UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., et al., Plaintiffs, v. DONALD J. TRUMP, President of the United States, et al., Defendants.	Civil Action No. 17-253 (RDM)

PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs Public Citizen, Inc., Natural Resources Defense Council, Inc., and Communications Workers of America hereby move for leave to file a second amended complaint.

In support of this motion, plaintiffs submit the accompanying (1) memorandum, (2) proposed second amended complaint (both clean and redlined), (3) declarations of Amy Allina, Denise Abbott, Karen Bain, Barbara Blau, R.J. Mastic, Joanna Mauer, Eduardo Pontoriero, Jose Rivero, Robert Weissman, and Mae Wu, and (4) a proposed order.

Dated: April 2, 2018

Respectfully submitted,

/s/

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PUBLIC CITIZEN, INC., et al., Plaintiffs, v. DONALD J. TRUMP, President of the United States, et al., Defendants.	Civil Action No. 17-253 (RDM)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

REGULATORY MATERIALS

MISCELLANEOUS

INTRODUCTION

This action seeks declaratory and injunctive relief with respect to Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs," issued by President Donald Trump on January 30, 2017, and two Office of Management and Budget (OMB) Guidances regarding implementation of the Executive Order. Plaintiffs Public Citizen, Natural Resources Defense Council (NRDC), and Communications Workers of America (CWA) initially filed this action on February 8, 2017, and, after OMB issued a new Guidance five days before defendants' deadline to respond to the complaint, filed an amended complaint on April 21, 2017. Plaintiffs alleged that the Executive Order and implementing OMB Guidances would block, weaken, or delay regulations authorized or mandated by Congress to protect health, safety, and the environment, across a broad range of topics—from automobile safety, to occupational health, to air pollution, to energy efficiency—and that the Order exceeded the President's constitutional authority, violated his duty under the Take Care Clause, U.S. Const. art. II, § 3, and directed federal agencies to engage in unlawful actions that will harm plaintiffs and their members, as well as many other Americans.

On February 26, 2018, this Court granted defendants' motion to dismiss. The Court held that plaintiffs had failed to establish standing. Noting, however, that the Court was not holding that plaintiffs would never be able to show standing, the Court allowed plaintiffs 30 days in which to move for leave to amend their complaint. *See* Mem. Op. 3 (Dkt. 63); Minute Order dated Mar. 1, 2018.

Plaintiffs now seek leave to file a second amended complaint, which is attached in both clean and redlined forms as exhibits to their motion. The proposed second amended complaint sets forth allegations sufficient to establish standing under the reasoning of the Court's memorandum

opinion, and the accompanying declarations substantiate those allegations sufficiently to overcome any motion to dismiss based on standing and to support plaintiffs' entitlement to summary judgment. Therefore, because the merits issues fully briefed by the parties in connection with plaintiffs' motion for summary judgment have not changed, the Court should proceed, after granting this motion, to consider and decide the summary judgment motion anew.

ARGUMENT

Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, "[t]he court should freely give leave [to amend] when justice so requires." In other words, "leave to amend should be freely given unless there is a good reason … to the contrary." *Willoughby v. Potomac Elec. Power Co*., 100 F.3d 999, 1003 (D.C. Cir. 1996). Denial of leave to amend is an abuse of discretion absent a sufficiently compelling reason, such as "undue delay, bad faith, or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments … or futility of amendment," *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (ellipsis in original; quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)), or undue prejudice to the opposing party, *see Foman*, 371 U.S. at 182.

No ground for denying leave to amend exists here: As the docket in this case reflects, plaintiffs have diligently pursued this case, moving promptly for summary judgment. Any suggestion of bad faith or dilatory motive would thus be wholly unsupported. Although plaintiffs filed an amended complaint on April 21, 2017, that amendment was not to cure a deficiency identified by defendants or the Court, but to update the pleading to incorporate new guidance issued by defendant OMB on April 5, 2017, that directly impacted plaintiffs' challenge. And defendants would suffer no undue prejudice from the proposed amendment, because they have operated under the challenged Executive Order and OMB Guidances throughout this litigation and,

in any event, have no legitimate interest in avoiding a decision on the merits with respect to the important questions raised in this case.

