No. 22-30087

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE STATE OF LOUISIANA, by and through its Attorney General, Jeff Landry; THE STATE OF ALABAMA, by and through its Attorney General, Steve Marchall; THE STATE OF FLORIDA, by and through its Attorney General, Ashley Moody; THE STATE OF GEORGIA, by and through its Attorney General, Christopher M. Carr; THE COMMONWEALTH OF KENTUCKY, by and through its Attorney General, Daniel Cameron; THE STATE OF MISSISSIPPI, by and through its Attorney General, Lynn Fitch; THE STATE OF SOUTH DAKOTA, by and through its Governor, Kristi Noem; THE STATE OF TEXAS, by and through its Attorney General, Ken Paxton; THE STATE OF WEST VIRGINIA, by and through its Attorney General, Patrick Morrisey; THE STATE OF WYOMING, by and through its Attorney General, Bridget Hill,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; CECILIA ROUSE, in her official capacity as Chairwoman of the Council of Economic Advisers; SHALANDA YOUNG, in her official capacity as Acting Director of the Office of Management and Budget; KEI KOIZUMI, in his official capacity as Acting Director of the Office of Science and Technology Policy; JANET YELLEN, Secretary, U.S. Department of Treasury; DEB HAALAND, Secretary, U.S. Department of the Interior; TOM VILSACK, in his official capacity as Secretary of Agriculture; GINA RAIMONDO, Secretary, U.S. Department of Commerce; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; JENNIFER GRANHOLM, Secretary, U.S. Department of Energy; BRENDA MALLORY, in her official capacity as Chairwoman of the Council on Environmental Quality; MICHAEL S. REGAN, in his official capacity as Administrator of the Environmental Protection Agency; GINA MCCARTHY, in her official capacity as White House National Climate Advisor; BRIAN DEESE, in his official capacity as Director of the National Economic Council; JACK DANIELSON, in his official capacity as Executive Director of the National Highway Traffic Safety Administration; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

REPLY BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRANDON BONAPARTE BROWN
United States Attorney

SARAH E. HARRINGTON
Deputy Assistant Attorney General

MICHAEL S. RAAB
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332

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INTRODUCTION AND SUMMARY

Since the Nixon Administration, Presidents have exercised their constitutional authority to oversee the rulemaking efforts of executive agencies. As part of that oversight, Presidents have required agencies to undertake a cost-benefit analysis of certain regulatory proposals and have supervised the execution of such analyses.

Executive Order 13990 is the latest in a series of presidential directives in this area. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (E.O. 13990). Section 5 of the order directs an interagency group of experts (the Working Group) to develop a set of estimates for the social cost of greenhouse gases (the Interim Estimates) and orders federal agencies to use the estimates when they monetize such costs, to the extent consistent with applicable law.

Defendants' opening brief explained why Plaintiffs' preemptive challenge—before the Interim Estimates have been relied on to justify a regulation that harms Plaintiffs' concrete interests—is not justiciable. Whether viewed through the lens of standing (as a panel of this Court did previously), ripeness, or sovereign immunity, Plaintiffs' challenge to the legality and reasonableness of the Interim Estimates is premature.

Plaintiffs contend that their suit is proper because the Interim Estimates "are in use" now. Resp. 2 (emphasis omitted). But "use" alone does not create a justiciable case or controversy. At most, it gives rise to "a generalized grievance of how the current administration is considering [the social cost of greenhouse gases (SC-GHG)]." Stay Order 6. Even now, nearly 18 months after the issuance of E.O. 13990 and the publication of the Interim Estimates, Plaintiffs are unable to identify a single example of a final agency action that was justified on the basis of these values. If they did, there would be "no obstacle to prevent [them] from challenging [that] specific agency action in the manner provided" by the Administrative Procedure Act (APA). Stay Order 7. What they cannot do is bring a single programmatic challenge to force wholesale change on the entire Executive Branch.

Moreover, even if Plaintiffs' suit were justiciable, the district court erred in issuing a preliminary injunction. Plaintiffs fall short at every step of the required showing for any injunctive relief, let alone the sweeping and unprecedented injunction they requested. Indeed, after a panel of this Court concluded that "Defendants' likelihood of success on the merits," "the balance of harms to the parties," and "the public interest" all counseled in favor of staying the district court's injunction, Stay Order 4, 7, the Supreme

Court declined to vacate the stay, with no dissent noted. Order, *Louisiana v. Biden*, No. 21A658 (May 26, 2022).

