IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., PLAINTIFFS, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; et al., DEFENDANTS.	CIV. NO. 2:21-CV-1074-JDC-KK

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants must *really* want to avoid judicial scrutiny of the merits of this case. They oppose Plaintiffs' injunction motion with novel arguments contesting this Court's authority to hear this case—arguments that ample Fifth Circuit cases foreclose. First, Defendants contest irreparable harm. But Fifth Circuit courts have long held that threats to sovereign State interests, and the federal government's imposing fiscal harms on the States, are irreparable. Second, Defendants contest standing. But Fifth Circuit courts have found imminent, traceable, and redressable injury for harms far more attenuated than Plaintiff States suffer here—including harms involving predictable third-party action in the chain of causation. Third, Defendants contest ripeness. But the SC-GHG Estimates *are currently in effect* and currently harming Plaintiff States' concrete interests. Finally, Defendants contest final agency action. But the SC-GHG Estimates impose a binding legal regime upon agencies.

All that wasted focus on jurisdictional issues cannot obscure a dispositive fact: Defendants have never identified a single source of statutory authority for Executive Order 13990 or the SC-GHG Estimates. Not only has the Executive transgressed the Administrative Procedure Act's procedural and reasoned decisionmaking requirements, but it has also issued one of the most consequential regulatory actions in history without *any* congressional authority, much less the unambiguous authority required to fundamentally alter the administrative state and federal-state relations. Executive Order 13990 and the SC-GHG Estimates immediately and irreparably harm Plaintiff States' concrete interests without any congressional authorization to do so. They must be enjoined.

ARGUMENT

I. PLAINTIFF STATES HAVE ESTABLISHED IRREPARABLE HARM.

Defendants first try (at 13-15) to impose an unprecedented irreparable-harm standard that directly conflicts with Fifth Circuit precedent. Plaintiff States do not need to show that the "harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, Plaintiff States "need only show" harm that "'cannot be undone through monetary remedies.'" *Louisiana v. Biden*, 2021 WL 2446010, at *21 (W.D. La. June 15, 2021). Fifth Circuit courts have uniformly held that the very types of economic and fiscal harms Plaintiff States have suffered are irreparable because States cannot recover money damages from the federal government. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (financial injury irreparable); *Louisiana v. Biden*, 2021 WL 2446010, at *21 (financial and parens patriae injury irreparable); *Texas v. Brooks-LaSure*, No. 6:21-cv-00191 (E.D. Tex. Aug. 20, 2021) (resource reallocation and harm to industry irreparable); *Texas v. United States*, 2021 WL 3683913, at *58 (S.D. Tex. Aug. 19, 2021) (financial and parens patriae harm irreparable); *State v. Biden*, 2021 WL 3603341, at *26 (N.D. Tex. Aug. 13, 2021) (financial injuries irreparable); *Texas v. United States*, 2021 WL 2096669, at *47 (S.D. Tex. Feb. 23, 2021) (same). And Fifth Circuit courts have held that injuries to Plaintiff States' sovereign power are irreparable. *See, e.g.*, *Texas*, 2021 WL 3683913, at *59; *Nevada v. United States Dep't of Lab.*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016). Finally, considering the importance and complexity of the issues involved, Plaintiff States acted with reasonable diligence in moving for a preliminary injunction.

A. Plaintiff States' harms are imminent and actually occurring and cannot be remedied by a future judgment.

Perhaps because several Fifth Circuit courts have emphatically, consistently, and recently rejected Defendants' standing contentions, Defendants moved them from the likelihood-of-success section of their brief to the irreparable-harm section. No matter; those arguments fail under either

heading. The analyses substantially overlap, and Defendants cannot hide their doomed standing challenge behind the irreparable-harm standard. *See, e.g.*, *Texas*, 2021 WL 3683913, at *58 ("The Court concludes the States have demonstrated they are likely to suffer irreparable harm for the following reasons. As discussed in this Court's standing analysis, the States have presented evidence demonstrating the Memoranda cause financial harm."); *Texas*, 2021 WL 2096669, at *47 (same). More to the point, Defendants misapply that standard in any event. Their irreparable-harm-specific case, *Melancon v. City of New Orleans*, was explicitly premised on its holding that Plaintiffs' "only alleged harm can be obviated by monetary relief." 703 F.3d 262, 280 (5th Cir. 2012). The relief available "in the ordinary course of litigation," *id.*, which Defendants cite four times (at 14, 15, 16), is *precisely* the monetary relief that Plaintiff States cannot obtain against the federal government. *See, e.g.*, *Louisiana*, 2021 WL 2446010, at *21 ("The Plaintiff States have alleged very substantial damages from Government Defendants, which would be difficult, if not impossible to recover, due to sovereign immunity."). So Defendants' attacks on Plaintiff States' standing fail whether examined under the irreparable-harm or likelihood-of-success prong. Consider Defendants' seven contentions in turn.

First, though Defendants persist in asserting (at 15-16) that Plaintiff States are harmed only by future actions, there is nothing speculative about Plaintiff States' injuries. Several imminent and independently sufficient harms stem from the Executive Order and SC-GHG Estimates themselves. The EO and Estimates have already produced a binding rule of decision that agencies must use when evaluating Plaintiff States' compliance with cooperative federalism programs. *See infra*. This type of "pressure" on Plaintiff States to "abandon [their] laws and policies" and adopt the Estimates' approach to greenhouse gases is a concrete, current harm. *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Beyond that, Plaintiff States have an irreparable procedural harm because they were denied the ability to defend this concrete interest through submitting comments. *See, e.g.*, *id.*; *see also*

Texas, No. 6:21-cv-00191, at 8. Additionally, Plaintiff States would have submitted comments about how the SC-GHG Estimates undermine their concrete reliance interests in cooperative federalism programs that had long been subject to Circular A-4. *See, e.g.*, *State v. Biden*, 2021 WL 3674780, at *9 (noting the importance of reliance interests in regulatory analysis). These harms are not future injuries; they're already-occurred (and continuing) concrete harms to concrete interests.