The amendment also would not be futile. The Court's February 26 memorandum opinion enumerated four showings that plaintiffs must make to establish standing to proceed in this case on behalf of their members based on delay in issuing a regulation: (1) that the relevant agency intended to issue the regulation in question; (2) that Executive Order 13771 will likely cause the agency to delay issuance of the regulation; (3) that—with the relevant period of delay taken into account—an identified member of one of the associations will face a substantial probability of a concrete injury; and (4) that the period of delay attributable to the Executive Order will substantially increase that risk of harm. Mem. Op. 19. The second amended complaint alleges these facts, and the attached declarations, along with previously submitted declarations, make the necessary showing with respect to each plaintiff. Four specific examples are below.[1]

The second amended complaint and declarations also address one aspect of the Court's holding on the organizations' assertion of standing based on injury to their advocacy interests, in order to narrow the issue to the legal question regarding the construction of *Clapper v. Amnesty*

[1] In bringing this facial challenge, "it is not necessary that [p]laintiffs establish standing with respect to each individual" rule to which the Order applies. *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 141 (D.D.C. 2012) (citing *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994)). Rather, because plaintiffs' "declarations allege injury with respect to" some affected rulemakings, they "are sufficient to ensure that 'the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Id*. (quoting *Wyo. Outdoor Council v. U.S. Forest Serv*., 165 F.3d 43, 48 (D.C. Cir. 1999)).

Similarly, only one plaintiff must have standing for the Court to proceed to decide the merits issues in this case. *See Nat'l Fed'n of Fed. Emps. v. United States*, 905 F.2d 400, 402 (D.C. Cir. 1990) ("We affirm the district court's finding that [one plaintiff] has standing to pursue its constitutional claims and consequently need not reach the question of [the other plaintiff's] standing.").

International USA, 568 U.S. 398 (2013), that was the second basis for the Court's ruling rejecting that basis for standing. The second amended complaint, like the earlier complaints, alleges that plaintiffs are injured by Executive Order 13771, and therefore have standing, because the Order puts them in the lose-lose position of either urging agencies to adopt new regulations, when adopting those regulations would depend on the repeal of existing regulatory safeguards, or refraining from advocating for new public protections to avoid triggering repeal of existing ones. To address the Court's concern that plaintiffs had not shown that they had "declined … to advocate for a new rule out of fear the Executive Order would compel the repeal of existing rules," Mem. Op. 47–48, plaintiffs submit a declaration of one of their staff members, documenting that injury. *See* Wu Decl. ¶ 7. However, recognizing that the Court also ruled against them on a legal question related to causation with respect to this basis for standing, plaintiffs do not address this basis for standing further in this motion seeking leave to amend.

A. The proposed second amended complaint and supporting declarations demonstrate that Public Citizen has standing based on the Department of Transportation's withdrawal of a rule to require disclosure of certain airline baggage fees.

In May 2014, the Department of Transportation (DOT) issued a notice of proposed rulemaking that proposed to require airlines and ticket agents to disclose at all points of sale the fees for certain basic ancillary services associated with air transportation that consumers are buying or considering buying. *See* 79 Fed. Reg. 29970 (2014). DOT stated that "there is a need for rulemaking because we believe that consumers continue to have difficulty finding ancillary fee information." *Id.* at 29977. Of the more than 600 consumers who submitted comments, more than 450 supported the proposed additional disclosure requirements. 82 Fed. Reg. 7536, 7537 (2017). DOT also received comments opposed to any disclosure requirement, including from Airlines for America (the trade association of the major airlines), the international airline trade association, and

foreign and domestic air carriers. DOT has referred to the proposed rule as the "Consumer Protection NPRM." 82 Fed. Reg. at 7536.

On January 19, 2017, DOT issued a Supplemental Notice of Proposed Rulemaking (SNPRM) on the same topic, proposing to require air carriers, foreign air carriers, and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers. *See id*. If an airline or ticket agent has a website that markets to U.S. consumers, the SNPRM proposed to require that the baggage-fee information be disclosed adjacent to the fare at the first point in a search process where a fare is listed in connection with a specific flight itinerary. *Id*. The agency designated the proposed rule "significant" under Executive Order 12866. *Id*. at 7554. DOT provided a comment period for the proposal through March 20, 2017. *Id.* at 7536.

In the SNPRM, DOT "disagree[d] with airlines and airline associations" that had earlier commented that the facts before DOT "do not reflect consumer harm." *Id.* at 7540. DOT stated that "we believe the additional time spent searching to find the total cost of travel and the additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front are the harms suffered by consumers when basic ancillary service fees are not adequately disclosed." *Id.* at 7540–41; *see also id.* at 7536 (disagreeing with comment that there is "no need for any proposal regarding ancillary service fee information because the industry has already provided that information in response to existing Department regulatory requirements and market pressure and no consumer harm is occurring").