ARGUMENT

I. Plaintiffs' Complaint Must Be Dismissed for Lack of Jurisdiction.

A. Plaintiffs Lack Article III Standing.

A panel of this Court recognized that Plaintiffs "lack standing" to press their "generalized grievance" about how the federal government accounts for the social cost of greenhouse gases. Stay Order 5-6. The stay panel explained that, because "[t]he Interim Estimates on their own do nothing to the Plaintiff States," the claimed injury "is, at this point, merely hypothetical" and does not meet "the standards for Article III standing." *Id.* Rather than try to explain why the panel's analysis was mistaken, Plaintiffs ignore it. *See* Resp. 26-30.

Plaintiffs claim (Resp. 26) that "the Executive Order and Estimates injure the Plaintiff States" in three ways, but none is sufficient to establish standing. First, they argue that use of the Interim Estimates in environmental reviews under the National Environmental Policy Act (NEPA) will "increase the cost estimates of [oil-and-gas] lease sales," which "reduces the number of parcels being leased," which, in turn, "result[s] in the

States receiving less" revenue. Resp. 26-27 (quoting ROA.4047). Defendants already explained (Br. 32-33) why a loss of such revenue (assuming one had occurred) would not support standing here. Among other reasons, E.O. 13990 does not require use of the Interim Estimates in NEPA reviews, and such reviews do not dictate substantive decisions about which or how many parcels are made available for lease.

Plaintiffs do not directly respond. The closest they come is the assertion (Resp. 54) that the Bureau of Land Management (BLM) "expressly justified withholding massive tracts of land" in Utah based on the Interim Estimates. But the environmental review Plaintiffs cite considered the Interim Estimates "only as a useful measure of the benefits of [greenhouse gas] emissions reductions to inform agency decision making" that had yet to be finalized. Bureau of Land Management, DOI-BLM-UT-0000-2021-0007-EA, Environmental Assessment, *Utah 2022 First Competitive Oil and Gas Lease Sale* 45 (June 2022), https://perma.cc/TY7W-YZNH. When the final decision was made, the agency stated that "[t]he [Environmental Assessment] analyzes emissions and the social cost thereof for informational purposes only, and BLM has not determined to lease individual parcels (or not) based on greenhouse gas emissions." Bureau of Land Management,

DOI-BLM-UT-0000-2021-0007-EA, Decision Record, *Utah 2022 First Competitive Oil and Gas Lease Sale* 2 (June 2022), https://perma.cc/5BU4-ZY9N; *see also id.* Appx. J (identifying criteria for parcel selection). Thus, any injury caused by the leasing decision would not be fairly traceable to the conduct challenged here.[1]

Second, Plaintiffs repeat the district court's assertion that the Environmental Protection Agency (EPA) is "coercing the States to use" the Interim Estimates by "disapprov[ing] state air-quality implementation plans" under the National Ambient Air Quality Standards (NAAQS) program and imposing "federal implementation plans" based on the estimates. Resp. 27 (citing ROA.4047, 4049). As Defendants previously demonstrated, however, EPA did not rely on the Interim Estimates to justify its final rule and did not require State to use them either. Br. 31; *see also* New York Amicus Br. 10-11, 13. Plaintiffs do not respond to these points or identify contrary evidence in EPA's rulemaking.

This is not surprising. The NAAQS program concerns an entirely different set of pollutants, *see Utility Air Regulatory Grp. v. EPA*, 573 U.S.

[1] It is also unclear why a decision not to lease parcels of land in Utah (which is not a party here) would cause any revenue loss to Plaintiffs.

302, 308 (2014), and state implementation plans are evaluated for adequacy in addressing obligations with respect to those pollutants. Thus, as the *amici* States explain, the particular implementation plans cited by the district court and Plaintiffs were disapproved on grounds entirely "unrelated to the social cost of greenhouse gases." New York Amicus Br. 11-12. Plaintiffs offer no theory for how such unrelated agency action could coerce them into using the Interim Estimates.

Third, and finally, Plaintiffs claim (Resp. 28) to have suffered "a procedural injury" when they were not permitted to comment on the Working Group's Technical Support Document before it was issued. But because they fail to identify any "concrete interest that is affected by the deprivation," as demonstrated above, Plaintiffs assert only the kind of "procedural right *in vacuo*" that the Supreme Court has repeatedly rejected as insufficient. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Plaintiffs' remaining arguments regarding injury-in-fact fare no better. They claim (Resp. 29) that "the district court's extensive jurisdictional findings" must be "assumed correct" absent a showing of clear error. But that court's assessments of the legal effects or bases of various administrative actions are not factual findings entitled to deference. Rather,

any "findings regarding injury in fact and causation" are "mixed questions of fact and law" that this Court "review[s] de novo." *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014). Plaintiffs further urge (Resp. 29) that "States are entitled to special solicitude" in the standing inquiry, but they offer no response to Defendants' arguments that such solicitude is not warranted here given the absence of concrete injury. Br. 34-35.

