two seminal cases: *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523

[2] In the months that followed the issuance of the 2020 Rule, four other lawsuits were filed challenging the Rule. *See* 86 Fed. Reg. 55,757, 55,758 (Oct. 7, 2021). The courts have maintained temporary stays in each case.

U.S. 726 (1998), and *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). Opinion, ECF 155 at 23-24, 32-33 [JA 944-45, 953-54].

First, the court analogized the 2020 Rule to the forest plan at issue in *Ohio Forestry* in that neither agency action authorized any ground-disturbing action. *Id*. at 26 [JA 947]. The court observed that, like a forest plan, the 2020 Rule could cause real-world effects only when it is applied in another final agency action. *Id*. at 23-29 [JA 944-50]. The court thus concluded that "*Ohio Forestry* counsels that this case is unripe" because it held that a justiciable controversy does not exist unless and until the agency applied the regulations of concern to a site-specific project. *Id*. at 23-24 [JA 944-45].

Second, on the issue of standing, the court found "[t]he *Summers* case is instructive." *Id*. at 32 [JA 953]. The court observed that here, as in *Summers*, Plaintiffs seek to challenge a set of planning regulations that apply to government officials and not to their own primary conduct. *Id*. at 33 [JA 954]. *Summers* held that the plaintiffs in that case lacked standing to challenge such regulations in the abstract, without challenging any concrete application of those regulations in a site-specific project. *Id*. at 32 [JA 953]. The court found that Plaintiffs here similarly failed to challenge such a concrete application of the 2020 Rule and thus lack standing for same reason. *Id*. at 33 [JA 954]. The court noted that Plaintiffs' allegations of harm (whether identified as environmental, procedural, or

informational) are based on pure speculation about how federal agencies might apply the provisions of the 2020 Rule when making future decisions. *Id*. at 34-42 [JA 955-63].

E. Additional CEQ actions relating to the 2020 Rule

Soon after assuming office, President Biden in Executive Order 13,990 directed federal agencies to review and address the promulgation of regulations and other actions taken during the previous four years that conflict with the Nation's environmental and public health values. *See* 86 Fed. Reg. 7,037 (Jan. 25, 2021). The White House specifically identified the 2020 Rule as subject to this review. *See* Lee-Ashley Decl. ¶ 6, ECF 145-1 [JA 825].

In response, CEQ began its reconsideration process with the goal of considering the "full array of questions and substantial concerns connected to the 2020 Rule," including issues "directly relevant to this litigation." *Id.* ¶ 9 [JA 826]. Toward that goal, CEQ identified three planned regulatory actions to address the 2020 Rule: (1) a rulemaking to extend the deadline by two years for federal agencies to develop or revise proposed procedures for implementing the 2020 Rule; (2) a "Phase 1" rulemaking to propose a narrow set of changes to the 2020 Rule; and (3) a "Phase 2" rulemaking proposing broader changes to the 2020 Rule. 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021).

On June 29, 2021, CEQ completed the first of those three regulatory actions when it published an interim final rule that amended 40 C.F.R. § 1507.3(b) to provide an additional two years for agencies to develop or revise procedures implementing the 2020 Rule. 86 Fed. Reg. 34,154 (June 29, 2021). CEQ took this action to "allow Federal agencies to avoid wasting resources developing procedures based upon regulations that CEQ may repeal or substantially amend." *Id.* at 34,155-56. CEQ further explained that it "has substantial concerns about the legality of the 2020 Rule, the process that produced it, and whether the 2020 Rule meets the nation's needs and priorities," and intends "to address these issues through further rulemaking." *Id.* at 34,155.

On October 7, 2021, CEQ published and solicited public comments on a proposed "Phase 1" rule. 86 Fed. Reg. at 55,757. The Phase 1 rule proposes three changes to the 2020 Rule. *Id.* at 55,759-60. *First*, the rule would revert to the definition of "purpose and need" in the 1978 regulations (40 C.F.R. § 1502.13) and makes a conforming amendment to the definition of "reasonable alternatives" (40 C.F.R. § 1508.1(z)). *Id.* at 55,760-61. These proposed amendments are intended to clarify that agencies do not need to base the purpose and need for their actions solely on the goals of private applicants and the agency's authority when the agency's statutory duty is to review an application for authorization. *Id.* at 55,760. *Second*, the rule would remove a provision making CEQ's regulations "the ceiling"

for agency NEPA procedures, meaning federal agencies may adopt and implement NEPA procedures that require additional or more specific environmental analysis than called for by the CEQ regulations (40 C.F.R. § 1507.3). *Id.* at 55,761-62. *Third*, the rule would restore the definitions of "direct" and "indirect" effects and "cumulative impacts" in the 1978 regulations (40 C.F.R. § 1508.1(g)). *Id.* at 55,762-67. CEQ's goal is to complete the Phase 1 rulemaking process and issue a final Phase 1 rule in February 2022. *See* Agency Rule List, Fall 2021, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0331-AA05 (listing date for final rule as "02/00/2022").

CEQ is also currently working on a "Phase 2" rulemaking. CEQ has held several meetings with federal agencies and outside stakeholders to listen to their concerns about the 2020 Rule and ideas for a Phase 2 rule. CEQ's goal is to issue a proposed Phase 2 rule in June 2022. *See* Agency Rule List, Fall 2021, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0331-AA07 (listing date for proposed rule as "06/00/2022"). In addition, while it proceeds with this phased rulemaking process, CEQ is assisting federal agencies in implementing NEPA in a manner consistent with the statute, case law, Executive Order 13,990 and CEQ's goals.

SUMMARY OF ARGUMENT

Plaintiffs' facial attack on the 2020 Rule is inconsistent with a plethora of Supreme Court cases holding that, absent circumstances not present here, federal courts lack Article III jurisdiction under both the ripeness and standing doctrines to directly review agency regulations under the APA in the absence of a challenge to a specific application of the regulations that causes them imminent, concrete, and particularized harm. At the time of the Complaint (the date for assessing jurisdiction), the 2020 Rule had not even become effective. Thus, Plaintiffs did not challenge (and logically could not challenge) a concrete application of the 2020 Rule. And for the same reason, none of the plaintiff member organizations here could know that they even have one or more members threatened by such concrete action. Facial review can occur when a specialized statute permits pre-application judicial review of a regulation, or the plaintiffs demonstrate that the regulation itself threatens their concrete interests with imminent harm. But NEPA is not such a statute, and Plaintiffs make no such demonstration.

If Plaintiffs someday encounter a situation where the 2020 Rule imminently harms their concrete interests, they can file a lawsuit at that time against that application of the 2020 Rule. But that situation has not occurred (and it may not ever occur because CEQ is in the process of amending the 2020 Rule). The district court thus correctly dismissed this case for lack of Article III jurisdiction.

Moreover, even if this case were justiciable, it is prudentially moot. This Court should exercise its discretion to withhold relief to avoid hindering CEQ's ongoing review of the 2020 Rule, which may partially or fully redress Plaintiffs' concerns. The alleged errors that Plaintiffs identify in their Complaint are unlikely to reoccur or evade review due to CEQ's reconsideration of the 2020 Rule and Plaintiffs' ability to challenge specific applications of its provisions.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal for a lack of jurisdiction. *See Salt Inst. v. Leavitt*, 440 F.3d 156, 158 (4th Cir. 2006).