On March 2, 2017, DOT issued a notice suspending the comment period for the SNPRM indefinitely. 82 Fed. Reg. 13572 (2017). Each month from February 2017 through July 2017, DOT published a statement on its website that Executive Order 13771 was affecting the timing of ongoing rulemakings: "As DOT rulemakings are being evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of May." DOT, Significant Rulemaking Reports by Year, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited Mar. 7, 2018). Then, in the agency's spring 2017 regulatory agenda, DOT moved the baggage-fee disclosure rulemaking from "proposed rule stage" to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." DOT/OST, Transparency of Airline Ancillary Service Fees, RegInfo.gov (Spring 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2105-AE56. At the same time, OMB stated in the Unified Agenda of Regulatory and Deregulatory Actions that "[a]gencies withdrew 469 actions proposed in the fall 2016 Agenda" and moved 391 previously active actions to "long-term" or "inactive" categories, as a step toward complying with Executive Order 13771. OMB, Current Unified Agenda of Regulatory and Deregulatory Actions (July 20, 2017), https://www.reginfo.gov/public/do/eAgendaMain.

In a September 7, 2017, memorandum from OMB concerning implementation of Executive Order 13771, the agencies were instructed to "propose a net reduction in regulatory costs for FY2018" in their fall regulatory agendas.[2] On December 5, 2017, DOT withdrew the proposal to require air carriers and ticket agents to clearly disclose to consumers certain information about fees

[2] OMB, Memo. for Regulatory Reform Officers at Executive Departments and Agencies (Sept. 7, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf.

for checked bags, wherever fare and schedule information is provided to consumers. *See* 82 Fed. Reg. 58778 (2017). The 1-page Federal Register notice described the reason for the withdrawal as follows: "The Department's existing regulations already provide consumers some information regarding fees for ancillary services. The withdrawal of this rulemaking corresponds with the Department's and Administration's priorities and is consistent with Executive Order 13771." *Id.*

Executive Order 13771 has thus delayed and blocked issuance of the DOT rule requiring clear disclosure of customer-specific fee information, or itinerary-specific information, regarding baggage fees at all points of sale to consumers. *See* Mem. Op. 26–30 (finding it plausible that the Executive Order has delayed rulemakings by DOT and other agencies). As a result, baggage-fee information is currently available on some websites but not others, and is not available in the manner proposed in the SNPRM. *See* Allina Decl. ¶ 3. Importantly, DOT itself has determined that consumer-friendly disclosure of baggage fees will not happen voluntarily because, "until all airlines and ticket agents are required to display certain basic ancillary service fees, and carriers are required to transmit fees for basic ancillary services to ticket agents, there is a strong incentive for carriers to obfuscate those fees." 82 Fed. Reg. at 7541. As DOT explained, "if all competing carriers do not make similar disclosures, any airline that disclosed the cost of ancillary services, such as baggage fees, would appear to charge more for air transportation than the airlines that did not clearly provide fee information for those ancillary services. Therefore, even carriers that believe it is appropriate and consumer-friendly to provide the information in a clear fashion have a strong marketplace disincentive to disclose the cost of ancillary services." *Id.*

Plaintiffs' members, such as Public Citizen member Amy Allina, purchase airline tickets online and sometimes check baggage. They have to spend time searching for baggage-fee information to figure out for themselves the true total cost of listed flights, and sometimes have

not gotten accurate information or have misunderstood the information, given the way in which it is provided. *See* Allina Decl. ¶¶ 3–4; *see also* 82 Fed. Reg. at 7556–57 (stating that the proposed disclosure would save consumers time and enable them to make better informed purchasing decisions). Members such as Ms. Allina would benefit from having baggage-fee information easily accessible wherever fare and schedule information is provided, to allow them to easily search for and compare the true total cost of air travel among air carriers. Members such as Ms. Allina are injured by having to spend more time searching to find the total cost of air travel than they would if DOT required baggage-fee disclosure along the lines described in the SNPRM, as DOT recognized when it described the need for a mandatory disclosure. The loss of time attributable to the absence of a fee-disclosure regulation is a legally cognizable injury. *See Pedro v. Equifax*, 868 F.3d 1275, 1280 (11th Cir. 2017) (stating that the plaintiff alleged a concrete injury because she alleged that she "lost time ... attempting to resolve the credit inaccuracies"); *Brown v. Artery Org., Inc*., 654 F. Supp. 1106, 1118 (D.D.C. 1987) (listing waste of time among types of irreparable injury); *see also People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (stating that "denial of access to bird-related … information including, in particular, investigatory information" caused by agency's failure to act, constituted "cognizable injury sufficient to support standing"); *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 939 & n.9 (D.C. Cir. 1986) (describing plaintiffs as "injured by a loss of information" due to agency's failure to issue regulations).

In short, until Executive Order 13771, the agency had intended to issue this rule; the Executive Order caused the agency to withdrawal the proposed rule; and the withdrawal is causing injury to plaintiff Public Citizen's members.

B. The proposed second amended complaint and supporting declarations demonstrate that Public Citizen has standing based on the Department of Transportation's delay of a rule to require vehicle-to-vehicle communications.