Finally, Plaintiffs contend (Resp. 30) that there is "nothing speculative about the chain of causation" in this case because "the federal government is using the Estimates right now." This argument captures the shortcoming at the heart of Plaintiffs' suit. Plaintiffs cannot establish standing merely based on the fact that federal agencies use the Interim Estimates in some unspecified manner (nor have Defendants ever denied this fact, *contra* Resp. 2, 22). Rather, Plaintiffs must establish that agencies are relying on the Interim Estimates as the basis for a final agency action that in turn causes a judicially cognizable injury to Plaintiffs' concrete interests.

Plaintiffs have failed to carry this burden. For example, they claim (Resp. 55 & n.6) "presently occurring damages" as a result of a rulemaking where the Department of Energy "trie[d] to justify a manufactured housing rule based on the Estimates." But the Department explained that it had

used Interim Estimates only "in support of the cost-benefit analyses required by Executive Order 12866," and that they "were not factored into [its] determination of whether the final rule is cost-effective" under the statutory standard. *Energy Conservation Standards for Manufactured Housing*, 87 Fed. Reg. 32,728, 32,802 (May 31, 2022). To underscore the point, the Department stated that it "would reach the same conclusion presented in this document in the absence of the social cost of greenhouse gases, including the February 2021 Interim Estimates." *Id.* In other words, as with the BLM lease sale and the NAAQS rule, the agency is *using* the Interim Estimates, but there is no judicially cognizable *injury* traceable to the use of such Estimates.

B. Plaintiffs' Claims Are Not Ripe.

Rather than wait "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action" in which a federal agency uses the Interim Estimates "in a fashion that harms or threatens to harm" their interests, *National Park Hosp. Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003) (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)), Plaintiffs seek "to preemptively challenge the Interim Estimates" in the abstract, Stay

Order 4. The ripeness doctrine prevents such premature interference with agency decisionmaking. *National Park Hosp. Ass'n*, 538 U.S. at 808; *see also* Br. 35-40.

Plaintiffs urge (Resp. 31) that waiting for further "factual development would not aid the Court" in resolving their claims regarding statutory authorization "[b]ecause these are purely legal issues." But these are distinct inquiries. *See Texas v. United* States, 497 F.3d 491, 498 (5th Cir. 2007) (explaining that a claim is "fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented'" (quoting *National Park Hosp. Ass'n*, 538 U.S. at 812) (alterations in original)).

Here, postponing judicial review until a party challenges use of the Interim Estimates in a particular administrative action would serve two purposes. First, it would bring clarity to the legal questions presented because "[t]he operation of the statute is better grasped when viewed in light of a particular application." *Texas v. United States*, 523 U.S. 296, 301 (1998); *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998) (explaining that premature review of a resource management plan would

"take place without benefit of the focus that a particular logging proposal could provide"); *Missouri v. Biden*, 558 F. Supp. 3d 754, 772 (E.D. Mo. 2021), *appeal pending* No. 21-3013 (8th Cir.) (explaining that a "determination of the legality of an agency's reliance on the Interim Estimates will necessarily be informed by the specific statutory directives that Congress has provided to guide the agency's actions"). And second, further developments would shed light on which, if any, specific statutory questions need to be answered at all. "At present, this case is riddled with contingencies and speculation that impede judicial review," including whether any agency will rely on the Interim Estimates to justify a final rule, "let alone in a manner substantially likely to harm any of the plaintiffs here." *Trump v. New York*, 141 S. Ct. 530, 535 (2020).

Plaintiffs further fail in their efforts to demonstrate (Resp. 33-38) that they "will suffer hardship absent immediate review." *See Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) ("[E]ven where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." (quoting *Central & Sw. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir.2000))). The hardships they claim are the same harms they rely on to demonstrate the injury-in-fact for standing, and their arguments are no

more successful the second time around. The hypothetical and speculative nature of the claimed injuries is equally fatal under the ripeness doctrine. *See Texas*, 523 U.S. at 300 ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotation marks omitted)).

Plaintiffs' reliance on this Court's decision in *Texas v. United States* is unavailing. In that case, there was no need to wait for concrete action affecting the State's interests to make its claims fit for review because the challenged procedures "ha[d] *already been applied* to Texas." 497 F.3d at 497 (emphasis added); *see also id.* at 499. Similarly, this "present injury" meant that Texas would suffer hardship from delayed review: it had to either "participate in an allegedly invalid process that eliminate[d] a procedural safeguard promised by Congress, or eschew the process" and "ris[k] the approval of gaming procedures in which the state had no input." *Id.* at 499. Here, Plaintiffs have not been subjected to an allegedly invalid procedure, nor do they run any risk of harm from being required to "challeng[e] a specific agency action in the manner provided by the APA." Stay Order 7.