ARGUMENT

Article III of the United States Constitution limits the federal-court jurisdiction to "Cases" and "Controversies." *See Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009). Effectuated by a cluster of overlapping doctrines—including standing and ripeness—the case-or-controversy requirement serves both to maintain the separation of powers and to ensure that legal issues "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

Here, well-established Article III principles as applied in the context of APA review—and as articulated in numerous Supreme Court cases—demonstrate that Plaintiffs' facial challenge to the 2020 Rule is not justiciable because it is not ripe and because Plaintiffs lack standing. Plaintiffs' challenge to the 2020 Rule is justiciable only in the context of a challenge to a specific application of the 2020 Rule that causes actual, concrete "real world" harm. Plaintiffs have not presented that that a kind of challenge, and the district court therefore properly dismissed this case for lack of jurisdiction.

I. In the absence of a live dispute over the application of the regulations to a particular project or decision, Plaintiffs' challenge is not ripe.

Plaintiffs' challenge to CEQ's compliance in promulgating 2020 Rule is brought under the APA. Complaint, ECF 1 ¶ 19 [JA 34]. To determine whether administrative action is ripe for judicial review under the APA, courts evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Both prongs counsel that Plaintiffs' lawsuit is not ripe.

A. Plaintiffs' lawsuit is not fit for review.

1. A regulation is ordinarily fit for APA review only as part of a challenge to a regulation's application.

Under *Abbott Labs*' first prong, a challenge to a "rule" of general applicability and future effect such as the regulations at issue here is presumed not

to be fit for review until the rule has been applied in a concrete manner threatening imminent harm. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (*NWF*); 5 U.S.C. § 551(4) (defining rule). In *NWF*, in rejecting a programmatic challenge to the Bureau of Land Management's rules for land withdrawal, the Supreme Court explained that

> Absent a [pre-implementation provision] . . . *a regulation is not ordinarily considered the type of agency action "ripe" for judicial review* under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

497 U.S. 871, 891 (1990) (*NWF*) (emphasis added); *Trump v. New York*, 141 S. Ct. 530, 536 (2020); *see also Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (same holding in the context of notice-and-comment rulemaking); *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58 (1993) (same).

Likewise, in *Ohio Forestry*, the Court held that, in the absence of a statute allowing "pre-implementation judicial review of forest plans" (*i.e.*, a set of rules governing a National Forest unit), a challenge is ripe only in the context of an application of the plan's provisions in agency actions approving specific projects. 523 U.S. at 736-37; *see also Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241, 1252 (9th Cir. 2016) (applying *Ohio Forestry* to hold unripe a pre-application challenge to regulations). The same is true here. Plaintiffs' challenge

to the 2020 Rule is ripe only in the context of a site-specific application of its provisions that threatens imminent, concrete harm. 523 U.S. at 734.

Ultimately, while Plaintiffs may prefer to mount one legal challenge against the 2020 Rule now rather than to pursue potentially multiple challenges to site-specific decisions, the "case-by-case approach . . . is the traditional, and remains the normal, mode of operation of the courts." *Ohio Forestry,* 523 U.S. at 735 (internal quotation marks, ellipses and citations omitted); *see also Reno v. Flores*, 507 U.S. 292, 300 (1993).

2. No special circumstances justify direct review of the 2020 Rule.

There are ordinarily only two exceptions to the presumption against pre-application review of regulations: (1) where there is a special review statute permitting the regulation "to be the object of judicial review directly," or (2) where the regulation is a "substantive rule" requiring the plaintiff to immediately adjust its primary conduct under threat of serious penalties. *NWF,* 497 U.S. at 891. Neither exception applies here.

First, neither the APA nor NEPA contain any specialized review procedure that would allow for a direct challenge to CEQ regulations. *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). This is in stark contrast to, for example, the Clean Air Act, which expressly allows direct review of certain Environmental Protection Agency regulations in the D.C. Circuit within sixty days of publication, because

Congress saw a need to confirm rapidly, and on a national basis, the validity of a new set of clean air regulations through the process of judicial review. *See* 42 U.S.C. § 7607(b)(1). Cases involving direct facial review of regulations promulgated under environmental or energy statutes frequently fall within this exception. *See, e.g.*, *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (direct pre-application review for certain Toxic Substances Control Act rulemakings (15 U.S.C. § 2618(a))). As to NEPA, however, Congress did not opt to include a judicial review provision explicitly authorizing an exception to the ordinary rule that facial challenges to unapplied regulations are not ripe.

Second, the 2020 Rule is a procedural rule guiding actions of other agencies—it is not a substantive rule regulating the primary conduct of, or posing an immediate threat to, Plaintiffs. The regulations "provide direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review where applicable." *See* 85 Fed. Reg. at 43,358; *see also Public Citizen*, 541 U.S. at 756-57 ("NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.").

Plaintiffs err in claiming that the 2020 Rule regulates their "primary conduct," or that they are its "object." Br. 37, 52. Clearly, the 2020 Rule does not regulate Plaintiffs; it regulates government agencies that implement NEPA. *See* 40

C.F.R. § 1507.1 (2020) ("All agencies of the Federal Government shall comply with the regulations in this subchapter."). Nevertheless, Plaintiffs claim they are the object of the 2020 Rule because it purportedly withdraws benefits and imposes burdens when they *voluntarily* participate in an agency's *future* NEPA process. This reasoning conflicts with *Summers*. *Summers* is premised on the understanding that the public is not the "object" of regulations that impose requirements on agencies for future public involvement processes. 555 U.S. at 493 (explaining that Forest Service regulations establishing notice, comment, and appeal procedures "govern only the conduct of Forest Service officials engaged in project planning"); *see also Habeas Corpus Res. Ctr.*, 816 F.3d at 1252 (explaining that regulations governing future agency decision-making do not regulate citizens' "primary conduct").

In any event, as a rule outlining the procedures agencies will follow as they conduct environmental analysis of future decisions, the 2020 Rule does not threaten Plaintiffs with the prospect of penalties of any kind, let alone the serious penalties needed to overcome the presumption against facial review.

Thus, neither exception for allowing facial review of regulations applies here. The district court rightly concluded that this case was not ripe.

3. Plaintiffs' claims are not procedural and, regardless, procedural claims are not per se justiciable.

Plaintiffs contend that *Ohio Forestry* recognized a third exception to the *NWF* presumption for "facial challenges to procedural failures." Br. 54. It did not. *Ohio Forestry* merely repeated in dictum what the Supreme Court had already recognized under the procedural-rights doctrine when addressing the related concept of standing—that a "*person* who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and *immediacy*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) (emphasis added to highlight the personal nature of the right and the immediacy requirement, which is the standing requirement most related to ripeness). Crucially, neither *Defenders of Wildlife* nor *Ohio Forestry* said that every challenge to an alleged procedural failure is immediately justiciable without any consideration of the immediacy of the threatened harm at all, and the Supreme Court later clarified in *Summers* that not every challenge is. Regardless, the procedural-rights doctrine does not assist Plaintiffs here because they are not seeking to enforce procedural rights and instead are bringing substantive "arbitrary or capricious" claims under APA § 706(2).

a. Plaintiffs bring substantive APA claims, and do not seek redress from a deprivation of a personal procedural right.

The procedural-rights doctrine does not assist Plaintiffs here because they bring substantive APA claims. They do not seek to enforce a procedural right.