In January 2017, DOT, through the National Highway Traffic Safety Administration (NHTSA), proposed to require all new light vehicles to include crash-avoidance technologies known as vehicle-to-vehicle (V2V) communications, which will send information about a vehicle's speed, heading, brake status, and other data to surrounding vehicles and receive the same information from other vehicles. 82 Fed. Reg. 3854, 3855–57 (2017). NHTSA stated that it expected V2V technology to identify and prevent potential crashes. *Id.* NHTSA proposed to phase in the V2V safety standard over time, with costs that were expected to change over the phase-in period. Total estimated vehicle costs per year range from $2 to $5 billion ($135–$300 per vehicle). *Id*. at 3857. On the benefit side, the technology "could potentially prevent 424,901–594,569 crashes and save 955–1,321 lives [annually] when fully deployed throughout the light-duty vehicle fleet. Converting these and the accompanying reductions in injuries and property damage to monetary values, [NHTSA] estimate[s] that in 2051 the proposed rule could reduce the costs resulting from motor vehicle crashes by $53 to $71 billion (expressed in today's dollars)." *Id*. at 3858. NHTSA estimated that the safety standard would have net positive benefits in 3 to 5 years. *Id*. at 3982–4000. The comment period ended on April 12, 2017. *Id*. at 3854.

As demonstrated above, from February 2017 through July 2017, DOT acknowledged that Executive Order 13771 was affecting the timing of ongoing rulemakings. *See supra* p. 6. In late July 2017, in the agency's first regulatory agenda after issuance of the Executive Order, NHTSA moved the V2V rulemaking from its "current agenda" to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." DOT/NHTSA, Federal Motor Vehicle Safety Standard (FMVSS) 150—Vehicle to Vehicle (V2V) Communication, RegInfo.gov (Spring 2017),

https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2127-AL55; *see also* DOT/NHTSA, Federal Motor Vehicle Safety Standard (FMVSS) 150—Vehicle to Vehicle (V2V) Communication, RegInfo.gov (Fall 2017), https://www.reginfo.gov/public/do/eAgenda ViewRule?pubId=201710&RIN=2127-AL55. This Court determined in its memorandum opinion that plaintiffs had adequately alleged that the delay in the V2V rulemaking was attributable to the Executive Order, particularly in light of the fact that, given the rule's costs (looked at in isolation from its benefits), it would take many years of deregulatory actions for DOT to accrue sufficient cost offsets to enable it to issue the V2V rule. *See* Mem. Op. 27–30.

Plaintiffs' members, such as Public Citizen members Terri Weissman and Amanda Fleming, would like to purchase vehicles equipped with V2V communications when they next purchase a new car. *See* T. Weissman Decl. ¶ 4 (Dkt. 16-10); Fleming Decl. ¶ 5 (Dkt. 16-7). Yet without a federal mandate, such vehicles are not available. As NHTSA explained, "[w]ithout a mandate to require and standardize V2V communications, the agency believes that manufacturers will not be able to move forward in an efficient way and that a critical mass of equipped vehicles would take many years to develop, if ever." 82 Fed. Reg. at 3854. Executive Order 13771 is blocking or delaying issuance of a rule that would require this feature on passenger vehicles and without which this feature will not be available to plaintiffs' members, including Ms. Fleming and Ms. Weissman, who desire to purchase vehicles with V2V communications.

In its memorandum opinion, the Court faulted plaintiffs' showing of injury for not addressing "how long it will take before there is a substantial decrease in the risk of accidents, how that risk will decline over time, how many accidents would be avoided by finalizing the proposed rule, how V2V technology compares to other safety technologies that are likely to develop over the next several years, and whether Fleming or Weissman face a substantial probability of harm

taking into account the increased risk posed by the delay in finalizing the V2V rule." Mem. Op. 41 (internal quotation marks and citations omitted). Although the Court addressed whether the members' declarations demonstrated an increased "risk" of suffering an accident, the Court did not address the type of injury on which plaintiffs rely to establish standing: With regard to the delay of this rulemaking, the declarations of Ms. Fleming and Ms. Weissman establish that Public Citizen members are being deprived of the opportunity to purchase vehicles with a particular desired feature. *See* Fleming Decl. ¶ 5 (stating "I will not only be limited in my ability to purchase the vehicle I desire"); T. Weissman Decl. ¶ 4 (same). And the D.C. Circuit has permitted consumers "to challenge agency action that prevented the consumers from purchasing a desired product." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1077–78 (D.C. Cir. 2017) (quoting *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281 (D.C. Cir. 2012), and collecting cases). NHTSA's proposal to phase in the final rule by requiring 50 percent of new cars to have V2V communications in the first year and 100 percent in the third year, *see* 82 Fed. Reg. at 4006, would necessarily provide Public Citizen members with a meaningful opportunity to purchase vehicles with this technology—an opportunity they want but will not otherwise have. 82 Fed. Reg. at 3854 (stating that *without* a federal mandate, "a critical mass of equipped vehicles would take many years to develop, if ever"); *see also Public Citizen v. NHTSA*, 374 F.3d 1251 (D.C. Cir. 2004) (deciding on the merits Public Citizen's challenge to a NHTSA safety standard). The "lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements." *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990).[3]