Plaintiffs likewise miss the mark in their invocation (Resp. 34) of an allegedly "general rule that executive actions that bind agencies to a certain

course are immediately reviewable." Neither E.O. 13990 nor the Interim Estimates bind agencies to any particular regulatory course. Indeed, an agency's consideration of the Interim Estimates in a regulatory analysis may not have any material effect on the final rule. *See supra* pp. 4-5 (discussing BLM lease sale); *supra* p. 7-8 (discussing Department of Energy rule); *see also, e.g.*, *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, 86 Fed. Reg. 74,434, 74,498 (Dec. 30, 2021) ("EPA weighed the relevant statutory factors to determine the appropriate standard and the analysis of monetized [greenhouse gas] benefits was not material to the choice of that standard.").

Moreover, the case that Plaintiffs cite (Resp. 34-35) for this rule makes clear that "a regulation is *not* ordinarily considered the type of agency action 'ripe' for judicial review under the APA" before it is applied, unless the regulation is "a substantive rule which as a practical matter requires *the plaintiff* to adjust his conduct immediately." *National Wildlife Fed'n*, 497 U.S. at 891 (emphasis added). Here, "[t]he Interim Estimates on their own do nothing to the Plaintiff States." Stay Order 6.

Finally, Plaintiffs contend (Resp. 38) that this is their "only adequate opportunity to challenge" E.O. 13990 and the Interim Estimates. A panel of

this Court disagreed, *see* Stay Order 7 (finding "no obstacle to prevent the Plaintiff States" from challenging an agency's use of "the Interim Estimates in reaching a specific final agency action"), and Plaintiffs offer no reason to support a contrary conclusion.

Plaintiffs' predictions (Resp. 37 n.4) that agencies will "point to the Executive Order as a justification for ignoring contrary comments" and that States will be unable to "challeng[e] individual agency actions on arbitrary-and-capricious grounds" have already been disproven. As the Office of Information and Regulatory Affairs Guidance instructed, ROA.359, agencies have repeatedly and substantively responded to comments on the Interim Estimates and applied their own independent judgment to ensure that use of the estimates was appropriate.[2] Several of the Plaintiff States have

[2] *See, e.g.*, 87 Fed. Reg. at 32,802-05 ("DOE agrees that the interim SC-GHG estimates represent the most appropriate estimate of the SC-GHG until revised estimates have been developed reflecting the latest, peer-reviewed science."); EPA, *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards: Response to Comments* 755-57 (Dec. 2021), https://perma.cc/CSU8-U2GF ("EPA has carefully reconsidered for this rulemaking the Technical Support Document [(TSD)], the underlying studies discussed in the TSD and the issues raised by commenters. EPA concludes that . . . the discussions in the TSD represent appropriate consideration of the various issues (e.g., appropriate discount rate and scope) and the resulting estimates of the TSD represent appropriate, if conservative, estimates for purposes of this rulemaking.").

challenged an EPA rule resulting from such independent consideration, on the ground that it was "arbitrary and capricious to rely on inputs from the Interagency Working Group on the Social Cost of Greenhouse Gases." Statement of Issues To Be Raised at 3, *Texas v. U.S. EPA*, No. 22-1031, (D.C. Cir. Apr. 1, 2022).[3] As for their claim (Resp. 33) that delay will "bog [them] down in years of litigation," the Supreme Court has expressly rejected that concern as a basis to evade ordinary ripeness principles. *See Ohio Forestry Ass'n*, 523 U.S. at 734.

C. Plaintiffs' Programmatic Challenge Is Barred by Sovereign Immunity.

In addition to standing and ripeness, Plaintiffs face a third justiciability obstacle in sovereign immunity. As Defendants explained (Br. 41-46), this

[3] *Amicus* America First Legal Foundation claims that the government "already made th[e] argument" in the *Zero Zone* case that agency use of the Interim Estimates is "*not* subject to full APA procedures and judicial review," and that it can therefore be expected to do so again. America First Amicus Br. 20-21. What the Department of Energy actually argued in that case was that it had "reasonably explained" why it used the Working Group's 2013 estimates, which "f[ou]nd ample support in the record." Brief for Respondents at 35, *Zero Zone, Inc. v. U.S. Dep't of Energy*, Nos. 14-2147, 14-2159 & 14-2334 (7th Cir. July 22, 2015). The Department sought "to rely on the reasonable opinions of *its own* qualified experts." *Id.* (emphasis added) (quotation marks omitted). It did not, as *amicus* suggests (America First Amicus Br. 21), seek to hide behind the Working Group.