A procedural-rights claim arises where a "person . . . has been accorded a procedural right to protect his [or its] concrete interests" such as a hearing before, or ability to comment on, agency action. *See Defenders of Wildlife*, 504 U.S. at 572 & n.7 (emphasis added); *see also Summers*, 555 U.S. at 496-97 (describing the "procedural right" as "the ability to file comments"); *Doe v. Va. Dep't of State Policy*, 713 F.3d 745, 755 (4th Cir. 2013) (procedural due process claim for a hearing before being listed as sex offender). NEPA is a quintessential example of a statute providing a personal procedural right to participate in the preparation of an EIS. But as the district court recognized (Op. 24), this is not a NEPA case challenging a failure to prepare an EIS. It is an APA case seeking to facially challenge a rule. None of the Plaintiffs' ten claims seek to invoke a procedural right conferred to them by statute. Complaint, ECF 1 ¶¶ 560-656 [JA 185-207]. Plaintiffs' claims are substantive APA § 706(2) claims, alleging that the 2020 Rule is substantively invalid because it is arbitrary, capricious, or inconsistent with the law. *See, e.g., Texas v. United States*, 809 F.3d 134, 149, 178 (5th Cir. 2015) (distinguishing between the APA's procedural and substantive provisions, noting

that an arbitrary or capricious claim under § 706(2) is a substantive claim); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 901 F. Supp. 2d 1, 6 (D. D.C. 2012) (recognizing that APA § 706(2) "arbitrary or capricious" claims are substantive, not procedural), *aff'd*, 751 F.3d 629 (D.C. Cir. 2014).

By its plain terms, Section 706 does not confer procedural rights. *See* 5 U.S.C. § 706(2)(A). It, for example, confers no right to a hearing or ability to comment on agency action. Generally, in procedural-rights cases, a plaintiff sues under the APA § 706(2) because an agency failed to follow a particular procedure that Congress created in a separate statute or provision of the APA. In these cases, the plaintiff is "seeking to enforce [through the APA] a procedural requirement," which is declared elsewhere, "the disregard of which could impair a separate concrete interest of theirs." *Defenders of Wildlife*, 504 U.S. at 572. But Plaintiffs do not allege that they were deprived of any personal procedural right, let alone one to which they were legally entitled.

Unable to identify a relevant procedural right, Plaintiffs argue that their claims deserve special treatment under Article III merely because the APA requires agencies to follow lawful rulemaking procedures. *Defenders of Wildlife* rejected this argument, after describing the claimed "interest" as "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 572-73. It is fundamental that Article III's case-or-

controversy requirement demands more than a mere statutory violation of the APA. *See Spokeo v. Robbins*, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

At bottom, Plaintiffs seek to have the 2020 Rule "h[e]ld unlawful and set aside" as substantively invalid under the standard for review in APA § 706(2)(A)—they do not seek to invoke a personal procedural right. Their claims are not entitled to any special consideration in the ripeness analysis.

b. Procedural-rights claims are not per se justiciable.

Even assuming Plaintiffs' APA claims are "procedural," claims pursing procedural rights are not always ripe. Certainly, *Ohio Forestry* states that "*a person with standing who is injured by a failure to comply with the NEPA procedure* may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737 (emphasis added). But Plaintiffs err in interpreting the Court's statement to mean that every claim seeking to enforce a procedural right is ripe for judicial review as soon as a deprivation occurs. The first part of the Court's statement qualifying that the person must have standing limits the reach of its statement about ripeness. Accordingly, although many procedural-rights claims may be ripe as soon as the alleged violations occur—for example, where the agency action directly authorizes particular trees to be cut or a specific highway to be built—the associated agency action must have direct on-

the-ground consequences. Thus, for a person with standing, a regulation promulgated in violation of some procedural right would be subject to immediate challenge if it *directly* authorized actions with real on-the-ground consequences. *See Center for Biological Diversity v. Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009).

A procedural injury, on its own, does not confer standing. *See Sierra Club v. EPA*, 754 F.3d 995, 1002 (D.C. Cir. 2014). When alleging the deprivation of a procedure such as notice and comment, the complainant must demonstrate that it has also "suffered personal and particularized injury." *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005) (cleaned up).

The Supreme Court confirmed this principle in *Summers*, holding that a plaintiff cannot bring a facial challenge to a regulation, absent a special review provision, until the regulation is applied to a project with real on-the-ground consequences that threatens imminent injury to their interests. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496-97. Thus, because the 2020 Rule has no on-the-ground consequences until applied in a concrete setting, Supreme Court precedent refutes Plaintiffs' claim to immediate review.

B. The hardship-to-the-parties factor also counsels that Plaintiffs' facial challenge to the 2020 Rule is not ripe.

The relative "hardship to the parties" factor also favors deferring judicial review until the 2020 Rule is applied in a concrete setting. *Abbott Labs*., 387 U.S. at 149. In weighing the relative hardships, the district court concluded that this matter is analogous to *Ohio Forestry*, and that the Supreme Court's weighing of the hardships in that case "counsels that this case is [also] unripe." Op. 23 [JA 944].

In *Ohio Forestry*, the Court found that waiting for a concrete application of the forest plan would not cause a hardship to the plaintiffs. 523 U.S. at 733-34. Here too, Plaintiffs face no hardship from waiting to pursue their claims through a challenge to a specific application of the 2020 Rule. Like the forest plan in *Ohio Forestry*, the 2020 Rule itself does not govern conduct by Plaintiffs and thus has no impact on Plaintiffs until it is applied—it does not "command anyone to do anything or to refrain from doing anything"; "grant, withhold, or modify any formal legal license, power, or authority"; "subject anyone to any civil or criminal liability"; or create "legal rights or obligations." *Id.* at 733. Like a forest plan, the 2020 Rule will impact Plaintiffs only if and when it is applied in the context of a future site-specific action that affects their interests. *Id.* at 733-34. At that point, Plaintiffs can seek judicial review of the specific action and ask the Court to set it aside because the action relied on the (allegedly flawed) 2020 Rule.

Ohio Forestry also held the case was not ripe because immediate judicial review could "hinder agency efforts to refine [their] policies." *Id.* at 735. Here too, immediate facial review of the 2020 Rule would cause real hardship to agencies. *Id.*; *Reg'l Mgmt. Corp. v. Legal Servs.*, 186 F.3d 457, 465 (4th Cir. 1999) ("fitness for judicial decision" turns in part on "the agency's interest in crystallizing its policy before that policy is subject to review") (quotation omitted)). Before the 2020 Rule can be applied to site-specific actions, CEQ and federal agencies must interpret the rule and determine how to apply it. The 2020 Rule is, after all, a regulation administering agency decision-making, not a rule that governs citizen's primary conduct. In the context of site-specific applications, agencies may interpret and apply the 2020 Rule with CEQ's guidance in a manner that entirely avoids the harms that Plaintiffs speculate may result. They may, for example, analyze impacts previously identified as indirect or cumulative under the 1978 regulations, as the 2020 Rule allows.

Moreover, the 2020 Rule directs federal agencies, in consultation with CEQ, to develop and then propose for public comment agency-specific NEPA procedures in response to the 2020 Rule. *See* 85 Fed. Reg. at 43,373-74 (40 C.F.R. § 1507.3). Again, through these rulemaking processes, agencies may adopt NEPA procedures that do not conflict with the 2020 Rule, but nevertheless eliminate any risk of harm to Plaintiffs that Plaintiffs speculate the 2020 Rule might cause.

With so many procedural steps remaining and so much uncertainty about how any federal agency will apply the 2020 Rule when preparing NEPA documents for site-specific decisions, allowing for judicial review in this case at the time of the Complaint's filing—before federal agencies have even attempted to determine how they would apply the 2020 Rule—would interfere in numerous agencies' environmental review processes. And, contrary to *Ohio Forestry*'s admonition, it would embroil the judiciary in an abstract challenge to a government-wide program that does not raise any special circumstances justifying direct review. 523 U.S. at 736. Like standing, "[a] claim is not ripe for judicial review 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013)); *see also Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (explaining that a dispute is not ripe when additional procedural steps and agency assessments remain).