And, as discussed below, Plaintiff States have also established several immediately impending harms. To avoid grappling with the harms caused by EO 13990's mandatory commands, Defendants ask the Court (at 16) to assume that the Order is a nullity that will not make an iota of difference in executive-branch decisionmaking. But the Executive Order could not be clearer in instructing agencies that "[i]t is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, *including by taking global damages into account*," and that "[a]n accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions." E.O. 13990 §5 (emphasis added). To this end, the Order *directs*—not *recommends*—that agencies "shall use" the SC-GHG Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions." *Id.*

Plaintiff States do not speculate—they simply expect that agencies will follow the President's direct order to apply the unlawful SC-GHG Estimates. The SC-GHG Estimates have resulted in a massive increase in the estimated costs associated with greenhouse gases. And under Executive Order 12866, agencies must "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation *justify* its costs." 58 Fed. Reg. 51735 (Sept. 30, 1993) (emphasis added). No "hypotheticals" are needed to confirm that EO 13990 changes the legal regime by binding agency officials to the SC-GHG Estimates. The Executive Order's text makes that plain. Similarly, no guess work is required to see that the SC-GHG Estimates will yield greater

regulation of greenhouse gases by significantly inflating the cost of *not* regulating greenhouse gas (thereby justifying increased regulation under E.O. 12866). And Plaintiff States have put forth detailed and unrebutted expert testimony that "Louisiana will be harmed by federal agencies' use of the interim values of the SC-GHG in procurement, budgeting, grant programs and regulatory actions" and that the potential loss of "federal funding will be particularly harmful to Louisiana since it is one of only seven states where federal funds are the largest revenue source." Doc. 57 at 4 ¶18; *see also id.* ¶¶18, 19, 22 ("Because the SC-GHG Estimates are required to be applied at all stages of the OCSLA process, they will imminently harm Alabama, Louisiana, Mississippi, and Texas."); *id.* ¶¶ 24, 25, 26 (When competing for federal sales and contracts, Louisiana businesses will be at a disadvantage compared to businesses in states where a larger share of electricity comes from renewable generation."). Courts consistently find that this kind of evidence of those kinds of harms supports injunctive relief. *See, e.g.*, *Texas v. United States*, 2021 WL 3025857, at *11 (S.D. Tex. July 16, 2021) ("Texas seeks to protect its legal residents' economic and commercial interests from labor market distortion caused by DACA.").

In sum, by binding agency officials to a specific cost measure in all regulatory activities, the Executive Order and SC-GHG Estimates "alter[] the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Before the challenged actions, agencies were subject to Circular A-4. Now they are subject to the SC-GHG Estimates. This fundamental change in the legal framework amply establishes an imminent injury caused by the challenged actions. *Louisiana*, 2021 WL 2446010, at *10 ("The plaintiff need not demonstrate that the defendant's actions are the very last step in the chain of causation.").[1]

[1] Defendants lean heavily (at 16) on the *Missouri* court's holding that the Estimates are not the source of harm because they are only "one of innumerable other factors" in a cost-benefit analysis. But unlike this Court, the *Missouri* court was not bound by Fifth Circuit precedent holding that special solicitude relaxes the traceability factor. And the *Missouri* court appears to misunderstand

Second, Defendants' assertion (at 16-17) that post-judgment relief is sufficient flatly contradicts precedent from Fifth Circuit courts in cases involving relief against the federal government. And as discussed below, Plaintiff States will not have "ample opportunity" to bring their claims in the future. *See infra* Sec. II.A.2. Given the Executive Order's mandatory nature, attempts to urge agencies to ignore the Estimates in future proceedings will be futile. *Id.* And in the meantime, Plaintiff States and their citizens will be faced with Executive regulations and enforcement activities subject to the mandatory SC-GHG Estimates. Plaintiff States need not wait for the Executive to "'drop the hammer' in order to have their day in court." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 1129 (2016). And *contra* Defendants' arguments (at 17), the D.C. Circuit's opinion in *Building & Construction Trades Department v. Albaugh* cannot save them because Section 5 of Executive Order 13990 and the SC-GHG Estimates are *themselves* unlawful and not authorized "by statute or other law." 295 F.3d 28, 33 (D.C. Cir. 2002). Unlike the Executive Order in *Allbaugh*, Section 5 of Executive Order 13990 has no lawful application because no law anywhere authorizes agencies to consider the social cost of greenhouse gases and global effects; nor is the President authorized to dictate such considerations. *See infra* Sec. II.B.1; *see also Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (the Fifth Circuit "has repeatedly rejected '[t]his nothing-equals-something' argument").

Third, Defendants continue (at 17-18) to minimize the importance of procedural harms. But they ignore that when seeking to vindicate procedural rights, Plaintiff States "are also operating under a favorable presumption," and that "'[p]laintiffs asserting a procedural rights challenge need not show the agency action would have been different had it been consummated in a procedurally

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the importance of the Estimates in cost-benefit analysis because it ignores Executive Order 12866's command that regulations be adopted only if costs outweigh benefits. The SC-GHG Estimates are thus not merely one of innumerable considerations; they're an outcome-determinative one.

valid manner—the courts will assume this portion of the causal link.'" *Texas v. United States*, 86 F. Supp. 3d 591, 615-16 (S.D. Tex.), *aff'd*, 809 F.3d 134. Nor do Plaintiff States assert a procedural right "in vacuo," but instead seek to assert their right to defend their concrete reliance interests in cooperative federalism programs, revenues, and their economies, and their citizens' concrete economic interests. *See Texas*, No. 6:21-cv-00191, at 8. If Plaintiff States had been allowed to comment on the 2021 SC-GHG Estimates, they would have raised those substantial interests. This procedural right to protect concrete interests, combined with special solicitude, greatly reduces Plaintiff States' burden on causation and redressability. *Texas*, 2021 WL 3025857, at *9. That Plaintiff States were deprived of their procedural right to defend these concrete interests establishes yet another independently sufficient ground of standing and irreparable harm.

