UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

THE STATE OF LOUISIANA, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 2:21-cv-01074-JDC-KK

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

Landmark Legal Foundation ("Landmark") respectfully submits this motion for leave to file the attached amicus brief in support of Plaintiffs' Motion for Preliminary Injunction, Dkt. No. 53. A proposed order also accompanies this motion.[1]

Landmark is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark presents in its attached brief a unique perspective on the President's authority to act absent a delegation of power from Congress.

Landmark's involvement with the Executive Branch's attempts to improperly set the Social Cost of Greenhouse Gasses ("SC-GHGs") dates to 2013. That year, the Obama Administration's Department of Energy ("DOE") published a rule pertaining to the energy usage in microwave ovens using a new estimate for calculating the Social Cost of Carbon ("SCC"). "Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens" 78 Fed. Reg.

[1] Counsel for both parties consent to Landmark's filing of this brief.

36316 (June 17, 2013). The SCC estimate used in DOE's rule differed from the SCC estimate in the rule's earlier iterations. The SCC valuation jumped from the number in the proposed rule to the number used in the final rule. *Id.* at 36351. And the SCC used in the final rule had been developed by an Interagency Working Group (IWG) identical to the entity reconstituted in Executive Order 13990. *Id.* DOE incorporated the newly constituted SCC without notice or opportunity for public comment. DOE also specified that this valuation would be used by all agencies when calculating costs and benefits associated with carbon dioxide. *Id.* at 36349.

Landmark filed a Petition for Reconsideration to compel DOE and the Obama Administration to follow the requirements of the Administrative Procedure Act. "Landmark Legal Foundation Petition" 78 Fed. Reg. 49975 (Aug. 16, 2013). In short, Landmark urged suspension of the Microwave Oven Rule until DOE provided the public the opportunity to comment upon the new SCC valuation. *Id.* Shortly thereafter, DOE published Landmark's Petition, suspended implementation of the rule, and opened the rulemaking to public comments. Concerned parties filed comments describing the flaws in the IWG's methodology in calculating the SCC. But despite these comments, the DOE denied Landmark's Petition and promulgated a final rule using the IWG's SCC estimates. "Petition for Reconsideration, Notice of Denial" 78 Fed. Reg. 79643 (Dec. 31, 2013).

Landmark now moves for permission for leave to file as amicus curiae in the instant matter to provide a unique perspective on the failure of the Biden Administration to respect the separation of powers and failure to follow the APA's requirements.

Respectfully submitted,

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* *Motion for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I do hereby certify that I caused the *Motion for Leave to File as Amicus Curiae* to be served on those parties receiving electronic notification via the Court's CM/ECF System on July 30, 2021.

/s/ John B. Dunlap III
John B. Dunlap III

UNITED STATES DISTRICT COURT
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ORDER

Whereas, this matter has come before the Court pursuant to Landmark Legal Foundation's Motion for Leave to File as Amicus Curiae.

Whereas, the Court, having considered the Motion, it is hereby:

ORDERED that Amicus Curiae's Motion is **GRANTED**.

This _____ day of _____ 2021.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

THE STATE OF LOUISIANA, et al., Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official Capacity as President of the United States, et al., Defendants.	Case No. 2:21-cv-01074-JDC-KK

AMICUS CURIAE LANDMARK LEGAL FOUNDATION'S
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT ON CONSENT TO FILE

All parties have consented to the filing of this brief.[1] Amicus Curiae Landmark Legal Foundation ("Landmark") files this brief as an attachment to its Motion for Leave to File.

Landmark certifies that a separate brief is necessary to provide the perspective of a constitutional organization that believes separation of powers is necessary to ensure preservation of liberty. The President has violated the separation of powers by acting outside his constitutional authority through an executive order not rooted in a statutory grant from Congress that bypassed the Administrative Procedure Act's ("APA") procedural requirements.

CORPORATE DISCLOSURE STATEMENT

Landmark is a Missouri nonprofit corporation. It has no parent corporations and does not issue stock.