As the district court recognized, Plaintiffs' characterization of their suit as a "purely legal" challenge to "final agency action" does not change the analysis. Op. 22 [JA 943] (citing *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162-63 (1967)). A court must still consider whether deferring judicial review would cause real hardship to the plaintiff and whether further factual development would assist

the court. *See Nat'l Park Hospital Ass'n*, 538 U.S. at 808 (finding a purely legal claim to be unripe). Thus, even assuming the claims are all purely legal, the Court would benefit from reviewing them in the context of a specific application where the "scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out." *NWF*, 497 U.S. at 891; *see also Catholic Social Servs.*, 509 U.S. at 58-59; *Habeas Corpus Res. Ctr.*, 816 F.3d at 1252-54.

In sum, Plaintiffs' facial challenge to the 2020 Rule is not ripe.

II. In the absence of a live dispute over a concrete, site-specific application of the 2020 Rule, Plaintiffs lack standing.

For similar reasons, Plaintiffs lack Article III standing. To establish Article III standing, a plaintiff must allege facts showing (1) that it suffered an injury-in-fact, (2) that it is fairly traceable to the defendant's conduct, and (3) that it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *See Defenders of Wildlife*, 504 U.S. at 560-61. The elements of standing must exist at the time the complaint is filed. *Id.* at 570 n.5.

Plaintiffs allege that they have both representational and organizational standing to challenge the 2020 Rule. To demonstrate representational standing (also known as associational standing), an organization must show that it has members who "would have standing to sue in their own right." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). To demonstrate organizational standing, an organization

must show that it satisfies the same three-part test as individuals, but in its own right. *Id.* at 182.

Plaintiffs fail in both regards because their alleged environmental, procedural and informational harms are untethered to any threat of imminent injury to a concrete interest. They fail to identify a single imminent, concrete and particularized injury to either themselves or their members.

A. *Summers* forecloses Plaintiffs' lawsuit.

Plaintiffs "can demonstrate standing only if application of the [2020 Rule] by the Government will affect" them in a way that threatens to impose an "'injury in fact' that is concrete and particularized." *Summers*, 555 U.S. at 493-94. That threat of "'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo,* 578 U.S. at 340. It also "must be actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493; *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). To meet the imminence requirement, a "threatened injury must be certainly impending"; "[a]llegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 409-10 (2013) (citation omitted); *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (explaining that "certainly impending" injury cannot be premised on a "highly attenuated chain of possibilities."). Merely increasing the risk of some speculative future harm is not enough. *Clapper*, 568 U.S. at 409-10. Combined, these requirements ensure that

the alleged injury is not too speculative for Article III purposes, *see South Carolina*, 912 F.3d at 727 (citing *Clapper*, 568 U.S. at 410), and "that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers*, 555 U.S. at 493 (internal quotations omitted).

In *Summers*, the Supreme Court applied these deep-rooted standing principles to a suit brought by environmental organizations challenging the Forest Service's adoption of regulations setting out notice, comment, and appeal procedure rules governing administrative review of some future projects which had been categorically excluded from NEPA. 555 U.S. at 490-91. The organizations challenged both the procedural regulations themselves and a particular application of the regulations to a specific Forest Service project. *Id.* at 491. By the time the case came to the Supreme Court, the parties had settled their dispute concerning the specific project, leaving only the plaintiffs' direct facial challenge to the regulations in the abstract. *Id.* at 491-92, 494. The Supreme Court held that the organizations did not have standing to challenge the regulations after the settlement because plaintiffs failed to demonstrate that the government had applied the regulations to any other particular project that would imminently harm one of their members. *Id*. at 492-96. According to the Supreme Court, there is

> no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that

> action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.

Id. at 494. "Such a holding," the Supreme Court continued, "would fly in the face of Article III's injury-in-fact requirement." *Id.*

Just as in *Summers*, Plaintiffs' challenge presents precisely the sort of review—untethered to a concrete factual context—that contravenes Article III's injury-in-fact requirement. Plaintiffs assert concerns that the 2020 Rule will result in future approvals of projects that are premised on "less robust" NEPA analyses, predictions of diminished access to information and public participation, and projected resource expenditures on additional future litigation, information gathering, and early commenting. But none of these hypothetical future projects had been developed under the 2020 Rule when Plaintiffs filed their Complaint. And Plaintiffs offer only speculation about how, when, and where the 2020 Rule will be applied, and how those future applications would result in injury. It is not sufficient to recite that they are harmed because the existence of the 2020 Rule *could* allegedly cause federal agencies to apply the 2020 Rule to *future* NEPA reviews in an attenuated chain of events that *could* lead to environmental, procedural or informational harm. Even before *Summers*, it was well established that "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore*, 495 U.S. at 158.

While one need not "await the consummation of the threatened injury to obtain preventative relief," Br. 27 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Center*, 204 F.3d 149, 160 (4th Cir. 2000)), there is a vast gap between the "concrete, particularized, and imminent" harms of standing, and Plaintiffs' hypothetical harms premised on the 2020 Rule's future application. The point is not that a plaintiff must wait until the tree is cut down to have standing. Rather, until a specific final agency action approves the logging of the trees in the place that the plaintiff visits, the risk to the plaintiff remains speculative. Thus, challenging a concrete application of a regulation is necessary to the Article III analysis. Even before *Summers*, the Supreme Court recognized that programmatic challenges disconnected from challenges to specific applications of the program (such as through a project approval) were "rarely if ever appropriate for federal-court adjudication." *Defs. of Wildlife*, 504 U.S. at 568 (internal quotations omitted); *see also City of New York v. Dep't of Defense*, 913 F.3d 423, 433 (4th Cir. 2019); *Fund for Animals, Inc. v. BLM*, 460 F.3d 13, 21 (D.C. Cir. 2006).

The Supreme Court recently reaffirmed these principles in *Trump v. New York,* 141 S. Ct. 530 (2020). There, the Supreme Court held that the challenge to President Trump's policy "of excluding from the apportionment base aliens who are not in a lawful immigration status" was not justiciable for lack of standing and ripeness. 141 S. Ct. at 534-36. As here, the plaintiffs in that case challenged the

policy in the abstract instead of in a concrete application. The Supreme Court held that the plaintiffs lacked standing to pursue such a challenge because "the source of any injury to the plaintiffs is the action that the Secretary or President might take in the future to exclude unspecified individuals from the apportionment base—not the policy itself 'in the abstract.'" *Id.* at 536 (citing *Summers*, 555 U.S. at 494). The Supreme Court continued, "[l]etting the Executive Branch's decisionmaking process run its course . . . brings more manageable proportions to the scope of the parties' dispute." *Id*. (citing *NWF*, 497 U.S. at 891). "And in the meantime . . . the plaintiffs suffer no concrete harm from the challenged policy itself, which does not require them 'to do anything or to refrain from doing anything.'" *Id*. (citing *Ohio Forestry*, 523 U.S. at 733). This matter is not justiciable for the same reasons.

Plaintiffs respond that, "unlike *Summers*, Plaintiffs' declarations 'do point to specific project proposals.'" Br. 38 (citing Op. 33 [JA 954]). In fact, the declarant in *Summers* also identified specific project proposals applying the challenged regulations "to a series of projects." 555 U.S. at 496. But, like here, the allegations of harms stemming from the *future* projects were not tied to a concrete application of the rule and were too vague to confer standing. *Id.* at 495-96.