Court's precedents bar Plaintiffs' claims because they are not directed at agency action, much less final agency action, under the APA.

"Under the terms of the APA, [a party] must direct its attack against some particular 'agency action' that causes it harm." *National Wildlife Fed'n*, 497 U.S. at 891. But Plaintiffs "do not challenge any specific regulation or other agency action." Stay Order 4. Plaintiffs' effort to deny that they bring the same kind of programmatic challenge rejected in *National Wildlife Federation*, *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484 (5th Cir. 2014), and *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000) (en banc), is undermined by their acknowledgement (Resp. 39) that they seek to change the way agencies account for the social cost of greenhouse gases in "all agency cost/benefit analysis." Likewise, Plaintiffs' representation that their "lawsuit does not ask the courts to dictate policy" (Resp. 39) is contradicted by their request for a preliminary injunction that forces "the current administration to comply with prior administrations' policies on regulatory analysis" that were "not mandated by any regulation or statute in the first place," Stay Order 6.

Plaintiffs are no more successful in their efforts (Resp. 40-42) to establish that the Working Group is an agency under the APA because it

"wield[s] substantial authority independently of the President." *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009). As Defendants previously explained (Br. 43), any authority exercised by the Working Group flows directly from the President through E.O. 13990. It is that order, not any "unilateral" action of the Working Group (Resp. 41), that requires agencies to use the Interim Estimates in their regulatory analyses. *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993) (noting that "[a] careful reading of the Executive Order . . . is the most important indication of the [entity's] role"). Thus, the fact that "[n]o further action from the President is needed" (Resp. 40) is beside the point. To the extent that E.O. 13990 delegates authority to the Working Group, that delegation "simply make[s] the entity an extension of the President" for this limited purpose. *Main St. Legal Servs., Inc. v. National Sec. Council*, 811 F.3d 542, 558 (2d Cir. 2016). Plaintiffs point to no provision in either E.O. 13990 or any statute that provides the Working Group with an independent power to "promulgat[e] final rules that bind executive branch agencies." Resp. 41.

But even if the Working Group were an agency, and even if the Interim Estimates could be considered agency action, they certainly would not be

final agency action under the APA. Whether the Interim Estimates "are in use across the Executive Branch" (Resp. 42) is not an element of the relevant inquiry and Plaintiffs provide no authority otherwise. *See Sierra Club*, 228 F.3d at 565 ("Final agency actions are actions which (1) 'mark the consummation of the agency's decisionmaking process,' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.'" (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).[4] The fact that an injunction prohibiting consideration of the Interim Estimates "significantly undermine[d] Executive Branch decisionmaking" (Resp. 42) only underscores that such consideration is part of decisionmaking processes that were not yet complete. *See* Stay Order 6 (noting that the preliminary injunction interferes with agency decisionmaking "*before* they even make those decisions"); *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 337 (5th Cir. 2004) (explaining that agency actions that only adversely affect private rights "on the contingency

[4] Plaintiffs contend (Resp. 39) that the Supreme Court has "explained that a specific action 'applying some particular measure across the board' *would* constitute final agency action." What the Court in fact said was that such an action could "be challenged under the APA by a person adversely affected" "*if* that order or regulation is final, *and* has become ripe for review." *National Wildlife Fed'n*, 497 U.S. at 890 n.2 (emphases added).

of future administrative action" were not final (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939))).

II. The District Court Erred in Granting a Preliminary Injunction.

A. Plaintiffs' Claims Lack Merit.

Even if Plaintiffs could show that the district court has jurisdiction to consider their claims, they cannot carry the heavy burden of establishing the need for preliminary injunctive relief. Indeed, they stumble at the first hurdle of demonstrating a likelihood of success on the merits.

Plaintiffs primarily contend (Resp. 46-47) that E.O. 13990 is unlawful under the major questions doctrine because there is no "clear congressional authorization" for the President's directive that agencies use the Interim Estimates in their regulatory analyses. As Defendants previously explained, however (Br. 47-48), that doctrine has no application here. Section 5 of E.O. 13990 rests on Article II, not on congressional authorization. Plaintiffs do not argue that the President has exceeded this constitutional authority. Nor could they reasonably do so, having acknowledged (Resp. 3-4, 6-7) that the President can "requir[e] agencies to perform cost-benefit analysis before regulating" and dictate the specific discount rates that agencies must use when doing so. Plaintiffs also do not explain why a "President's directive to

agencies in how to make agency decisions, *before* they even make those decisions," Stay Order 6, could represent an "unprecedented" and "transformative expansion in [an agency's] regulatory power," *West Virginia v. EPA*, 142 S. Ct. 2587, 2610, 2612 (2022), particularly where the directive is to return to the use of previously adopted values (adjusted only for inflation) in a cost-benefit analysis that may have no causal connection to any particular final agency action.