Fourth, Defendants' assertion (at 18) that States cannot bring a *parens patriae* suit against the federal government seems to be rejected by a new Fifth Circuit court every week. *See, e.g.*, *Texas*, 2021 WL 3683913, at *15 ("[A] long train of federal courts have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a parens patriae action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right."). Because Plaintiff States "do not challenge the operation of any federal statute" and instead challenge the Executive's unauthorized actions, there is no bar to their asserting *parens patriae* standing against the federal government here. *Id.*; *accord, e.g.*, *Texas*, 2021 WL 3025857, at *14; *Texas v. United States*, 328 F. Supp. 3d 662, 697 (S.D. Tex. 2018); *see also State of Fla. v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974) ("The calamitous prospect of such a loss of funding, even for a short period, to the state and to the disadvantaged citizens for whom it stands parens patriae is so grave as to suffice for such hardship as may be required."). And for these harms to economic interests, monetary injuries cannot be remedied by a final judgment due to the federal government's sovereign immunity. *See Louisiana*, 2021 WL 2446010, at *21.

Fifth, Defendants' attack (at 18-19) on Plaintiff States' purchaser standing disregards longstanding precedent allowing government entities and private citizens to challenge regulatory actions that increase energy prices. *See, e.g.*, *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1074 (D.C. Cir. 2017) ("[T]he city has demonstrated an imminent loss of the opportunity to purchase a desired product (reliable and low-cost wholesale power)."); *see also* Doc. 48 at 21 (collecting cases). To the extent Defendants try to break Plaintiff States' straightforward causal chain between increased energy regulation and increased energy prices, the harms caused by the SC-GHG Estimates are far more direct than those in *Massachusetts v. EPA* when the Court found "traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline." *State v. Biden*, 2021 WL 3674780, at *5. Again, because Plaintiff States cannot receive money damages against the federal government, this injury is irreparable.

Sixth, Defendants portray Plaintiff States (at 19) as asserting losses to only "general" tax revenues. But Plaintiff States have shown that they will lose significant revenues they are entitled to under specific statutory programs. To cite just a few examples, Louisiana will lose revenue from the Outer Continental Shelf oil and gas leasing program. *See* Dismukes Decl. ¶¶21-22. And Kentucky will lose its severance tax from coal. Doc. 63 at 46. The loss of this specific tax revenue confers standing, *Dep't of Energy v. State of Louisiana*, 690 F.2d 180, 187 (Temp. Emer. Ct. App. 1982); *State of La. v. Dep't of Energy*, 507 F. Supp. 1365, 1373 (W.D. La. 1981), *aff'd sub nom.* 690 F.2d 180 ("[T]he [Supreme] Court recognized the principle that lost tax revenues could confer standing where there existed 'some fairly direct link between the state's status as a collector and recipient of revenues, and the legislative or administrative action being challenged.'"), and is irreparable, *Texas*, 809 F.3d at 186.

Seventh, Defendants misrepresent (at 19-22) Plaintiff States' cooperative federalism injuries to avoid the obvious conclusion that the Executive Order and SC-GHG Estimates apply substantial

and ongoing pressure on them to alter their conduct. On Defendants' reading, Plaintiff States would have standing only if the Executive Order said "the States shall apply the SC-GHG Estimates." *See* Doc. 68 at 19 ("The Executive Order applies to 'all executive departments and agencies' of the *federal* government.'"). That is not the law. Instead, a State has standing when a federal regulation or policy imposes "pressure" on it "to abandon its laws and policies," *Texas*, 933 F.3d at 447 or "reconfigure its budget," *Texas*, 2021 WL 2096669, at *20; *accord State v. Biden*, 2021 WL 3674780, at *5; *Texas*, 2021 WL 3683913, at *19; Texas, 2021 WL 3025857, at *10. Notably, the *Missouri* court never passed upon this injury, but merely mentioned it in passing when recounting the States' claims. Under Fifth Circuit precedent, it is clear that this pressure is sufficient for standing purposes and is also an immediate and irreparable harm to the States' "sovereign interest in the power to create and enforce a legal code." *Texas*, 933 F.3d at 446-47.

Defendants' assertions (at 20-21) that agencies are not using the SC-GHG Estimates in cooperative federalism programs such as NAAQS misstates the on-the-ground reality in the regulatory world. Executive Order 13990 and the SC-GHG Estimates have fundamentally changed the landscape of cooperative federalism programs. For example, as Plaintiff States have explained, the EPA used the Estimates in analyzing State Implementation Plans (SIPs) under the NAAQS good-neighbor program. 86 Fed. Reg. 23054 (Apr. 30, 2021). Defendants' litigation position (at 20) that the decision to disapprove State plans and impose more onerous federal implementation plans "had nothing to do with the [] Estimates" conflicts with EPA's actual explanation, which employs the Estimates throughout the Final Rule and Regulatory Impact Analysis. *See* 86 Fed. Reg. at 23061, 23153-155. And the Department of the Interior has begun to employ the Estimates in hallmark cooperative federalism programs such as oil and gas leasing. *See* Sec'y of the Interior Order No. 3399 ("[W]hen a Bureau/Office determines that a monetized assessment of socioeconomic impacts is relevant, the SC-GHG protocol is an essential tool to quantify the costs and benefits associated with

a proposed action's GHG emissions and relevant to the choice among different alternatives being considered.").