Put differently, *Summers* did not hold that plaintiffs facially challenging a regulation may establish standing merely by "pointing to" pending or future agency actions that *may be* subject to that regulation and that *might*, depending on

the final agency decision, harm them. Rather, a plaintiff must demonstrate that a particular project "*will* impede" his or her "specific and concrete" interests by showing that a project is "about to" happen "*in a way that harms*" the plaintiff's interests, which Plaintiffs have failed to do here. *Id.* at 495-96 (emphasis added). When they filed their Complaint, Plaintiffs could only speculate which actions will apply the 2020 Rule, whether those actions will actually injure their interests, and whether those injuries are caused by the 2020 Rule or by some other factor. Plaintiffs therefore lack Article III standing.

B. Plaintiffs' speculation about pending and future projects and allegations of possible future injury are insufficient.

Even apart from *Summers*, Plaintiffs' allegations about pending and future projects or decisions fall far short of establishing an injury in fact because those allegations merely speculate about possible future injuries. That is insufficient.

1. The "substantial risk" formulation of imminence does not save Plaintiffs' claims.

Plaintiffs cannot show any potential injuries were imminent at the time they filed their Complaint. As the district court concluded (Op. 33 [JA 954]), Plaintiffs have failed to show that any injuries from pending or future projects were "certainly impending" at the time they filed their Complaint. Indeed, they could not be "certainly impending" because the 2020 Rule had not gone into effect. Even after the Rule went into effect months later, any concrete injuries would not

be "certainly impending" until much later after some federal agency applies the 2020 Rule when analyzing the impacts of its proposed action and decides to take a final agency action that threatens to harm a concrete interest of the Plaintiffs.

Unable to demonstrate any "certainly impending" injuries caused by the 2020 Rule, Plaintiffs retreat to the notion that the "2020 Rule substantially heightens the risk of harm to the places and resources Plaintiffs care about." Br. 24. They rely on *Susan B. Anthony List v. Driehaus* for the proposition that "threatened injury is justiciable if it is 'certainly impending' *or* if 'there is a 'substantial risk' that the harm will occur." Br. 25 (quoting *Susan B. Anthony List*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5).[3] Plaintiffs appear to argue that "substantial risk" is something less than or distinct from "certainly impending." But *Susan B. Anthony List* quoted *Clapper* for the relevant standard and *Clapper* declined to endorse the view that "certainly impending" and "substantial risk" are distinct standards. *See* 568 U.S. at 409, 414 n.5. *Clapper* concluded that, even if substantial risk were a distinct standard, it still does not allow a finding of harm based on an "attenuated chain of inferences" or

[3] *Susan B. Anthony List* is another case establishing that pre-application review of a law is limited to situations where Congress enacts a special review provision or, as in *Susan B. Anthony List,* when the law requires a plaintiff to immediately adjust its primary conduct under threat of serious penalties. 573 U.S. at 159; *see also Buscemi v. Bell*, 964 F.3d 252, 259 (4th Cir. 2020).

"speculation about the unfettered choices made by independent actors not before the court." *Id.* at 414 n.5 (citations and quotations omitted).

The substantial risk standard therefore does not save Plaintiffs from their failure to demonstrate an injury in fact. As in *Clapper*, and, as the district court recognized (Op. 29-41 [JA 950-62]), Plaintiffs' allegations of harm (whether they are asserted as environmental, procedural or informational harms) are based on an "attenuated chain of inferences" or "speculation about the unfettered choices made by independent actors not before the court." The inherently speculative nature of Plaintiffs' allegations of harm stems in part from the fact that Plaintiffs do not challenge a concrete application of the 2020 Rule as required by *Summers*, but is also a problem independent of its holding. We explain below.

2. Plaintiffs fail to allege specific facts establishing that their interests are imminently threatened.

Plaintiffs identify two specific projects that they allege will harm their members: the Greenbrier Southeast Project and the James River Water Project. Br. 25-26 (citing Young Decl. ¶¶ 14-17, ECF No. 30-16 [JA 346-48]; Kolsteny Decl. ¶¶ 3-6, ECF No. 30-41 [JA 590-93]]). These projects illustrate the attenuated chain of inferences in Plaintiffs' standing arguments. For both projects, the NEPA processes had already begun under the old regulations when the Complaint was filed. Thus, in both cases, the chain of events necessary to get from the 2020 Rule to a harm to the declarant's concrete interest assumes: (1) the agencies will apply

the 2020 Rule to the projects (an *option* the agencies possess under 40 C.F.R. § 1506.13 (2020) but had not exercised at the time of the Complaint and may never exercise); (2) if applying the 2020 Rule, the agencies will in some unidentified way inadequately analyze impacts or alternatives, or frustrate comment opportunities; and (3) the agencies will ultimately make a final decision on the projects that harm the declarant's particular interests. This speculative chain of multiple surmises cannot support standing. *See Clapper*, 568 U.S. at 409. If the Greenbrier Southeast Project and the James River Water Project ever result in final decisions that suffer from some defect that can be traced to the 2020 Rule, Plaintiffs may challenge those decisions and the provisions of the 2020 Rule they believe contributed to them. But Plaintiffs do not have standing to challenge the 2020 Rule based on the mere possibility its provisions *might* be applied to these projects sometime after they filed their Complaint.

All of the other alleged harms to Plaintiffs' interests contained in their declarations are similarly attenuated and contingent. They theorize future NEPA violations based on Plaintiffs' assumptions about how the Rule *may be* applied in future final agency decisions that *might* harm the "places and resources in which they have concrete interests" or "den[y] them information." Br. 24. For example, the declarations express the following vague and speculative concerns:

- *I am also concerned* that without reviewing a good range of environmental effects and alternatives the agencies will not engage in thoughtful decision-making and will make choices that lead to bad environmental outcomes. Stangler Decl. ¶ 6, ECF 30-23 [JA 428]; *see also id*. ¶¶ 10, 16-19 [JA 430, 432-33] (expressing vague concerns about possible future harms).
- *ARA is concerned that* the Commission *might* elect not to consider the cumulative effects of the lethally-low dissolved oxygen caused by the dams as well as the cumulative effects of no fish passage. FERC *might* consider these effects insignificant once again. Lowry Decl. ¶ 22, ECF 30-4 [JA 220]; *see also* ¶ 25 [JA 221] (alleging that without the information that they speculate they *might* not receive they will likely divert organizational resources to study the cumulative effects of the dams).
- FHWA *may* decide that it no longer needs to consider indirect and cumulative effects. It *may* decide that it no longer needs to study all reasonable alternatives. Gestwicki Decl. ¶ 15, ECF 30-20 [JA 391-92] (Note: This speculation is built on further speculation that the plaintiff group *may* win a pending lawsuit against FHWA and obtain a remand).

If any of these things happen and threaten the declarants with injury, the final agency action making these decisions could be the point of challenge. But these speculative concerns and worries about what an agency *might do* in the future—assuming that an agency will, in fact, violate the law—were insufficient to support standing when Plaintiffs filed their Complaint. *See South Carolina*, 912 F.3d at 728-29 (rejecting standing based upon "chain of possibilities" that assume the government will "breach or abandon their existing commitments"); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 322 (4th Cir. 2002) ("The injury-in-fact prong of the standing inquiry cannot be met by citizens hypothesizing about the speculative effects of" an agency action or lack thereof).