Plaintiffs fare no better in their attempts to argue (Resp. 47-50) that the Interim Estimates can never be used in any circumstance because selected statutes governing certain agency actions permit "considering only national effects." This claim would at most justify relief in a challenge to a specific agency action taken under one of those statutes, not the blanket relief Plaintiffs seek here. *See Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002).

In any event, Plaintiffs fail to make their case even with respect to the curated examples on their incomplete list. *See generally* NYU Amicus Br. 22-30 (detailing the consistency of the Interim Estimates' geographic scope with Circular A-4 and various statutes). For example, Plaintiffs cite a provision in the Energy Policy and Conservation Act, 42 U.S.C.

§ 6295(o)(2)(B)(i), without acknowledging the Seventh Circuit's holding that the Department of Energy "acted reasonably" when it concluded that "global effects are an appropriate consideration when looking at a national policy" under this provision. *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 679 (7th Cir. 2016), *cited at* Br. 49-50. Plaintiffs also suggest that a provision of the Outer Continental Shelf Lands Act governing the preparation of lease sale schedules, 43 U.S.C. § 1344(a), denies the Department of the Interior "discretion to consider any global effects [of] oil and gas consumption," Resp. 50 (quoting *Center for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009)), while neglecting to mention that the relevant limitation is on consumption-related effects, not global ones. *Center for Biological Diversity*, 563 F.3d at 485. The D.C. Circuit upheld the Department's analysis of *production*-related effects, which had "examined the cumulative impact of [greenhouse gas] emissions on the global environment." *Id.* at 485-86.

Yet, even if a statute did prohibit use of the Interim Estimates in a particular context, E.O. 13990 does not purport to dictate otherwise. The order limits implementation of any requirement to a manner "consistent with applicable law." E.O. 13990, §§ 5(b)(ii), 8(b). Plaintiffs urge the Court (Resp.

37 n.4, 45) to disregard this instruction. But this is not a situation where a "savings clause . . . would nullify the 'clear and specific' substantive provisions of the Order." *HIAS, Inc. v. Trump*, 985 F.3d 309, 325 (4th Cir. 2021); *see also City & County of San Francisco v. Trump*, 897 F.3d 1225, 1239-40 (9th Cir. 2018) (same). Where it is possible for courts to give meaning to both specific and general provisions of an executive order, they do so. *City & County of San Francisco*, 897 F.3d at 1240; *Allbaugh*, 295 F.3d at 33. Plaintiffs cite no authority for the proposition that an executive order must be given an unnatural reading in order to create conflict with existing statutes when the reading commanded by plain text and endorsed by Executive Branch guidance would avoid such a conflict. *See* ROA.359 (instructing agencies to give precedence to any applicable statute that "specifies and requires or excludes an analytic approach, such as cost-benefit analysis, in deriving a standard").

Plaintiffs likewise fail to rehabilitate their notice-and-comment claim. The APA requires notice and comment only for "substantive," or "legislative," rules. *Texas Sav. & Cmty. Bankers Ass'n v. Federal Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000). Plaintiffs ignore this Court's teaching in *Walmart v. U.S. Dep't of Justice*, 21 F.4th 300, 308 (5th Cir.

2021), *cited at* Br. 50, that agency actions "not binding on the regulated public" are not substantive rules and therefore "need not be preceded by notice-and-comment rulemaking." Instead, Plaintiffs cite out-of-circuit cases to argue that the Interim Estimates must be legislative in character because they involve "specific numerical values." Resp. 46, 50 (quoting ROA.4060). But these cases establish that the use of specific numerical values by itself does not make a rule legislative, particularly (as here) "in scientific and other technical areas, where quantitative criteria are common," or other situations where numbers can "be derived from a particular record." *See, e.g.*, *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010).

Plaintiffs further argue (Resp. 51) that the absence of notice and comment before the Interim Estimates were published could not be harmless error—notwithstanding the opportunity to comment on the prior iteration that the Working Group updated for inflation—because there has been "no opportunity to raise four years of developments and new studies since the last comment period" and there will be no future opportunity for comment. But as Defendants explained (Br. 51), Plaintiffs will have such an opportunity when the Interim Estimates are used in connection with a specific agency action. Indeed, several of the Plaintiffs (including Louisiana and Texas)

submitted comments in a recent EPA rulemaking criticizing the agency's use of the Interim Estimates. *See Comment Submitted by Ohio Attorney General Office, et al.* (Sept. 29, 2021), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0258. Plaintiffs chose not to argue there that the Interim Estimates relied on outdated science, but another group of States did so. *Comment Submitted by Attorney General of Missouri, et al.* (Sept. 29, 2021), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0288.