Defendants thus have already applied the SC-GHG Estimates when making decisions in cooperative federalism programs. If States do not change their regulatory analyses to conform, they risk further adverse consequences across such programs. As explained below, it is insufficient to challenge the Estimates in individual proceedings because the Executive Order deprives agencies of discretion to disregard the Estimates. Accordingly, the substantial pressure that the Executive Order and SC-GHG Estimates places on Plaintiff States is a harm that gives them standing to assert their claims. *See Weinberger*, 492 F.2d at 494; *Texas v. United States*, 497 F.3d 491, 497 (5th Cir. 2007) ("Texas's only alternative to participating in this allegedly invalid process is to forfeit its sole opportunity to comment upon Kickapoo gaming regulations, a forced choice that is itself sufficient to support standing."). And such harms to the States' ability to implement laws and policies are consistently held to be irreparable—States cannot pause their regulatory processes in anticipation of the outcome of this litigation. *Cf. Texas*, 2021 WL 3683913, at *59; *Nevada v. U.S. Dep't of Lab.*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016).

Ultimately, Defendants ask this Court to assume that the Executive Branch is systematically ignoring Executive Order 13990. That bid to avoid judicial review contradicts (1) the Order's mandatory text; (2) history, *see* Doc. 48 at 20 (explaining how "in Obama Administration, the SCC estimates were used in rulemakings across the board to justify unprecedented regulatory costs"); and (3) the current on-the-ground reality in the Executive Branch, *see, e.g.*, 86 Fed. Reg. 27150 (May 19, 2021) (employing the SC-GHG Estimates). Since cases involving "the predictable effect of Government action on the decisions of third parties," *Biden*, 2021 WL 3603341, at *11, and the effect of government inaction on a State's coastline hundreds of years in the future, *id.* at *5 (discussing *Massachusetts v. EPA*), are justiciable, this case *must* be, too. It involves no such guesswork—an Executive Order directs executive

officers to act in a manner contrary to law and that will irreparably harm several concrete interests of Plaintiff States. Accordingly, Plaintiff States have demonstrated standing and irreparable injury.

B. Plaintiff States Timely Sought a Preliminary Injunction.

Plaintiff States timely filed their motion for preliminary injunction. The SC-GHG Estimates are amongst the most complex and important regulatory actions ever taken by the Executive Branch. To effectively challenge them and present the Court with the best scientific evidence, Plaintiff States conducted an exhaustive review, retained experts, and amassed a filing package composed of thousands of pages of documents contained in several expert declarations and over fifty exhibits. That kind of motion cannot be prepared over a weekend. Far from delaying, Plaintiff States have acted as quickly as they could to exhaustively document the flaws behind the SC-GHG Estimates, rather than present the Court with slipshod arguments challenging this immensely important and complex regulatory action. Plaintiff States acted with "reasonable diligence" in submitting an extensively documented motion. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018).

Indeed, if the time it took Plaintiff States to conduct that thorough review could be characterized as "delay" at all, it "can hardly be found unreasonable." *Optimus Steel, LLC v. U.S. Army Corps of Engineers*, 492 F. Supp. 3d 701, 719-20 (E.D. Tex. 2020). "[C]ourts in the Fifth Circuit have accepted delays of several months or more." *Id.* (collecting cases). Such a delay will not preclude preliminary injunctive relief so long as the moving party "has a good explanation." *Daily Instruments Corp. v. Heidt*, 998 F. Supp. 2d 553, 570 (S.D. Tex. 2014).

Five months[2] was a reasonable period for Plaintiff States to marshal the adequate analysis and evidence to bring a proper challenge and avoid wasting the Court's time. Plaintiff States'

[2] The timing of Plaintiff States' motion must be measured from the date of the SC-GHG Estimates, not Executive Order 13990. Plaintiff States directly challenge the Estimates as well as the Order and the majority of Plaintiff States' expert analysis focused on the Estimates. It would be particularly anomalous to measure from the date of EO 13990 because the Order directed IWG "to

preparation of the motion involved extensive expert analysis that takes time to conduct. For example, Plaintiff States engaged Dr. Anne Smith, an expert in environmental and economic policy and analysis, who prepared an extensive declaration analyzing the technical aspects of the SC-GHG Estimates. Such "good faith efforts to investigate facts and law" have justified much longer delays. *See, e.g.*, *ADT, LLC v. Cap. Connect, Inc.*, 145 F. Supp. 3d 671, 698-99 (N.D. Tex. 2015) (collecting cases); *see also BP Chemicals Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 264 (3d Cir. 2000) ("conscientious decision to fully investigate the very serious charges" justified delay).

Indeed, in cases involving challenges to government regulations, "courts in the Fifth Circuit have accepted delays of several months or more." *Sierra Club v. United States Army Corps of Engineers*, 482 F. Supp. 3d 543, 555 (W.D. Tex. 2020). For example, in *Sierra Club*, the Western District of Texas found a four-month period reasonable because movants "needed time to ... evaluate their claims after the Corps issued its verifications in February 2020, all while managing the disruptions caused by the COVID-19 pandemic." *Id.*; *see also Optimus Steel, LLC*, 492 F. Supp. 3d at 719-20 (in challenge to agency action, "[a]t the very least, the Court can presume that Plaintiff needed ample time to evaluate its claims"). So too here. Plaintiff States have had to evaluate multiple regulatory actions taken in reliance on the SC-GHG Estimates to provide this Court with sufficient information. *See id.*; *see also Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1544 (10th Cir. 1994) ("We are reluctant to criticize plaintiffs for awaiting specific and concrete documentation of the adequacy" of administrative action).

What's more, any "tardiness is not particularly probative in the context of ongoing, worsening injuries." *Arc of California v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014). With the federal

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solicit public comment; engage with the public and stakeholders; [and] seek the advice of ethics experts." IWG never did that. Plaintiff States should not now be penalized because their suit came after (and challenges) that failure.

government continuously issuing new regulatory actions directly adverse to Plaintiff States and based on the binding SC-GHG Estimates, *see, e.g.*, 86 Fed. Reg. 49602 (Sept. 3, 2021) (Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks), Plaintiff States face precisely such an ongoing injury. This principle applies equally in challenges to agency action. *See, e.g.*, *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014) (noting that the "magnitude of the potential harm becomes apparent gradually, undermining any inference that the plaintiff was sleeping on its rights"); *accord S.A. v. Trump*, 2019 WL 990680, at *14 (N.D. Cal. Mar. 1, 2019). Accordingly, any delay in filing is excused by the ongoing nature of the SC-GHG Estimates' harm.