Moreover, while the presently constituted CEQ is not defending the 2020 Rule, it is *not* a foregone conclusion that reasonable alternatives or impacts classifiable as cumulative or indirect under the previous regulations will be omitted from future NEPA documents, despite how Plaintiffs characterize the 2020 Rule.[4] The 2020 Rule replaces the concepts of indirect and cumulative impacts with a

[4] As another example of how Plaintiffs mischaracterize the 2020 Rule, NEPA regulations have *always* allowed agencies to categorically exclude actions that *normally* do not have an individually or cumulatively significant impact. *See* 40 C.F.R. § 1508.4 (2019). That federal agencies continue to update their regulations to exclude certain categories of actions from further NEPA process is irrelevant to the Article III analysis because it is post-complaint activity. Br. 9, 20. And if Plaintiffs believe a particular application of an exclusion imminently threatens their concrete interests, they may challenge that application under the APA.

requirement to consider "those effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action" consistent with pre-2020 Rule case law that bounded all effects analysis. 85 Fed. Reg. at 43,343. Federal agencies might well consider all the impacts that Plaintiffs speculate may not be considered under that standard, including reasonably foreseeable impacts on unique resources, public lands, cultural or historic resources, and rare species and their critical habitat. Br. 10; *see* 85 Fed. Reg. at 43,344 ("The rule does not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment.").

The 2020 Rule also requires agencies to consider a reasonable range of alternatives. 85 Fed. Reg. at 43,351. Just as the Supreme Court required in *Public Citizen*, Plaintiffs have an obligation under the 2020 Rule to alert agencies to particular alternatives or forfeit their challenges to the agency's alternatives analysis in a subsequent lawsuit. *See Public Citizen*, 541 U.S. at 764; 85 Fed. Reg. at 43,317. So citizens can alert agencies to reasonable alternatives and agencies have an incentive to consider such alternatives to avoid litigation. It is therefore pure conjecture on Plaintiffs' part that, under the 2020 Rule, some federal agency might not properly consider alternatives to its proposed action.

The same analysis for how federal agencies applying the 2020 Rule in the future may avoid harming Plaintiffs' interests may be applied to any of the fears

expressed in Plaintiffs' declarations. And if a federal agency in the future applies the 2020 Rule and authorizes an action in a way that threatens imminent harm to Plaintiffs' interests, Plaintiffs may commence a suit seeking to enjoin that action before any harm materializes. Accordingly, Plaintiffs' fears of harms are all premised on speculation about what federal agencies might do or require someday in the future. The alleged harms therefore are neither concrete nor imminent. Rather, any future harm to Plaintiffs requires "guesswork as to how independent decisionmakers will exercise their judgement." Op. 35 [JA 956].

Plaintiffs argue that they do not have to demonstrate with any certainty that the use of the allegedly improper NEPA procedure would result in a different substantive outcome. Br. 38-39. But that point goes to redressability, not injury in fact. Even assuming this were a case about a procedural deprivation (which it is not), the relaxed redressability standard in procedural rights cases does not relieve a plaintiff of the duty to demonstrate that its alleged procedural right is tied to a concrete interest under imminent threat. "Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *See Summers*, 555 U.S. at 497. The problem identified by the district court is not one of redressability. The problem is that the district court could not find Plaintiffs' interests under threat of future injury without engaging in

impermissible "guesswork." Op. 35 [JA 956]. Without an injury in fact, the district court did not need to (and in fact did not) reach the issue of redressability.

3. Plaintiffs cannot allege standing "as a matter of law."

Ultimately, Plaintiffs simply do not have the necessary facts to support their standing. Plaintiffs therefore ask this Court to find that they have standing because a "substantial risk of harm to natural resources exists *as a matter of law*" based on the "difficultly of stopping a bureaucratic steamroller" effect of, and "risk inherent" in, the 2020 Rule. Br. 28, 39 (emphasis added) (citing, *inter alia*, *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), and *Friends of the Earth*, 204 F.3d at 160). There are multiple problems with this request.

First, "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56. Where, as here, a case is at the summary-judgment stage, the plaintiff "must set forth by affidavit or other evidence *specific facts*," establishing standing.[5] *Defenders of Wildlife*, 504 U.S. at 561 (internal citations and quotations omitted, emphasis added). Moreover, "the relevant showing for purposes of Article III

[5] Plaintiffs contend that, at summary judgment, facts and reasonable inferences must be taken in their favor, not resolved against them. Br. 31 n.6. But the district court did not resolve any factual disputes against them. Instead, the court simply found that Plaintiffs failed to satisfy their burden of establishing by affidavit or other evidence specific facts establishing jurisdiction.

standing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Without "specific facts" establishing that Plaintiffs' interests are under threat of concrete, particularized, and imminent harm, a court cannot exercise Article III jurisdiction. As discussed, Plaintiffs have failed to set forth those "specific facts," and rely instead on their own *opinions* about how agencies may apply the Rule.

Second, an "increased risk" of harm is not itself a concrete, particularized, and actual injury. *See Beck*, 848 F.3d at 274-75 (holding alleged "increased risk" of future identity theft due to data breach insufficient to support standing because it assumes without evidence that plaintiffs in particular will be targeted in future attacks); *South Carolina*, 912 F.3d at 727-28 (holding alleged "increased risk" of environmental, health, and safety harms insufficient to support standing where it is premised on a "chain of possibilities" that assumes government agencies will make particular future decisions (citations omitted)). Otherwise, "possible future injuries, whether or not they are imminent, would magically become concrete, particularized, and actual injuries merely because they could occur." *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1298 (D.C. Cir. 2007). Rather, the risk of the "ultimate alleged harm,"—*i.e.*, the on-the-ground harm of the chopped-down trees or release of emissions—must be concrete, particularized, and imminent. *Id.*; *see also Holland v. Consol. Energy*,

781 F. App'x 209, 212 (4th Cir. 2019) ("Although a risk of future harm can certainly satisfy the injury-in-fact requirement, the plaintiffs must still show that the harm is imminent."). Plaintiffs, however, can identify no such concrete, particularized, and imminent "ultimate alleged harm" because, again, no federal agency had taken (or even was about to take) a final agency action applying the 2020 Rule when they filed suit.

Finding injury in fact based on a "bureaucratic steamroller" effect or a "statistical probability" or "realistic threat" of harm is also insufficient. Justice Breyer took these positions as a Circuit judge in *Marsh* and later as an Associate Justice in *Summers*, but his view has not prevailed. *Summers* explicitly rejected Justice Breyer's position that a finding of injury in fact may be based on a "statistical probability" or a "realistic threat." 555 U.S. at 497-500; *see also Clapper*, 568 U.S. at 410 (rejecting an "objectively reasonable likelihood" of harm standard). Once again, Plaintiffs' arguments ignore the lessons of *Summers*.

To the extent *Friends of the Earth* suggests that standing may be based on a "statistical probability" or "increased risk" of harm, such a suggestion is no longer good law in light of subsequent Supreme Court decisions.[6] Moreover, the

[6] Plaintiffs cite an array of cases to support their pre-application facial challenge, but most were decided before *Summers* and *Clapper*, and all before *Trump*, and are in tension with those cases' justiciability requirements. *See, e.g., Citizens for Better Forestry v. USDA,* 341 F.3d 961 (9th Cir. 2003); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947 (7th Cir. 2000); *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d

plaintiffs in that case were challenging an event with real on-the-ground impacts, *i.e.*, an unlawful discharge of pollutants into a waterway that the plaintiffs had routinely used. 204 F.3d at 152-53. This Court held that the plaintiffs' diminished use and enjoyment of the polluted lake constituted sufficient injury in fact. *Id.* at 161 (citing *Laidlaw*, 528 U.S. at 181-84). Here, however, there is no actual or even threatened on-the-ground harm on which Plaintiffs may base their standing.