With respect to their substantive APA claim, Plaintiffs had offered the district court "numerous arguments as to why the [Interim] Estimates are arbitrary and capricious," ROA.4063, but before this Court they press only two.[5] They first argue (Resp. 52) that the Interim Estimates were "rushed

[5] While they do not offer legal argument on these grounds, Plaintiffs opine in their background section (Resp. 12-17) that the Working Group's 2016 estimates did not reflect "reasoned decisionmaking for many reasons" and that E.O. 13783 properly led agencies back to "Circular A-4's methodologies" for analyzing the social cost of greenhouse gases. It bears noting that the reports Plaintiffs rely on contradict both their characterization of Circular A-4, *see, e.g.*, ROA.2571-73 (noting that Circular A-4 "does not . . . prohibit consideration of global values" and permits use of discount rates under 3%), and their suggestion that agencies fully abandoned the Working Group's methodologies, *see, e.g.*, ROA.2570 (noting under E.O. 13783 "EPA used the same models and assumptions as the IWG except with respect to the scope (domestic versus global) and discount rates"); ROA.2575

Continued on next page.

out in a month," without taking "account of years of developments." The Working Group explained, however, that there was an "immediate need to have an operational SC-GHG until the revised estimates have been developed," which would incorporate both "recent science" and "the recommendations of the National Academies." ROA.312. Plaintiffs do not explain why this incremental approach was unreasonable. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991) ("[A]n agency need not solve every problem before it in the same proceeding.").

Second, Plaintiffs contend (Br. 53) that the Working Group "fail[ed] to consider the States' reliance upon the prior system," by which they mean the approach to estimating the social cost of greenhouse gases required by E.O. 13783. But their brief does not identify any specific reliance interests. Nor do Plaintiffs explain why any reliance by States on the manner in which federal agencies conduct intra-governmental regulatory analyses could be reasonable, especially given the disclaimer in E.O. 13783 that it did not create any "right or benefit, substantive or procedural, enforceable at law or

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(noting that EPA "estimated the forgone climate benefits using global values and an alternative discount rate (2.5%) and presented the results in an appendix").

in equity by any party against the United States . . . or any other person." Exec. Order No. 13783, § 8(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017).

Finally, Plaintiffs contend (Resp. 43-45) generally that "*[u]ltra vires* review is available to determine 'whether the President has violated the Constitution, the statute under which the challenged action was taken, or other statutes, or did not have statutory authority to take a particular action.'" Resp. 43 (quoting *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 406 (D. Md. 2011)). But they make no attempt to demonstrate that their non-statutory claim falls within the "very narrow" circumstances required by this Court for such a claim to proceed, including that there be no other "meaningful and adequate opportunity for judicial review" of the challenged action. *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293-94 (5th Cir. 1999); *see* Br. 53-54.

B. Equitable Factors Weigh Against Injunctive Relief.

A panel of this Court unanimously concluded that the balance of equities weighs against preliminary injunctive relief. Stay Order 6-8. Plaintiffs demonstrate no error in this analysis.

Plaintiffs' claims of irreparable harm rely on the same injuries invoked to establish standing, and they fail for the same basic reasons—any injury is

purely hypothetical and speculative. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Their continued inability to point to any concrete harm fairly traceable to the Interim Estimates, more than a full year after the estimates were published, underscores how inappropriate a preliminary injunction is in this case.

Plaintiffs' analysis of the balance of equities and the public interest is similarly inadequate. They contend (Resp. 55) that any harms to the Executive Branch and the public do not count because the Interim Estimates were unlawful. *See* Resp. 56 (referring to a "nonexistent interest in furthering an illegal policy"). That argument disregards the framework for preliminary injunctive relief, which requires a movant to demonstrate not only that "he is likely to succeed on the merits" but *also* "that the balance of equities tips in his favor" and "that an injunction is in the public interest." *Winter*, 555 U.S. at 20. If Plaintiffs' approach were correct, the test would stop at the first element. *See id.* at 31-32 (declining to "address the

underlying merits" but holding that the movants had failed to meet the equitable factors).