[3] *See also* Neal Boudette, *Car Sales End a 7-Year Upswing, With More Challenges Ahead*, N.Y. Times, Jan. 3, 2018, https://www.nytimes.com/2018/01/03/business/auto-sales.html (reporting domestic new-vehicle sales of 17.2 million cars and light trucks in 2017).

In short, until Executive Order 13771, the agency had intended to issue this rule; the Executive Order is delaying the rule; and the delay is causing injury to plaintiff Public Citizen's members.

C. The proposed second amended complaint and supporting declarations demonstrate that CWA has standing based on the Occupational Safety and Health Administration's delay of a safety standard addressing prevention of workplace violence in healthcare.

In January 2017, the Occupational Safety and Health Administration (OSHA) granted citizen petitions from Nurses National United and from other labor unions requesting that OSHA adopt a safety standard to address prevention of workplace violence in healthcare. *See* DOL, Prevention of Workplace Violence in Healthcare, RegInfo.gov (Fall 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1218-AD08 (unified agenda). "Before OSHA can enact any permanent health or safety standard, it must make 'a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.'" *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 750 (D.C. Cir. 2011) (quoting *Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 642 (1980)). Invoking this standard, OSHA's Administrator, in granting the citizen petitions, stated that "workplace violence is a serious occupational hazard that presents a significant risk for healthcare and social assistance workers." Nat'l Nurses United, *Big News: NNU Nurses Petition Granted for National Standard to Prevent Workplace Violence*, Jan. 10, 2017, https://www.nationalnursesunited.org/blog/big-news-nnu-nursesaeutm-petition-granted-national-standard-prevent-workplace-violence (quoting letter from David Michaels, Administrator of OSHA, to Bonnie Castillo, National Nurses United, dated Jan. 10, 2017, granting the citizen petition); Letter from David Michaels, Administrator of OSHA, to Rep. Bobby Scott, dated Jan.

8, 2017, http://democrats-edworkforce.house.gov/imo/media/doc/Perez_Scott_response.pdf (stating that OSHA is granting the petition and commencing rulemaking).

The agency had earlier issued a request for information concerning a workplace-violation standard, with a comment period ending on April 6, 2017. *See* 81 Fed. Reg. 88147 (2016). Since the close of the comment period in April 2017, OSHA has taken no public action on the rulemaking regarding prevention of workplace violence. Instead, in December 2017, in OSHA's fall regulatory agenda, after OMB had instructed the agency to implement Executive Order 13771 through a net negative regulatory budget, *see supra* note 2, OSHA moved the workplace-violence-prevention rulemaking to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." DOL, RegInfo.gov, *supra*. Executive Order 13771 is thus blocking or delaying issuance of a safety standard on prevention of workplace violation in healthcare and social assistance settings. *See* Mem. Op. 25–26 (noting similar "rule-specific evidence that Executive Order 13771 has contributed to delay"); *see also id.* at 30 ("This combination of factors—Executive Branch statements regarding the Executive Order, a common-sense understanding of the effect of the offset requirement, *see* [*Ashcroft v.*] *Iqbal*, 556 U.S. [662,] 679 [2009], and the actual delay of the six regulatory actions at issue here—belie the government's suggestion that Plaintiffs' concerns about delay are too speculative to survive a motion to dismiss.").

As alleged in the second amended complaint, the delay of the workplace-violence standard injures plaintiffs' members who work in healthcare, such as CWA member and emergency-room nurse Denise Abbott. The delay injures such members in two independent ways.

First, one feature of a standard on preventing workplace violence highlighted by OSHA is education and training, which OSHA identified as "an essential element of a workplace violence prevention program" that helps "ensure that all staff members are aware of potential safety hazards and how to protect themselves, their coworkers and patients." 81 Fed. Reg at 88160. OSHA

explained that such training generally covers policies and procedures specific to individual workplaces as well as "de-escalation and self-defense techniques." *Id*. CWA members such as Ms. Abbott want education and training on prevention of workplace violence at their places of employment, including education and training in de-escalation techniques. *See* Second Abbott Decl. ¶ 8. Ms. Abbott's employer has not provided hands-on workplace-violence training or workplace-violence education or training specific to her workplace, and she is not aware of the ready availability of such training from any other source. *Id.* ¶ 7. Training and education on preventing workplace violence would be available to her and other CWA members who work in healthcare, *see id*. ¶ 4, if OSHA issued a safety standard, as it intended to do when it granted the citizen petitions in January 2017. Ms. Abbott's lack of access to education and training in preventing workplace violence is thus caused by the delay attributable to Executive Order 13771.