Finally, Plaintiff States have not been sleeping on their rights. Instead, they have been actively engaged, without success, in attempting to bring the Executive's attention to the fact that the 2021 SC-GHG Estimates were not subject to notice and comment, and are otherwise unlawful. For example, on May 7, 2021, OMB put out the Federal Register notice calling for comments on the IWG's SC-GHG Estimates. *See* 86 Fed. Reg. 24,669 (May 7, 2021). After determining that the Notice's forty-five-day comment period would not allow it to gather the necessary materials and analysis, Louisiana promptly submitted an extension request on May 19, 2021. *See* St. John Decl. ¶1. But OMB waited nearly a month, until June 17, to deny Louisiana's extension request—issuing its denial a mere four days before the comment deadline. *See* St. John Decl. ¶2. And OMB's call for comment indicated that it would consider comments only for future SC-GHG Estimates, not the currently in force 2021 Estimates. 86 Fed. Reg. 24,669. Plaintiff States have tried—unsuccessfully, through no fault of their own—to engage with the government. They should not be faulted here for doing so. *See, e.g.*, *Optimus Steel, LLC*, 492 F. Supp. 3d at 719-20 (noting failed agency-engagement attempts "provides the Court with the requisite 'good explanation'"); *see also Texas Children's Hosp.*, 76 F. Supp. 3d at 245 ("In light of plaintiffs' diligent pursuit of a variety of avenues for reversing a

policy ... plaintiffs' 'delay' does not give rise to an inference that the harm is not irreparable and imminent.").

None of the cases Defendants cite involves the same type of complex, multi-claim suit presented here. Indeed, most concern unexplained delays in single-issue cases. *See, e.g.*, *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("Wreal has failed to offer any explanation for its five-month delay."). And Defendants have not even tried to show that they have been prejudiced by Plaintiff States' timing. *Cf. Sierra Club*, 482 F. Supp. 3d at 555 (no undue delay in part because Plaintiff "present[ed] several arguments about how their delay did not prejudice the Federal Defendants"); *see also Kansas Health Care Ass'n*, 31 F.3d at 1544 (no undue delay in part because "defendants have not claimed that they are somehow disadvantaged because of the delay"). In sum, Plaintiff States brought this suit with reasonable diligence; and to the extent the Court finds a delay, Plaintiff States have offered several independently sufficient "reasonable explanation[s] for the delay." *ADT, LLC*, 145 F. Supp. 3d at 698-99.[3]

II. PLAINTIFF STATES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. This Court Has Subject Matter Jurisdiction.

1. Plaintiff States have standing.

Defendants briefly contest Plaintiff States' standing separately and, like Defendants, Plaintiff States incorporate their Opposition to Defendants' Motion to Dismiss (Doc. 48) by reference. Beyond that, Plaintiff States briefly emphasize three points.

[3] Defendants' reliance on the *Missouri* litigation timeline is misplaced and irrelevant. *See California v. HHS*, 390 F. Supp. 3d 1061, 1067 (N.D. Cal. 2019) ("The Court finds Oregon's delay to be minimal and not a basis for denying preliminary relief. ... And Oregon has requested expedited consideration of its motion, which supports its argument that preliminary relief is needed. In sum, although Oregon has not prosecuted this case as quickly as the Plaintiff States, it also has not slept on its rights, and the Court would be loath to deny relief solely on the basis of a few months' delay.").

First, Defendants relegate (at 25 n.10) the concept of special solicitude to a footnote. But the Fifth Circuit, just last month, again "emphasize[d] that the States are entitled to 'special solicitude' in the standing analysis." *State v. Biden*, 2021 WL 3674780, at *5. This special solicitude is no mere wallflower adorning Fifth Circuit precedent; it can render an otherwise "infirm[]" claim to standing "unassailable." *Texas v. United States*, 2021 WL 2096669, at *10, 20; *accord Texas*, 2021 WL 3025857, at *9 ("The Fifth Circuit has explicitly interpreted special solicitude to lower the level of certainty required in the traditional causation and redressability analysis."). Indeed, Fifth Circuit courts routinely use *Massachusetts v. EPA* as a benchmark to determine if a State has sufficiently shown causation and redressability. *See, e.g.*, *Texas*, 809 F.3d at 159 ("[T]he government theorizes that Texas's injury is not fairly traceable to DAPA because it is merely an incidental and attenuated consequence of the program. But *Massachusetts v. EPA* establishes that the causal connection is adequate. Texas is entitled to the same 'special solicitude' as was Massachusetts, and the causal link is even closer here."). Because "the links between the States' injuries and the [Executive Order and Estimates] here are not perceptibly frailer than in *Massachusetts* and likely are firmer," *Texas*, 2021 WL 3683913, at *20, Plaintiff States' "standing to sue [is] unassailable," *Texas*, 2021 WL 2096669, at *10.

Second, Defendants also continue to lean heavily on the *Missouri* court's analysis of the State coalition's standing there. But the *Missouri* court noted that it was operating under a different legal regime than courts in the Fifth Circuit: "Lower courts have lamented the 'lack of guidance on how they are to apply the special solicitude doctrine to standing questions.'" *Missouri*, 2021 WL 3885590, at *10. No such lack of guidance regarding special solicitude exists in this Circuit. What's more, the Missouri court lacked the benefit of Fifth Circuit courts' robust analysis of *parens patriae* standing and neglected to analyze the Missouri coalition's *parens patriae* interests. *Id.* And the *Missouri* court mentioned the Missouri coalition's cooperative-federalism harms only in passing; it failed to analyze them consistent with binding Fifth Circuit precedent. *Id.* at *6.