Because these elements are separate, any weighing of the equities must take into account the harms to Defendants and public occasioned by Plaintiffs' requested relief. These include the creation of an impermissible *ex ante* mandate in ongoing agency rulemakings, imposition of a particular approach to regulatory analysis not required by any legal authority, and intrusion on the President's constitutional authority to supervise the Executive Branch. Br. 56-59. Given the absence of any harm (much less irreparable harm) on Plaintiffs' side of the balance, these serious injuries to the federal government and the public interest make any preliminary injunctive relief an abuse of discretion.

C. Even if Some Relief Were Appropriate, the District Court's Preliminary Injunction Was Significantly Overbroad.

Plaintiffs do not dispute that an injunction is overbroad and "must be vacated" if it "is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *ODonnell v. Harris County*, 892 F.3d 147, 155, 163 (5th Cir. 2018), *overruled on other grounds by Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022) (en

banc). But notably, they make no effort to defend the terms of the injunction they asked for. They do not explain, for example, how their "qualms with the Interim Estimates justify halting the President's [Working Group]." Stay Order 6. Nor do they justify a requirement that agencies adhere to Plaintiffs' preferred "approach to regulatory analysis" purportedly drawn from an internal guidance document that was "not mandated by any regulation or statute in the first place." *Id.* The district court imposed relief "outside the authority of the federal courts." *Id.* For that reason alone, the preliminary injunction must be vacated.

Plaintiffs instead assert (Resp. 57) that the injunction is properly tailored because it "prevents the Executive Branch from employing the Estimates." This relief goes far beyond the specific action Plaintiffs challenged, which was the President's directive that "agencies shall use" the Interim Estimates, E.O. 13990, § 5(b)(ii)(A).

If the district court had issued preliminary relief that required agencies to proceed "as if [that directive] were vacated" (Resp. 56), agencies would be free to use the Interim Estimates (or to decline to do so) in the exercise of their independent judgment. Even if the district court had vacated the Working Group's Technical Support Document, agencies would

be free to use the Group's 2016 estimates, updated for inflation, if they concluded that such values provided the best available accounting of the social cost of greenhouse gases. Neither of these options would bind agencies to the use of specific discount rates or a particular scope of analysis as the district court's injunction here did.

Plaintiffs suggest (Resp. 57-59) that the imposition of an overbroad injunction was justified here because Defendants might continue to use the Interim Estimates "[e]ven without any binding directive" from the President. ROA.261. This is nothing more than a complaint that legally available relief would not accomplish all of Plaintiffs' desired policy goals. Although no injunction is warranted in this case, the most that a properly tailored injunction could do is relieve agencies of any obligation imposed by E.O. 13990. It would not disable agencies from following their best view of the science or "return" OMB Circular A-4 as "the governing standard." Resp. 57. Indeed, Circular A-4 "is not binding on any agency" and never has been. Stay Order 3.

Equally without foundation is Plaintiffs' repeated assertion (Resp. 20, 58) that the Department of Energy "*continued to* employ the SC-GHG Estimates *even after* it was enjoined from doing so." In that particular

rulemaking, the Department responded to a commenter who had urged use of a "global estimate of the social cost of greenhouse gases" by pointing out that it "did not conduct an economic analysis or corresponding emissions analysis" at all and that there was "no corresponding consideration of emission reductions or the associated monetary benefits." *Energy Conservation Standards for Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps*, 87 Fed. Reg. 11,335, 11,348 (Mar. 1, 2022).

The Department could not have violated the injunction by explaining why it was *not* using the Interim Estimates. In the course of doing so, the Department stated that its general practice was to "us[e] the social cost of greenhouse gases from the [Working Group's] most recent update." 87 Fed. Reg. at 11,348. That statement was accurate when it was drafted and when it was signed by the relevant policymaker, both of which occurred no later than February 9, 2022, *see id.* at 11,354, before the district court entered its injunction. But by the time the statement was *published* in the Federal Register, the injunction was in place and the statement was no longer accurate. The Department subsequently issued a clarification to explain the situation and underscore that it was "adhering to the prohibitions in the preliminary injunction." *Energy Conservation Standards for Variable*

Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps; Clarification, 87 Fed. Reg. 14,186, 14,187 (Mar. 14, 2002). Plaintiffs' continued efforts to use this singular accident of timing to justify an unprecedented and otherwise unsupported injunction, despite having been informed of the underlying facts, should be thoroughly and swiftly rejected.

CONCLUSION

For the foregoing reasons, the district court's order should be vacated and the complaint dismissed for lack of jurisdiction.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRANDON BONAPARTE BROWN
United States Attorney

SARAH E. HARRINGTON
Deputy Assistant Attorney General

MICHAEL S. RAAB

s/ Thomas Pulham
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332
thomas.pulham@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Thomas Pulham
Thomas Pulham

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,497 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

s/ Thomas Pulham
Thomas Pulham