IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 1:17-cv-00253 RDM

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

It has been well over a year since the President issued Executive Order 13,771, generally requiring by the end of each year two deregulatory actions for every regulatory action promulgated by Executive Branch agencies.[1] It has been nearly as long since Plaintiffs filed this suit. In that time, and despite two opportunities to amend their Complaint, Plaintiffs have not identified a single harm that has occurred, or will imminently occur, as a result of the Executive Order.

In place of concrete allegations, Plaintiffs continue to speculate about the potential for increased risk to their members from various regulations that may be delayed by the Order. But as this Court previously recognized, demonstrating standing through these kinds of regulatory-delay allegations "is not eas[y]." *Public Citizen, Inc. v. Trump*, No. CV 17-253 (RDM), 2018 WL 1129663, at *9 (D.D.C. Feb. 26, 2018). Plaintiffs must establish that an agency actually intended to issue a final rule on a certain subject, that the rule is being delayed by the Executive Order, that—focusing on the specific period of delay—a member will face a *substantial* probability of injury, and that the period of delay would *substantially* increase the risk of harm. *Id.* This Court previously held that Plaintiffs' First Amended Complaint, and some eighteen supporting declarations, failed to carry this burden.

Now, in their Second Amended Complaint, Plaintiffs identify four new, or only slightly modified, sets of factual allegations, supported by ten additional declarations, that they believe remedy the standing deficiencies previously identified by this Court. However, although some of these allegations might involve new facts or new rules, they do not present a new theory of

[1] Specifically, the Executive Order applies to "EO 13771 regulatory action" as defined in OMB's guidance. *See* OMB, *Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs,"* ("April Guidance") ¶ Q2 (April 5, 2017), ECF No. 14-4.

injury. Instead, they primarily rest on the same circuitous argument about an increased risk of harm caused by purported delays in agency rulemaking that this Court has seen, and found wanting, once before. The outcome with respect to the Second Amended Complaint should therefore be no different.

Plaintiffs have had every opportunity to identify concrete harms that they allege to have suffered as a result of Executive Order 13,771, but they have been unable to identify any such harm with specificity. That is due, at least in part, to the generalized nature of their challenge to the Executive Order. The Executive Order provides just one consideration among many that an agency will weigh when deciding whether and how to regulate on a specific issue over which it has discretion. Plaintiffs are free to challenge the delay of individual rules in separate actions if they believe that the delay violates legal requirements. However, as this Court has previously explained, the limitations of Article III preclude the type of wide-ranging challenge Plaintiffs present here.

BACKGROUND

Defendants' original motion to dismiss the Amended Complaint sets forth the background pertaining to Executive Order 13,771 and similar Executive Orders. The Court is respectfully referred to that discussion for purposes of the instant motion. *See* Defs. Mot. to Dismiss at 1-14, ECF No. 15-1.

Previously in this case, Defendants moved to dismiss Plaintiffs' First Amended Complaint, and Plaintiffs cross-moved for summary judgment. On February 26, 2018, this Court granted Defendants' motion to dismiss and denied Plaintiffs' motion for summary judgment, finding that Plaintiffs lacked standing. In doing so, the Court noted that the "lion's share of Plaintiffs' efforts" was directed at showing that the Executive Order was delaying the promulgation of new regulations. *Public Citizen*, 2018 WL 1129663 at *8.

This Court explained that to establish associational standing on the basis that the alleged delay was causing injury to Plaintiffs' members, Plaintiffs would have to satisfy a demanding four-part test to establish injury and causation: "Plaintiffs must plausibly allege or show, first, that the relevant agency intended to issue the regulation in question; second, that Executive Order 13771 will likely cause the agency to delay issuance of the regulation; third, 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, finally, that the period of delay attributable to the Executive Order will substantially increase that risk of harm." *Id*. at *9.

The Court first determined that Plaintiffs could not even clear the first hurdle to show that the "relevant agencies actually intended to finalize" two of the eight rulemakings Plaintiffs had cited, namely unspecified "rules to curb climate change" and a petition concerning the use of "antibiotics in livestock and poultry." *Id*. at *10. As to the remaining six rulemakings,[2] the Court noted that "the challenge that Plaintiffs face [in showing injury and causation] is particularly daunting because they seek to set aside the Executive Order to facilitate the adoption of regulations by agencies in the hopes of compelling third parties to act in a manner that might mitigate risks posed to their members." *Id*. at *14.