Finally, in asking the Court to declare that they have standing irrespective of their deficient proof, Plaintiffs misstate CEQ's position as agreeing with them "that the 2020 Rule *will* negatively affect decisions." Br. 28 (emphasis added); Br. 31. Rather, CEQ stated that the 2020 Rule "*may* have the effect of limiting the scope of NEPA analysis." 86 Fed. Reg. at 55,759 (emphasis added). For all the reasons discussed herein, CEQ used the word "may" because it cannot know (just like Plaintiffs cannot know) whether the 2020 Rule actually will have that effect because whether it does depends on how federal agencies other than CEQ apply its provisions. While CEQ shares some of Plaintiffs' concerns with the 2020 Rule, those concerns are not tied to any concrete application of the 2020 Rule, and thus

694 (D.C. Cir. 1988); *Ohio Valley Environmental Coalition v. Hurst*, 604 F. Supp. 2d 860 (S.D. W. Va. 2009) (relying on the "substantial probability" of harm standard rejected in *Summers*). For the reasons articulated by Judge Millet, Plaintiffs' reliance on *PETA v. USDA* also is misplaced. 797 F.3d 1087, 1099-1106 (D.C. Cir. 2015) (Millet, J., *dubitante*) (explaining how the majority's opinion is inconsistent with Supreme Court case law).

are insufficient to create Article III jurisdiction under clear and established Supreme Court precedent.

C. Plaintiffs' claims of "procedural" and "informational" injuries also do not satisfy Article III.

Plaintiffs' claims of so-called procedural and informational injuries fail for the same reasons as their claims of environmental injuries discussed above, *i.e.*, because the claims are not attached to a real-world application of the 2020 Rule. For "a bare procedural violation, divorced from any concrete harm," cannot satisfy the injury-in-fact requirement. *Spokeo,* 578 U.S. at 341.

1. Mere deprivation of an alleged procedural right without concrete harm is not justiciable.

Plaintiffs also claim to have suffered "procedural" injuries from CEQ's alleged violations of the APA. Br. 24 n.5. As already explained, these so-called deprivations of a procedural right are actually alleged substantive APA violations. But even assuming the injuries were procedural, Plaintiffs do not separately brief the issue of procedural harm because they admit any procedural harms are identical to the alleged environmental or informational harms. They are correct.

In *Summers*, the Supreme Court held that the "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.* at 496; *see also Baehr v. Creig Northrop Team, P.C.,* 953 F.3d 244, 252, 258 (4th Cir.

2020); *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1255 (9th Cir. 2010). Because the respondents in *Summers* failed to challenge a concrete application of the regulations, the Supreme Court held that the alleged procedural violation was not justiciable. 555 U.S. at 497. This case warrants the same conclusion because Plaintiffs likewise do not challenge a concrete application of the 2020 Rule, as explained above (pp. 26-32). Therefore, Plaintiffs' allegations of so-called "procedural" harm add nothing to their purported standing. They, too, fail because Plaintiffs cannot show actual and imminent harm caused by the 2020 Rule.

2. Plaintiffs' alleged informational harms do not support their standing.

Plaintiffs alleged informational harms are not cognizable for similar reasons. A cognizable informational injury exists when two conditions are satisfied: (1) a plaintiff is denied "access to information to which he is legally entitled," and (2) "the denial of that information creates a 'real' harm with an adverse effect." *Dreher v. Experian Info. Sols.*, 856 F.3d 337, 345 (4th Cir. 2017) (citation omitted). Plaintiffs, however, cannot satisfy either condition.

a. NEPA does not create a statutory right to information.

At the threshold, Plaintiffs informational standing arguments fail because NEPA does not legally entitle Plaintiffs to any particular information. Unlike the Freedom of Information Act (FOIA) or the Federal Election Campaign Act, which

the Supreme Court has held require specific information be disclosed as a matter of law, Plaintiffs identify no similar statutory right to the information they seek in the present case. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989). While NEPA requires copies of any EIS prepared and comments received be made available to the public under FOIA, *see* 42 U.S.C. § 4332(2)(C), nothing in NEPA's text reveals a congressional intent to confer a legally actionable right to specific information on the public. *See Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991). The public disclosure of completed EISs through FOIA is an important part of NEPA but is merely *incidental* to NEPA's primary mandate of promoting informed agency decision-making, and is therefore not enough to satisfy the informational injury test's first part. *See Rey*, 622 F.3d at 1259 (contrasting a statute which involves the dissemination of information (such as NEPA) with one that grants a right to information per se (such as FOIA) and concluding that only the latter satisfies the informational injury test's first part).

Further, FOIA requires an agency to disclose only existing documents, not develop additional information. *See Forsham v. Harris*, 445 U.S. 169, 186 (1980). Plaintiffs here do not seek disclosure of existing, non-FOIA exempt EISs, as was found sufficient to establish informational standing in, for example, *Public Citizen*. 491 U.S. at 449. Rather, they are asking the Court to conclude that, as a statutory

matter, Congress intended NEPA to require agencies to develop and include *specific* information in EISs, and created in the public a cognizable right to that information. As the D.C. Circuit explained in *Lyng*, if this kind of claim seeking the production of certain information under NEPA were sufficient to sustain standing, "[i]t would potentially eliminate any standing requirement in NEPA cases" because any member of the public could always allege a right to more information. *Lyng*, 943 F.2d at 84-85; *Atl. States Legal Found. v. Babbitt*, 140 F. Supp. 2d 185, 194 (N.D.N.Y. 2001); *Heartwood, Inc. v. U.S. Forest Serv.*, No. 1:00-CV-683, 2001 WL 1699203, at *10 (W.D. Mich. Dec. 3, 2001).

Although *Dreher* is not a NEPA case, it demonstrates that this Court shares the concerns that have led other courts to reject informational injuries in the NEPA context: "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice as an informational injury." 856 F.3d at 346. This Court should therefore reject Plaintiffs' attempt to circumvent *Summers*' mandate requiring a challenge to a regulation to occur in a concrete setting by relying on an alleged informational injury that would, if accepted, allow anyone to manufacture standing by seeking additional information under NEPA. *See Rey*, 622 F.3d at 1260 (explaining that alleged "right to information" "simply reframes every procedural deprivation in terms of informational loss," which "would allow an end run around the Supreme

Court's procedural injury doctrine and render its direction in *Summers* meaningless"). Because NEPA does not entitle Plaintiffs to any particular information, they cannot satisfy the first condition for informational standing.

b. Plaintiffs alleged informational harms are insufficient to support their standing.

Plaintiffs also cannot satisfy the second condition for informational standing because they identify no cognizable harms resulting from a mere denial of information. Like all their allegations, the harms that Plaintiffs identify are based on past injuries or pure conjecture about information that they speculate they will not receive if federal agencies implement the 2020 Rule in the way they fear.

For example, Plaintiffs allege that they have had to file lawsuits in the past to obtain information under NEPA. Br. 34 (citing Lowry Decl. ¶ 25, ECF 30-4 [JA 221]; Gestwicki Decl. ¶ 15, ECF 30-20 [JA 391-92]; Blotnick Decl. ¶ 21, ECF 30-33 [JA 513]). But wholly past injuries are insufficient. *Defs. of Wildlife*, 504 U.S. at 564. And their fears of future injuries based on these past harms are based on speculation about how various federal agencies will act when approving projects. Moreover, if anything, that Plaintiffs previously have suffered these alleged injuries before the 2020 Rule's promulgation only proves that their feared future injuries are not "fairly traceable" to the 2020 Rule.

Plaintiffs also allege that they are suffering present harm to their organizational missions because they are expending resources on things such as

hiring experts, fact finding, and filing FOIA requests to counteract the 2020 Rule. Br. 33 (citing Burdette Decl. ¶ 26, ECF 30-47 [JA 642-43]; Blotnick Decl. ¶ 32-33, ECF 30-33 [JA 516]; Stangler Decl. ¶¶ 6, 18, ECF 30-23 [JA 428-29, 433-34]; Nieweg Decl. ¶ 10, ECF 30-38 [JA 567]; Mayfield Decl. ¶ 27, ECF 30-22 [JA 422-23]). But these expenditures or resource shifts do not confer standing because they too are the result of Plaintiffs' speculative fears about the future actions of federal agencies. Here, *Clapper* is instructive.