Third, Defendants' attack on redressability can be quickly dismissed. As a Fifth Circuit court recently noted, Defendants' (at 25) and the *Missouri* court's suggestion that "[e]ven if the Court were to declare the Interim Estimates non-binding, agencies would be free to—and may be required to—consider the social costs of greenhouse gas emissions," 2021 WL 3885590, at *9, "suggests [the Executive Order and Estimates] were issued in a vacuum" devoid of "prior policy concerning" regulatory analysis for greenhouse gases, *Texas*, 2021 WL 3683913, at *19. But as Plaintiff States have explained, an injunction and eventual vacatur would result in the prior regulatory regime based on Circular A-4 re-taking effect. *See* Doc. 48 at 32-34.

2. Plaintiff States' claims are ripe.

Defendants assert that this case is not ripe because some plaintiff at some future point might bring a future challenges to future regulatory actions based on the Estimates. That fundamentally misapprehends the ripeness inquiry. The Fifth Circuit has been clear on the proper standard: "To determine if a case is ripe for adjudication, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007).

First, this case is fit for review. Defendants chide Plaintiff States (at 26) for focusing on the legal nature of the dispute and whether the Estimates are final agency action. But Plaintiff States have merely followed the Fifth Circuit's teaching that "[a] challenge to administrative regulations 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.'" *Id.* at 498-99. Defendants do not contest that Plaintiff States' APA and ultra vires claims are purely legal. And as Plaintiff States explain below, the Estimates constitute final agency action. *See State of Fla. v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974) (case ripe because challenged "regulation is final and is formally and actually in

effect"); *Melissa Indus. Dev. Corp. v. N. Collin Water Supply Corp.*, 256 F. Supp. 2d 557, 567 (E.D. Tex. 2003) "[D]isagreements over final, specific agency actions are ripe."). Because these are purely legal questions, factual development would not aid the Court in determining whether the Estimates violate the APA or whether the Executive Order exceeds the President's lawful authority. *See, e.g.*, *Nevada v. United States Dep't of Lab.*, 275 F. Supp. 3d 795, 801 (E.D. Tex. 2017) (case ripe to determine whether "the Final Rule is lawful, whether the Department has authority to promulgate the Final Rule, and whether [agency actin] complies with the ... APA"); *see also Venetian Casino Resort, L.L.C. v. E.E.O.C.*, 409 F.3d 359, 364-65 (D.C. Cir. 2005) ("Resolution of this question turns on an analysis of the pertinent statutes and their construction by relevant case law. There is nothing to be gained by deferring such considerations."); *cf. Texas v. United States*, 201 F. Supp. 3d 810, 824 (N.D. Tex. 2016) (case ripe because "[t]he only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs"). That makes this case fit for review.

Defendants' arguments against fitness closely track those the Fifth Circuit rejected in *Texas v. United States*:

> Appellees do not dispute that the issues involved in this case are purely legal, but their arguments with regard to the remaining fitness principles are all based on the mistaken belief that Texas's alleged injury is the speculative harm that could result if the Secretary were ultimately to approve gaming procedures for Kickapoo land. As discussed in the standing inquiry, this is incorrect, as Texas claims present injury from submission to an invalid agency process, regardless whether the Secretary ultimately allows gaming on Kickapoo land.

497 F.3d at 499. Defendants again fail to acknowledge that Plaintiff States challenge not only the final outcome but also the flawed and unlawful process that led to the SC-GHG Estimates. "With this distinction in mind, [Plaintiff States'] claims are fit for adjudication" and "[a]dditional fact-finding would not aid [the Court's] inquiry into the purely legal question of [the Executive Order and Estimates'] validity." *Id.*

Second, Plaintiff States will suffer hardship absent immediate review. As an initial matter, "[t]he hardship prong of the ripeness doctrine 'is largely irrelevant in cases, such as this one, in which neither the agency nor the court have a significant interest in postponing review.'" *Venetian Casino Resort*, 409 F.3d at 365-66. Defendants identify no significant interest in postponing review here because there is none. Delay will only bog Plaintiff States down in years of litigation while the Executive employs the illegal Estimates in accordance with the illegal Executive Order.

In any event, "[t]he Supreme Court has found hardship to inhere in legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being 'force[d] ... to modify [one's] behavior in order to avoid future adverse consequences.'" *Texas*, 497 F.3d at 499 (citing *Ohio Forestry Ass'n*, 523 U.S. at 734). As Plaintiff States explained at length above, the SC-GHG Estimates and Executive Order do all three. And in the ripeness context, the Fifth Circuit has found asserted harms identical to Plaintiffs' to justify immediate review. *See, e.g.*, *id.* ("If Texas cannot challenge the Procedures in this lawsuit, the State is forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input."); *Weinberger*, 492 F.2d at 492 ("As for that hardship, the state is presently faced with the dilemma whether to bow to the Secretary's volte-face and amend its laws and procedures, with all the likely financial outlay and certain legislative and administrative effort which that process entails.").

Defendants' entire argument against ripeness rests on an erroneous reading of *Ohio Forestry Association* and *National Park Hospitality Association*—a reading that would necessarily mean the Fifth Circuit precedent cited above is all wrong—to hold that any time a regulatory action can also be challenged in a later proceeding, it is not ripe for review when it is promulgated. But *Ohio Forestry*

Association involved a nonbinding forest plan subject to "future actions to revise ... or modify the expected methods of implementation." 523 U.S. at 736. The Court held that the plaintiff's challenge to the plan was not ripe because the plan did not "inflict significant practical harm" upon the plaintiff and did not "force it to modify its behavior in order to avoid future adverse consequences," *id.* at 734—precisely the opposite of what Plaintiff States have demonstrated here. Similarly, *National Park Hospitality Association* involved "nothing more than a 'general statemen[t] of policy' designed to inform the public of" the agency's views. 538 U.S. 803, 809 (2003). The Court specifically found that plaintiffs suffered "no practical harm" from the policy statement, *id.* at 810—again exactly the opposite of Plaintiff States' detailed showing of legal and practical harm. This Court should follow the Fifth Circuit's interpretation of these cases in the ripeness context, *e.g.*, *Texas*, 497 F.3d at 499 (citing *Ohio Forestry Ass'n*, 523 U.S. at 734), rather than Defendants' novel approach.