Second, as OSHA has stated, "[h]ealthcare workers are at an increased risk for workplace violence." OSHA, Workplace Violence in Healthcare (2016), https://www.osha.gov/Publications/OSHA3826.pdf; *see* 81 Fed. Reg. at 88148, 88155; Second Abbott Decl. ¶ 6. OSHA issues a safety standard when the standard would "substantially reduce" a "significant risk of material harm." 58 Fed. Reg. 16612, 16613 (1993) ("OSHA interprets the Act as *requiring* safety standards to … substantially reduce a significant risk of material harm." (emphasis added)); *Nat'l Mar. Safety Ass'n*, 649 F.3d at 751–52 (deferring to OSHA's determination of significant risk). OSHA's determination to grant the rulemaking petition on workplace violence thus establishes that CWA members such as Ms. Abbott are exposed to "significant" risks that an OSHA standard on prevention of workplace violence in healthcare and social assistance would "substantially reduce." Exposure to a significant risk that would be substantially reduced by regulation is a cognizable injury. *See Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) ("When, as here,

the party seeking judicial review challenges an agency's regulatory failure, the petitioner need not establish that, but for that misstep, the alleged harm certainly would have been averted."); *In re Int'l Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (deciding on the merits a case brought by a union and Public Citizen challenging OSHA's unreasonable delay in issuing an occupational health standard, and imposing a deadline on OSHA). Executive Order 13771 perpetuates that risk by blocking or delaying issuance of a safety standard.

In short, until Executive Order 13771, the agency had intended to issue this rule; the Executive Order is delaying the rule; and the delay is causing injury to plaintiff CWA's members.

D. The proposed second amended complaint and supporting declarations demonstrate that NRDC and Public Citizen have standing based on the Department of Energy's delay of rules to establish new energy-efficiency standards.

The Energy Policy and Conservation Act (EPCA) authorizes the Department of Energy (DOE) to set energy conservation standards for various consumer products and certain commercial and industrial equipment. Specifically, DOE must set energy-efficiency standards that achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. 42 U.S.C. §§ 6295(o)(2)(A), 6313(a)(6)(A)(ii)(II). DOE must periodically review already-established energy conservation standards, and any new or amended standard must result in "significant conservation of energy." *Id.* § 6295(m), (o)(3)(B); *see id.* § 6313(a)(6)(A)(ii)(II). In deciding whether a new or amended standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens, taking into account seven statutory factors. *Id.* §§ 6295(o)(2)(B)(i), 6313(a)(6)(B)(ii). EPCA also contains an "anti-backsliding" provision that bars the agency from prescribing any standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. *Id.* §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I).

Residential conventional cooking products: In June 2015, DOE published a notice of proposed rulemaking on energy-efficiency standards for residential conventional cooking products, such as stoves and ovens. 80 Fed. Reg. 33030 (2015). In September 2016, DOE issued a supplemental notice of proposed rulemaking. 81 Fed. Reg. 60784 (2016). DOE estimated that the proposed standard would impose an additional $42.6 million in increased equipment costs annually, but result in more than $293 million in energy-bill savings for consumers, and more than an additional $88 million in reduced pollution benefits, for a net annual benefit of more than $339 million per year. *Id*. at 60789. DOE was required to publish a final rule no later than two years after the original proposal—that is, by June 2017. *See* 42 U.S.C. § 6295(m)(3)(A).

In its 2017 fall agenda, DOE designated the cooking appliance standard as "Major" and with "EO 13771 Designation: Regulatory." DOE, Energy Conservation Standards for Residential Conventional Cooking Products, RegInfo.gov (Fall 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1904-AD15. Under the Executive Order 13771 as applicable to DOE for fiscal year 2018, those designations prevent DOE from issuing the rule unless its costs are *more than* offset by repeal of at least two existing rules. *See* OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOP LINE_ALLOWANCES_20171207.pdf (stating annualized cost cap of –$80 million for FY2018, –$1142.9 million in present value). Instead of a final rule, the agency indicated that it would issue another supplemental notice of proposed rulemaking in October 2018. *See* DOE, Energy Conservation Standards for Residential Conventional Cooking Products, *supra*.