Just as Plaintiffs here speculate about a lack of information, the respondents in *Clapper* speculated that they imminently might be the target of government surveillance. *See Clapper*, 568 U.S. at 411. There, the Court held that Article III standing may not be based on speculation—it must be "certainly impending." *Id.* at 411-14. Respondents therefore alternatively argued that they had standing because the risk of surveillance "requires them to take costly and burdensome measures to protect" their interests. *Id.* at 415. This argument "fare[d] no better." *Id*. The Court held that voluntarily undertaking measures to avoid a speculative risk is not an injury in fact. *Id.* at 416; *see also Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (explaining that an organization's voluntary decision to spend resources educating members or undertaking litigation are not cognizable injuries). The harm in *Clapper*, the Court stated, was self-inflicted. 568 U.S. at 416. So too here. As in *Clapper*, Plaintiffs' harm is self-inflicted because they are choosing to

expend resources due to their own concerns of the risk that federal agencies may implement the 2020 Rule in the way they fear. *See also S. Walk*, 713 F.3d at 183; *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1208 (D.C. Cir. 2020); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *Ass'n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994).

Similarly, Plaintiffs' allegations of harms to their organizational missions of public education and involvement are based on their subjective fears that they may not receive information about alternatives, impacts, or mitigation in future NEPA documents. Br. 32 (citing Sutton Decl. ¶ 10, ECF 30-43 [JA 606]; Nieweg Decl. ¶ 4, ECF 30-38 [JA 563-64]; Young Decl. ¶ 23, ECF 30-16 [JA 351]). Such speculation about how the 2020 Rule might be applied by independent actors in the future does not carry Plaintiffs' burden to identify imminent harm at the time of the Complaint's filing. *Beck*, 848 F.3d at 274. Unlike the declarations in the cases on which Plaintiffs rely, such as *National Veterans Legal Services Program v. Department of Defense*, 990 F.3d 834 (4th Cir. 2021), which involve *actual* omissions of information, Plaintiffs' declarations are wholly deficient here because the declarants are only speculating that information *might* be omitted in the future.

Lastly, Plaintiffs claim that the 2020 Rule deprives them of information because they will not learn about the existence of certain proposals of the Farm

Service Agency (FSA) or Small Business Administration (SBA). Br. 33 (citing Burdette Decl. ¶ 26, ECF 30-47 [JA 642-43]; Stangler Decl. ¶ 5 ECF 30-23 [JA 428]). As the district court recognized (Op. 27 n.7 & 33 n.8), this too is pure speculation. Among other reasons, before any of Plaintiffs' alleged harms could occur, the FSA and SBA have indicated that—pursuant to 40 C.F.R. § 1501.1(b) (2020)—they will take (subsequent) final agency action to revise their respective regulations and policies to account for the 2020 Rule, and will maintain the status quo in the interim. *See* ECF No. 75 (Defs.' PI Opp); Decl. of Steven Peterson ¶¶ 18-19, ECF No. 75-2 [JA 711]; Decl. of William Manger ¶¶ 10-11, ECF No. 75-3 [JA 714]. Until the FSA and SBA change their implementing procedures and issue new loans or loan guarantees by separate final agency action, Plaintiffs' alleged injuries remain speculative. And of course, if any threats of harm to their concrete interests become imminent, Plaintiffs can bring suit against the FSA or SBA.

In addition to being speculative, Plaintiffs' alleged informational harms are also insufficiently concrete. Citing *Doe v. Public Citizen*, Plaintiffs contend they may establish concrete injury simply by showing they sought and were denied access to information. Br. 29 (citing 749 F.3d 246, 263 (4th Cir. 2014)). Not so. A bare violation of a statute providing a right to information—informational harm in vacuo—is no more cognizable under Article III than a bare procedural violation. *See Spokeo*, 578 U.S. at 341 ("Article III standing requires a concrete injury even

in the context of a statutory violation.") (citing *Summers*, 555 U.S. at 496). The Court should therefore decline Plaintiffs' invitation to interpret *Doe* inconsistently with Supreme Court precedent. *Id.*

III. The judgment should be affirmed on the alternative ground that the case is now prudentially moot.

Even if this matter were justiciable under Article III at the time of the Complaint, superseding events now render it prudentially moot. "The discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot, is well established." *S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987). Unlike constitutional mootness, prudential mootness (also called equitable mootness) is a pragmatic principle, grounded in the notion that, with the passage of time, sometimes effective relief becomes impractical or imprudent, and therefore inequitable. *See Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002). "Because the doctrine of equitable mootness is based on practicality and prudence, its application does not employ rigid rules." *Id.* But this Court has identified some factors to consider when deciding whether a case is prudentially moot, including: (1) the effectiveness of the judicial remedy; (2) the sensitivity or difficulty of the dispositive issue; and (3) the likelihood that the challenged act would recur and evade review. *See United States v. (Under Seal)*, 757 F.2d 600, 603 (4th Cir. 1985).

These factors instruct that this Court should exercise its discretionary power to withhold injunctive and declaratory relief for prudential reasons. *First*, the effectiveness of any judicial remedy is significantly diminishing as the months pass. CEQ's phased approach for promulgating new NEPA regulations could address many or all of the Plaintiffs' concerns with the challenged 2020 Rule. *See* 86 Fed. Reg. at 55,759. As a result, the 2020 Rule's expiration date is on the horizon. Indeed, many of Plaintiffs' allegations of injury are based on the theoretical environmental or informational harms that they speculate may occur if a federal agency in a future NEPA document fails to analyze impacts previously defined as indirect or cumulative under the 1978 regulations. *See, e.g.*, *supra* at 36-37. But the proposed Phase 1 rule (if adopted as final) restores the impacts definitions of the 1978 regulations, meaning that many of the allegations of harm will soon disappear. Moreover, the proposed Phase 1 rule would lift the provision making the 2020 Rule the "ceiling" for NEPA procedures, which would enable the agencies not to implement provisions of the 2020 Rule if they chose not to. 86 Fed. Reg. at 55,761-62. And, even before its phased rulemakings take effect, CEQ is working with federal agencies to ensure that they properly implement NEPA to avoid the kinds of harms that Plaintiffs speculate may occur if a federal agency misapplies the 2020 Rule.

Second, the sensitivities at play also favor withholding injunctive and equitable relief in part because continuing to litigate this matter would "hinder agency efforts to refine [their] policies." *Ohio Forestry*, 523 U.S. at 735. CEQ is a small agency with limited resources that does not want to defend the Rule on the merits. Continuing to litigate this case would interfere with CEQ's ongoing reconsideration process by forcing the agency to structure its administrative process around pending litigation, rather than the agency's priorities and expertise. Similarly, continuing to litigate the very same issues that CEQ is currently reconsidering would waste of scarce agency and judicial resources.

Finally, CEQ is also committed to assisting federal agencies in implementing NEPA in a manner consistent with Executive Order 13,990 such that there is little likelihood that the alleged errors would recur. Moreover, if any application of the 2020 Rule ever threatened Plaintiffs with imminent, concrete harm, it will not evade review because review will be proper at that time.

For these reasons, the judgment should be affirmed on the alternate ground that Plaintiffs' facial challenge to the 2020 Rule is prudentially moot.

CONCLUSION

For the foregoing reasons, the district court judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(b)(1) because it contains 12,956 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on February 18, 2022 an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

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