But even under Defendants' erroneous standard, Plaintiff States will not have "ample opportunity" to challenge the Executive Order and Estimates in the future. Executive actions that bind agencies to a certain course are immediately reviewable. For example, in *Lujan v. National Wildlife Federation*, the Court noted that an agency action "applying some particular measure across the board to all individual classification terminations and withdrawal revocations" would be reviewable "at once" if "as a practical matter [it] requires the plaintiff to adjust his conduct immediately." 497 U.S. 871, 890 n.2, 891 (1990). Such actions that "pre-determine[] the future through the selection of a long-term plan (to the exclusion of others which will not be among the available options at the implementation phase) [are] ripe for review." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003); *accord Texas*, 933 F.3d at 444 ("Although the order 'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier,' [the Supreme Court] held that the order was ... immediately reviewable.'"); *Weinberger*, 492 F.2d at 492 ("[T]here is

no need for Florida to stand by while the Secretary ticks, hoping that he will not go off."); *Strata Prod. Co. v. Jewell*, 2014 WL 12789010, at *9 (D.N.M. Aug. 11, 2014) ("Although the BLM may issue APDs and prepare additional environmental analyses in the context of specific APDs, those more specific actions do not mean that the promulgation of the more general policies set forth in the 2012 Order does not also constitute a final agency action.").

By imposing a new binding regime on agency decisionmaking by force of the Executive Order, the SC-GHG Estimates predetermine the factors agencies will rely on, making it futile for Plaintiff States to challenge those factors in the rulemaking process. This distinguishes the *Zero Zone v. Department of Energy* case and FERC examples the *Missouri* court relied so heavily upon, 2021 WL 3885590, at *11-13, and Defendants' reliance (at 27) on the holding of *Wild Virginia v. CEQ*. None of those situations involved a binding command from the President to agencies that established a new and binding framework. Instead, *Zero Zone*, 832 F.3d 654, 677 (7th Cir. 2016), involved the Obama Administration's technical support document, which was not imposed upon agencies by an executive order, *see* GAO, *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates* (July 2014). *Wild Virginia*, in turn, involved a challenge to a directive from one agency to other agencies to draft specific NEPA procedures—a far cry from a directive from the President to employ a specific numerical value in substantive rulemaking. 2021 WL 2521561 (W.D. Va. June 21, 2021). And FERC is an independent agency that is not bound by Executive Order 13990. *See* Doc. 48 at 38-39.

In sum, this is Plaintiff States' only adequate opportunity to challenge the Executive Order itself and 2021 SC-GHG Estimates themselves. Plaintiff States need not suffer ongoing and irreparable injury just to raise the same arguments against the same final action in a future case. "[T]he lines are drawn, the positions are taken and the matter is ripe for judicial review." *State of La. v. Dep't of Energy*, 507 F. Supp. 1365, 1372 (W.D. La. 1981), *aff'd sub nom.* 690 F.2d 180 (Temp. Emer. Ct. App. 1982).

3. The SC-GHG Estimates are final agency action.

In their opposition to Defendants' motion to dismiss Plaintiff States have thoroughly demonstrated, based on overwhelming precedent from Fifth Circuit courts, that the SC-GHG Estimates are final agency action. *See* Doc. 48 at 39-43. Cases decided since then only confirm the point. *See State v. Biden*, 2021 WL 3674780, at *6; *Texas*, No. 6:21-cv-00191, at 8-12;[4] *Texas*, 2021 WL 3683913, at *23-26; *State v. Biden*, 2021 WL 3603341, at *13-14. Indeed, just last month, Defendants' contention (at 28) that "*Bennett*'s second prong is evaluated 'from the regulated parties' perspective,' not 'from the agency's perspective,'" was once again emphatically rejected by the Fifth Circuit: "[W]here agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action' under the APA." *State v. Biden*, 2021 WL 3674780, at *6. Thus, despite Defendants' protestations that the Executive Order and Estimates are merely internal documents to guide the agencies, their binding nature renders them final agency action. *Id.*

B. Executive Order 13990 and the SC-GHG Estimates are Unlawful.

1. The Executive Order and SC-GHG Estimates are not authorized by law.[5]

Throughout this litigation, Defendants have never identified a specific source of authority for the SC-GHG Estimates. Though Defendants (at 44-45) strain to make the Executive Order's obviously mandatory text seem discretionary,[6] their argument fails for a more fundamental reason:

[4] The *Texas v. Brooks-LaSure* ruling also reaffirms the APA's broad definition of the term agency. No. 6:21-cv-00191, at 10 (APA defines an 'agency' for purposes of judicial review as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency'").

[5] Plaintiff States' opposition to the motion to dismiss establishes that they have a cause of action to challenge the President's ultra vires Executive Order. Doc. 63 at 38-40 (collecting cases).

[6] Plaintiff States have shown that the Executive Order's boilerplate savings clause does not shield it from review. *See* Doc. 48 at 28-29. And there are no circumstances in which an unlawful and unauthorized Executive Order can have lawful application. *Cf. Louisiana*, 2021 WL 2446010, at *19.

this massive regulatory innovation of the utmost national consequence is nowhere authorized by law. Indeed, Defendants do not even *try* to identify *any* legal authority for the Executive Order or Estimates, much less the explicit authority needed to push the limits of Executive and Federal power. When it comes to locating statutory authority, nothing does not equal something. *See Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) ("This nothing-equals-something argument is barred by our precedent."). Congress must "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. HHS*, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021). Defendants' silence on where Congress has spoken *at all*—never mind clearly—in granting statutory authority for one of the most consequential restructurings of the administrative state in history is deafening. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1848-49 (2020) ("[W]hen Congress wishes to 'alter the fundamental details of a regulatory scheme,' as respondents contend it did here through delegation, we would expect it to speak with the requisite clarity to place that intent beyond dispute.").