Some of plaintiffs' members, such as NRDC members Karen Bain, Barbara Blau, Eduardo Pontoriero, and Jose Rivero, intend to purchase new residential cooking appliances, including stoves and ovens, in the next two to five years, and want to purchase reasonably priced, energy-

efficient products. *See* Bain Decl. ¶¶ 6–7; Blau Decl. ¶¶ 7–8; Pontoriero Decl. ¶¶ 7–11; Rivero Decl. ¶¶ 4–5. Likewise, plaintiff Public Citizen itself would like to replace its old range with an energy-efficient model. *See* Second R. Weissman Decl. ¶¶ 4, 7. Energy-efficient stoves and ovens will reduce the members' and Public Citizen's energy use and utility bills, and serve their interests in reducing their environmental footprints. In addition, some of plaintiffs' members, including Mr. Pontoriero and Mr. Rivero, have economic and business interests in wider access to affordable energy-efficient ovens and stoves, with a broader range of features. Pontoriero Decl. ¶¶ 9, 11; Rivero Decl. ¶¶ 4–7. Although some cooking appliances that meet DOE's proposed energy-efficient standard are available, *see* 81 Fed. Reg. at 60789–90, consumers cannot readily and reliably select them, because DOE's energy-efficiency labeling rules do not apply to cooking products, *see* 42 U.S.C. §§ 6292(a), 6294(a)(1); Mauer Decl. ¶ 7; *see also* Rivero Decl. ¶ 5 (describing difficulty identifying an energy-efficient oven); Blau Decl. ¶ 4 (same). In addition, energy-efficient stoves and ovens currently are not widely available, are more expensive than less-efficient models, come in a limited selection of features, sizes, and brands, and do not consistently reflect the most technologically feasible technology. *See* Mauer Decl. ¶¶ 8–13.

DOE's proposed cooking appliance standard, if finalized, would benefit plaintiffs and their members by allowing them to reliably select residential ovens and stoves that are energy efficient—because all such appliances would then meet DOE's stricter energy-efficiency targets—and would give them a broader selection of energy-efficient products with lifecycle-cost savings. *See id*. ¶¶ 4, 10–13. These benefits are not speculative: As DOE itself found, the proposed rule, if finalized, would result in lifecycle-cost savings for all product classes. 81 Fed. Reg. at 60786. This determination is consistent with DOE's conclusion that energy-efficiency standards "increase[] the availability and affordability of energy efficient products." DOE, *Saving Energy and Money*

with Appliance and Equipment Standards in the U.S., Jan. 2017.[4] Because DOE's "efficiency standards have pushed manufacturers to develop high-efficiency equipment for cost-competitive prices," Berkley Energy & Resource Collaboration, *DOE Appliance Standards Program*, Nov. 18, 2017, http://berc.berkeley.edu/doe-appliance-standards-program/, its proposed cooking appliance standard would make ovens and stoves that are more energy-efficient widely available and would save money over the lifetime of the product. *See* Mauer Decl. ¶¶ 4, 10–14.

Thus, plaintiffs' members and Public Citizen are experiencing the same type of injury that sufficed to establish standing in *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986), where the D.C. Circuit held that an organization had standing to challenge an agency's failure to adopt a meaningful fuel-efficiency standard, based on its members' interest in purchasing fuel-efficient vehicles. The D.C. Circuit explained:

> There is no difficulty in linking the petitioners' injury to the challenged agency action. NHTSA sets standards for the purpose of making vehicles more fuel-efficient, which are enforced by penalties levied on manufacturers who do not comply with the regulations. The petitioners, in turn, complain of less fuel-efficient vehicles. The object of the agency's regulation and the injury are thus directly linked. If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless. In sum, this case involves none of the multiple, tenuous links between challenged conduct and asserted injury that have characterized claims in which causation has been found lacking.

Id. at 1334–35; *accord Competitive Enter. Inst*., 901 F.2d at 112–13 (finding organization had standing challenge NHTSA fuel-economy standard issued under EPCA where its members had been "frustrated by the declining availability and high prices of large cars, which they prefer for reasons of safety, comfort, and performance"). Similarly here, plaintiffs' members and Public

[4] https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf.

DOE also identifies the dissemination of "reliable and comparable product operating cost information" and "access to improved products with new features and comfort attributes" as "benefits resulting from appliance … standards." *Id*.

Citizen are suffering a cognizable injury because Executive Order 13771 is blocking or delaying issuance of DOE's final cooking appliance standard and thus making energy-efficient, affordable residential cooking products inaccessible to them. *See also Orangeburg, S.C.*, 862 F.3d at 1077–78 (recognizing standing to challenge agency action that prevented consumers from purchasing a desired product). Importantly, "[t]he lost opportunity to purchase a desired product is a cognizable injury, … 'even if [the consumer] could ameliorate the injury by purchasing some alternative product,'" *id*. at 1078 (citation omitted), or by purchasing the desired product only at a high price, *see Public Citizen v. Foreman*, 631 F.2d 969, 974 n.12 (D.C. Cir. 1980).