/s/ John B. Dunlap III

INTEREST OF AMICUS CURIAE

Landmark is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

President Biden issued Executive Order 13990 ("EO 13990" or "the Order") just days after entering office. The Order has tremendous implications for the American economy because it directs a non-accountable "Interagency Working Group" ("IWG") to publish a valuation for use by every government agency in calculating the cost and benefits of regulating greenhouse gasses or "social costs" of carbon, nitrogen, and methane respectively ("SC-GHGs").

SC-GHGs are the purported external costs that arise when these substances are released into the atmosphere. Proponents of using SC-GHGs assert that emissions of greenhouse gases "impose a negative externality by causing climate change, inflicting societal harm on the United States and the rest of the world." Nick Loris, *Flaws in the Social Cost of Carbon, the Social Cost of Methane, and the Social Cost of Nitrous Oxide*, testimony before House Subcommittee on Energy and Mineral Resources, July 27, 2017, available at: https://www.congress.gov/115/meeting/house/106337/witnesses/HHRG-115-II06-Wstate-LorisN-20170727.pdf (accessed July 22, 2021). SC-GHGs are therefore used "to calculate the climate benefit of abated [GHG] emissions from regulations." *Id.* In practice, governmental agencies "project a monetary value for the 'climate benefit' of regulations or a monetary 'climate cost' for proposed projects." *Id.* The SC-GHG can thus be used, for example, to justify regulations by states or the federal government to prevent construction of new power plants or to impose a cost on construction of new pipelines. *Id.* And the use of SC-GHGs is ubiquitous. As of 2017, the Congressional Research Service found that the use of SC-GHGs underpinned at least 150 regulations. Jane A. Leggett, *Federal Citations to the Social Cost of Greenhouse Gases*, Congressional Research Service, March 17, 2017, available at: https://fas.org/sgp/crs/misc/R44657.pdf (accessed July 23, 2021).

By Defendant's own admission, no statute vests the IWG with this authority. In fact, no statute vests the IWG with any authority. This group, however, does not function as a simple advisory body. Under the EO, it is tasked with standing in the shoes of every federal agency and issuing a valuation with enormous effects on individual states and the economy.

Landmark supports Plaintiff's Motion for Preliminary Injunction. Plaintiffs are likely to succeed on the merits because, among other reasons, EO 13990 and the IWG's actions do not have a basis in constitutional or statutory law. Landmark submits this brief to provide a unique perspective on the limits of presidential authority and the adverse outcomes that arise when a president bypasses the rulemaking process and directs unaccountable "working groups" to issue "super rules" that shape the American economy.

Landmark urges the Court to grant Plaintiffs' Motion and immediately enjoin all federal agencies from using the SC-GHGs promulgated by the IWG under EO 13990.

ARGUMENT

EO 13990 does not have a basis in constitutional or statutory law. President Biden acted beyond the authority vested in his office by the Constitution when he directed the IWG to publish "interim" SC-GHGs and ordered administrative agencies to use these valuations "when monetizing the value of changes in greenhouse emissions resulting from regulations and other relevant agency actions…" EO 13990 § 5(b)(ii)(A), 86 Fed. Reg. 7040 (Jan. 25, 2021).

The President did not order the IWG to issue *proposed* SC-GHGs that would allow the public and stakeholders the opportunity to comment on their efficacy. Nor did the President direct his respective administrative agencies to begin the rulemaking process by issuing notice of proposed rulemaking of revised SC-GHGs. Instead, he bypassed the rulemaking process by ordering all agencies to use the IWG's SC-GHGs valuations following their publication. Labeling

the valuation as "interim" creates the false impression that the initial valuations established by the IWG are not binding on agencies. They are. Section 5(b)(ii) and 5(b)(ii)(A) of the Order, labeled "Mission and Work" states, in relevant part, "The Working Group *shall*… … publish an interim SCC, SCN, and SCM within 30 days of the date of this order, which agencies *shall use* when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions…" (emphasis added). 86 Fed. Reg. 7040 (Jan. 25, 2021).