2. The SC-GHG Estimates are arbitrary and capricious.

Plaintiff States have demonstrated at length why the SC-GHG Estimates are arbitrary and capricious. *See* Doc. 63 at 19-30. Apart from asking the Court to treat arbitrary-and-capricious review as a blank check, *but see State v. Biden*, 2021 WL 3674780, at *8 ("This review 'is not toothless.'"), Defendants offer nothing to revive the Estimates and the process that created them, *Huawei Techs.*, 2 F.4th at 433-34 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."). Defendants offer only a handful of arguments not addressed in Plaintiff States' initial brief.

First, *contra* Defendants' claim (at 32), extra-record evidence is appropriate here because the IWG failed to create an administrative record in producing the Estimates. Because the IWG worked in darkness and did not allow Plaintiff States to submit comments, the Court may consider outside

evidence. *See Louisiana Sportsmen All., LLC v. Vilsack*, 2013 WL 12182156, at *2 (W.D. La. Sept. 4, 2013) ("In instances where 'the agency considered evidence omitted from the administrative record', a court may consider 'extra-record' evidence.").

Second, a holding that the SC-GHG Estimates are arbitrary and capricious would not create a circuit split. Even assuming Defendants' cited cases (at 33) stand for the proposition that *these* SC-GHG Estimates are not arbitrary and capricious (which they do not), the Court would be joining sides in an *existing* circuit split; it is Defendants who fail to acknowledge the cases condemning executive reliance on global considerations, *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1143-44 (9th Cir. 2013); *WildEarth Guardians v. Bernhardt*, 2020 WL 6799068, at *11 (D.N.M. Nov. 19, 2020); *Wyoming v. U.S. Dep't of the Interior*, 2020 WL 7641067, at *21 (D. Wyo. Oct. 8, 2020), or upholding agency refusal to employ previous iterations of the SC-GHG Estimates, *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

Third, Defendants call (at 34) for broad deference to the inherently flawed models underlying the Estimates. But the Fifth Circuit recently rejected an agency's attempt to "cherry-pick only the statistics it likes in the administrative record" or fail to "meaningfully discuss ... prior factual findings." *State v. Biden*, 2021 WL 3674780, at *10, *12 n.5. IWG nowhere acknowledges the specific fact findings made by Executive Branch agencies rejecting the previous SCC Estimates. *See id.* at *10 ("[A]n agency must provide 'a more detailed justification' when a 'new policy rests upon factual findings that contradict those which underlay its prior policy.'").

Fourth, Defendants cite (at 39) *Department of Commerce v. New York* for the principle that agency decisions cannot be held arbitrary and capricious solely because they were influenced by politics. But the Court emphatically held that it *is* arbitrary and capricious for an agency to conceal politically motivated decisionmaking behind the veneer of expert considerations. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) ("The reasoned explanation requirement of administrative law,

after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise."). If the IWG wished to make political decisions, it was required to do so frankly.

Fifth, Defendants baldly assert (at 41) that Plaintiff States have not identified specific reliance interests. This is doubly flawed. First, it's untrue. *See* Doc. 63 at 20-21 (detailing Plaintiffs' reliance interests); Dismukes Decl. ¶¶18-26 (same). Second, Plaintiff States were not even given the opportunity to provide IWG with evidence of their reliance interests because *there was no comment period*. IWG's complete failure to consider the States' reliance upon the prior system[7] is an independently sufficient reason to find the Estimates arbitrary and capricious. *See State v. Biden*, 2021 WL 3674780, at *10 ("While considering alternatives, DHS 'was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'").

3. The SC-GHG Estimates were promulgated without notice and comment.

Plaintiff States have demonstrated that the SC-GHG Estimates are legislative rules that required notice and comment. *See* Doc. 48 at 47-48. And the "conclusion" that the Estimates are "a substantive rule subject to the APA's notice-and-comment requirement ... follows naturally from" Plaintiff States' demonstration that they are "a final agency action." *Texas*, 933 F.3d at 451. The rarely invoked rule of harmless error cannot excuse IWG's failure. *See United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001).

[7] Contrary to Defendants' contention (at 39), Plaintiff States are not claiming a cause of action to enforce Circular A-4. Instead, Plaintiff States are seeking to enforce the APA, which prohibits unexplained departures from longstanding agency practice that has engendered reliance interests.

III. AN INJUNCTION WOULD NOT HARM DEFENDANTS OR DISSERVE THE PUBLIC INTEREST.

Defendants assert (at 47) that the importance of presidential leadership counsels against an injunction. The Fifth Circuit disagrees. Just *last month*, it rejected a substantively indistinguishable argument. *See State v. Biden*, 2021 WL 3674780, at *15 ("The Government is also wrong to say that a stay would promote the public interest by preserving the separation of powers."); *see also Texas*, 2021 WL 3683913, at *60; *State v. Biden*, 2021 WL 3603341, at *26. Thus, the "ongoing and future injuries sustained by Plaintiffs outweigh any harms to Defendants" *State v. Biden*, 2021 WL 3603341, at *26.[8]

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff States' Motion for a Preliminary Injunction.

[8] Contrary to Defendants' suggestion (at 48) regarding the scope of relief, the ordinary remedy for an unlawful government action is to enjoin reliance upon that action. *See, e.g.*, *Louisiana*, 2021 WL 2446010, at *22; *State v. Biden*, 2021 WL 3603341, at *27.

Respectfully submitted,

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