Commercial water heaters: In May 2016, DOE proposed a rule under EPCA to amend the energy-efficiency standards for commercial water heating equipment. 81 Fed. Reg. 34440 (2016). By law, DOE must publish a final rule no later than two years after this proposal—that is, by April 2018. 42 U.S.C. § 6313(a)(6)(C)(iii)(I). DOE estimated that the proposed standard for commercial water heating equipment would reduce energy use by 1.8 quadrillion British thermal units, or a savings of about 8 percent. 81 Fed. Reg. at 34445. DOE estimated that the proposed standard would increase annual equipment costs by $144 million, but provide annual benefits of $367 million in reduced equipment operating costs, and annual benefits from reduced air pollution of more than $200 million, with an annualized net benefit of more than $427 million per year. *Id*. at 34526. DOE calculated that the cumulative net present value of total commercial consumer savings from the proposed standard would be between $2.26 billion and $6.75 billion. DOE further calculated that the standard would result in cumulative emissions reductions of 98 million metric tons of carbon dioxide, more than 1000 tons of methane, and significant quantities of other air pollutants, providing air-pollution reduction benefits with a net present value of between about $1 billion and $10 billion. *Id*. at 34445.

DOE has stated that the standard is a significant regulatory action, *id*. at 34527, and is subject to Executive Order 13771, *see* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Fall 2017), www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1904-AD34. Therefore, notwithstanding the proposed commercial water heating equipment standard's considerable net benefits, Executive Order 13771 requires DOE to more than offset the proposed standard's costs, and to repeal *at least* two prior regulations. *See* OMB, Cost Caps Fiscal Year 2018, *supra*. In its 2017 fall regulatory agenda, DOE moved this rulemaking to its list of "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." *See* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, *supra*.

Some of NRDC's members, such as R.J. Mastic, have a direct professional and business interest in having wider access to affordable energy-efficient commercial water-heating equipment, with a range of features. *See* Mastic Decl. ¶¶ 3–7. By, among other things, increasing the selection and reducing the costs of energy-efficient products and encouraging manufacturers to develop more efficient technologies, *see* Mauer Decl. ¶ 4, energy-efficiency standards allow members such as Mr. Mastic to attract and better serve clients. As with the delay in issuing a standard with respect to residential cooking products, NRDC's members are suffering a cognizable injury because Executive Order 13771 is blocking or delaying issuance of DOE's commercial water-heater standard and thus making more energy-efficient, affordable commercial water heaters inaccessible to plaintiffs' members. *See supra* pp. 18–19 (citing cases).

In short, until Executive Order 13771, the agency had intended to issue these energy-efficiency rules; the Executive Order is delaying the rules; and the delay is causing injury to plaintiffs and their members.

* * *

Since this case was filed, federal agencies have implemented Executive Order 13771 and the OMB Guidances by withdrawing or delaying hundreds of pending rulemakings. OMB has stated that the number of withdrawn and delayed actions as of last December is 1,579. *See* OMB, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, RegInfo.gov (Dec. 14, 2017), https://www.reginfo.gov/public/do/eAgendaMain. OMB has directly attributed these actions to Executive Order 13771. *See* OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps (Dec. 14, 2017), https://www.reginfo.gov/public/do/eAgendaEO13771. In addition to these delays and withdrawals, OMB has reported the "Results" of implementing the Executive Order: "Agencies issued 67 deregulatory actions and only 3 regulatory actions." *Id*. Plaintiffs cumulatively represent hundreds of thousands of individuals, LeGrande Decl. ¶ 1; R. Weissman Decl. ¶ 2; Wetzler Decl. ¶ 6—members of the public whose interests the federal defendants are directed to serve in administering programs and promulgating regulations to achieve health, safety, consumer, and environmental objectives delegated to them by Congress. *See*, *e.g*., OSH Act, 29 U.S.C. § 651(b) (stating that purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources"); Motor Vehicle Safety Act, 49 U.S.C. § 30101 ("The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents."). If the "entire regulatory scheme is [not] pointless," *Ctr. for Auto Safety*, 793 F.2d at 1335, "common sense" dictates that delays in issuing rules to protect consumers, workers, and the environment cause concrete injury to many of plaintiffs' members. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) ("When performing that inherently imprecise task of predicting or speculating about causal effects, common sense can be a useful tool.").

This common-sense conclusion is fully applicable to the specific rules discussed above, the delay of which injures plaintiffs' members. The second amended complaint and declarations submitted herewith establish plaintiffs' standing under the standards that apply at both the motion to dismiss and summary judgment stages. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because, far from being futile, the amendment satisfies the criteria for standing set forth in the Court's Memorandum Opinion, the Court should grant plaintiffs' motion for leave to amend and proceed to decide the merits of the case.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for leave to file a second amended complaint should be granted.

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Respectfully submitted,

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