The President lacks authority to direct the IWG to function as an administrative agency and to issue binding rules on the entire federal government. The Order cites no statutory authority delegating to either the President or the IWG the power to unilaterally direct agencies to use new SC-GHGS. Nor does the Order specify any constitutional authority. It is an ultra vires action subject to review by the Court. And it is within the Court's purview to enjoin this order.

A. The President lacks authority to order the IWG to publish a binding SC-GHG estimate upon all agencies.

Unlike similar executive orders, EO 13990 cites no statutory authority in its preamble.[2] It cites no statutory authority for its creation of the IWG. And it relies on no authority for directing the IWG to publish a binding SC-GHG estimate and directing all government agencies to use said estimate. It simply states, "By authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:" 86 Fed. Reg. 7037 (Jan. 25, 2021). The Order is also not merely a policy decree or management statement on federal government operations. Rather, it imposes a new, unverified valuation for agency use when

[2] See, e.g., EO 14027, "Establishment of the Climate Change Support Office," (relying on 5 U.S.C. § 3161 to create an office within the State Department to support engagement in U.S. initiatives to address climate change); EO 14013, "Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration" (relying on 8 U.S.C. § 1101).

calculating costs and benefits of government actions. The Order has enormous implications. The SC-GHG valuation can be used on activities as varied as permit requests for construction of a pipeline or the quantification of the costs and benefits of rules involving energy conservation standards for microwave ovens. Loris, *Flaws in the Social Cost of Carbon, the Social Cost of Methane, and the Social Cost of Nitrous Oxide*.

Executive orders must have either a constitutional or statutory authorization. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Such authorization ensures adequate separation of powers and precludes the exercise of arbitrary power. Indeed, separation of powers' purpose "was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy." *Id.* at 629 (Douglas, J. concurring, quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)).

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). It must, in other words, "be grounded in a statutory mandate or congressional delegation of authority." *Chen v. INS*, 95 F.3d 801, 805 (9th Cir., 1996). Because the Constitution vests the legislative power with Congress, "the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp*. at 302. Further, "the promulgations of these regulations must conform with any procedural requirements imposed by Congress." *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). A rule will only have the force and effect of law if it is "issued pursuant to statutory authority." *Chrysler Corp.* at 302. (citing *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977)).

The President did not rely on any statutory authority when he issued EO 13990, the IWG does not have any delegated authority, and President Biden's action revives the improper rulemaking begun under President Obama's IWG.[3] In short, this regulatory action taken by the IWG, and the President has no basis in law and does not comply with the procedural requirements of the APA.

Arguments that Plaintiffs do not have a claim because their action is not rooted in a statute do not hold water. First, "the ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.* 575 U.S. 320, 327 (2015). Next, even when a statute provides no cause of action, courts still can review the actions of government officials. "Acts of [government] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Without judicial recourse, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Id.*

Moreover, "nothing in the subsequent enactment of the APA altered the McAnnulty doctrine of review… When an executive acts ultra vires, courts are normally available to reestablish the limits on his authority." *Chamber of Com. of the United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir., 1996) (quoting *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

[3] The Department of Energy under the Obama Administration published Social Cost of Carbon valuations in a little-noticed rule pertaining to consumer products that relied on the EPCA for authority. This regulatory effort ignored the APA's notice and comment procedures, and it wasn't until Landmark filed a Petition for Reconsideration did the agency open the process to comments. 78 Fed. Reg. 49975 (Aug. 16, 2013). Even then, the DOE disregarded the substantive arguments that it had arrived at an incorrect SCC and finalized the originally published SCC estimate.

Courts have never stated that "a lack of a statutory cause of action is per se a bar to judicial review." *Id.*

Defendants have also argued that the administrative process is ongoing and that published estimates are "interim," therefore the Court "need not engage in ultra vires review to 'police' the 'purity' of hypothetical agency actions." Def.'s Mem. in Supp. of Mot. to Dismiss, Dkt. No. 31-1 at 44. Attempts to categorize the EO and IWG's actions as hypothetical fail because of the EO's command that agencies "shall" use the IWGs estimates "when monetizing the value of changes in greenhouse gas emissions…" 78 Fed. Reg. 7040 (Jan. 25, 2021). Agencies have already incorporated these estimates into their rulemaking. See EPA, Proposed Rule – Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program under the AIM Act (April 30, 2021), available at: https://bit.ly/3uoJoFe (accessed July 22, 2021).

Nothing prevents the President from creating informal working groups of advisors to convene, discuss policy and make recommendation. But whatever decisions these groups may make, the formal implementation of the Executive Branch's administrative power must come from the Departments, bureaus, and councils created by Congress. Delegating to the IWG, an entity that Defendants acknowledge has not been established by statute or delegated with any legislative authority, the power to establish valuations for the entire federal government violates basic principles of federalism. Thus, a simple question should be asked. Under what authority does the President have to designate a nonagency outside the bounds of the APA to issue SC-GHG estimates binding on all federal agencies? The answer is simple – Defendants cannot point to any authority because Congress has not delegated it. The President is not exercising a specified constitutional power. His action is therefore ultra vires and should be enjoined.

B. At a minimum, the IWG's SC-GHG valuations are subject to the procedural requirements of the APA.

Even if the President did not act ultra vires by issuing EO 13990, his actions still violate the APA. Although Defendants claim the IWG is not subject to the APA, it has promulgated a final rule that marks "the consummation of the agency's decision-making process" and "legal consequences" result from them. *U.S. Army Corps of Engr's v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). A substantive rule is one "affecting individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The IWG released SC-GHG estimates that EO 13990 commands agencies to use. The IWG has dictated SC-GHG estimates that bind the entire federal government.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Agency action will be set aside if it is taken "without observance of procedure required by law." 5 U.S.C. §706(2)(D). To determine whether an agency action is final, courts will look to whether the action "is sufficiently direct and immediate" and "has a direct effect on day-to-day business." *Franklin v. Massachusetts*, 505 U.S. 788, 796-797 (1992). In fact, "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797. Further, an agency must "follow the same process to revise a rule as it used to promulgate it." *Clean Water Action v. United States Envtl. Prot. Agency*, 939 F.3d 308, 312 (5th Cir. 2019).

Again, agencies have been ordered to immediately implement the SC-GHGs. The valuation functions as a super rule in that it applies to all agencies. It is now being applied. For example, the EPA has relied on the valuations issued by the IWG in disapproving state implementation plans under the National Ambient Air Quality Standards ("NAAQS") good-neighbor provisions and to justify imposing more stringent federal implementation plans on several Plaintiff States. Complaint, Dkt. No. 1 at 45-46 ¶124. EPA has also relied on SC-GHG

valuations in formulating a "Social Cost of Hydrofluorocarbons." See EPA, Proposed Rule – Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program under the AIM Act (April 30, 2021), available at: https://bit.ly/3uoJoFe (accessed July 22, 2021).

C. Issuing SC-GHGs denies interested parties and the public the opportunity to participate in the rulemaking process.

Agency action will be set aside if it is "taken without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Rules are subject to the APA's notice and comment process unless covered by an exception. Notice and comment procedures apply because the SC-GHG estimates are not an "interpretative rule, general statement of policy, or rule of agency organization, procedure or practice." 5 U.S.C. § 553(b)(A).

The notice and comment period "encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decision-making." *Chocolate Manufactures Assoc. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (*citing Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980)). Providing adequate notice of a major change gives "the public the opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Comm'n.*, 412 F.2d 740, 744 (3rd Cir. 1969). When an agency fails to follow the APA's notice and comment procedures "interested parties will not be able to comment meaningfully on the agency's proposals." *Connecticut Light & Power, Co. v. Nuclear Regulatory Com.* 673 F.2d 525, 530 (D.C. Cir. 1982). Further, "the agency may operate with a one-sided or mistaken picture of the issues at stake in rule-making." *Id.*

As stated previously, EO 13990 circumvents traditional notice and comment process by unilaterally directing agencies to use the new SC-GHG metrics immediately. Use of these metrics violates the APA and must be suspended.

CONCLUSION

For these reasons, Amicus Curiae requests that the Court grant Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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