The Court found that while it was "plausible to conclude that the Executive Order has resulted in *some* measure of delay" for these rulemakings, Plaintiffs could not establish that any relevant delay in issuing a final rule created a substantial risk of harm traceable to the Executive

[2] The six cited rulemakings were: (1) OSHA's potential infectious disease standard, (2) EPA's proposed regulation to ban the use of certain chemicals in paint removal, (3) DOE's proposed energy efficiency standards for residential cooking products, (4) DOT's proposed rule concerning vehicle-to-vehicle communications technology, (5) DOT's proposed rule mandating speed-limiting devices on certain vehicles, and (6) DOT's proposed rule requiring development of oil spill response plans. *See Public Citizen*, 2018 WL 1129663 at *8.

Order. *Id*. The Court observed that "[u]nder [Plaintiffs'] theory of probabilistic injury, after an agency takes virtually any action, virtually any citizen—because of a fractional chance of benefit from alternative action—would have standing to obtain judicial review of the agency's choice." *Id*. at *19 (quoting *Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295 (D.C. Cir. 2007)). The Court thus concluded that none of Plaintiffs' declarants could establish a substantial risk of injury, given the declarants' reliance on speculation and "'equivocal' predictions." *Id*. at *19. Because the Court dismissed Plaintiffs' allegations of associational standing on these grounds it did not need to reach the issue of redressability.

This Court then proceeded to evaluate, and similarly reject, Plaintiffs' claims of organizational standing for two reasons. First, Plaintiffs failed to offer any evidence that their organizations "had declined—or are imminently likely to decline—to advocate for a new rule out of fear that the Executive Order would compel the repeal of existing rules. Instead, they merely assert that they have been forced to consider the issue." *Id*. at *22. "But," this Court held, "merely having 'to think twice' before engaging in advocacy, does not constitute a cognizable injury in fact." *Id*. Second, Plaintiffs "failed plausibly to allege causation." *Id*. at *23. That is, even assuming that Plaintiffs petitioned an agency and "encouraged an agency to take some regulatory action, one could only speculate about whether the relevant agency would agree to issue the rule, about which rules might be repealed in response, about whether those rules would not have otherwise been repealed, and about whether an identifiable member of one of the plaintiff-associations would suffer a cognizable injury-in-fact as a result." *Id*. Accordingly, this Court reasoned, any "self-inflicted injury" that Plaintiffs "sustain[] in order to avoid that speculative harm" is insufficient to establish standing. *Id.* Because Plaintiffs failed to

demonstrate either organizational or associational standing, this Court dismissed the First Amended Complaint.

Plaintiffs then moved to amend their Complaint once more. In response, Defendants explained that while they would not oppose the filing of the Second Amended Complaint, they believed that the amendment did not cure the jurisdictional defects identified by the Court. Defs. Non-Opp. to File Second Amended Complaint, ECF No. 65. On April 20, 2018 this Court deemed filed Plaintiffs' Second Amended Complaint, which primarily asserts standing on the basis of four new or slightly modified sets of allegations related to certain rulemakings, supported by ten new declarations. *See* Pls. Mot. to File Second Amended Complaint ("Pl. Mot."), ECF No. 64; Second Amended Complaint, ECF No. 67.

STANDARD OF REVIEW

Defendants move to dismiss the Second Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs bear the burden of demonstrating jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted). Because the Court has "an affirmative obligation . . . to ensure that it is acting within the scope of its jurisdictional authority," the Court may "consider matters outside the pleadings" in addressing Defendant's motion to dismiss under Rule 12(b)(1) without converting it to a motion for summary judgment. *Forrester v. U.S. Parole Comm'n*, 310 F. Supp. 2d 162, 167 (D.D.C. 2004) (citation omitted).

ARGUMENT

I. Plaintiffs' Allegations in the Second Amended Complaint Fail to Establish Standing to Challenge the Executive Order

To establish Article III standing, a plaintiff must demonstrate: (1) an "actual or imminent," "concrete and particularized" injury-in-fact, (2) a "causal connection between the injury" and the challenged action, and (3) a likelihood that the "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. In the Second Amended Complaint, Plaintiffs again claim standing on their own behalf and on behalf of their members. However, Plaintiffs concede in their brief in support of amendment that any argument as to organizational standing is precluded by this Court's prior decision. Pl. Mot. at 4 ("[R]ecognizing that the Court also ruled against [Plaintiffs] on a legal question related to causation with respect to this basis for standing, plaintiffs do not address this basis for standing further . . . .").[3] As such, Plaintiffs must establish associational standing on behalf of one of their identified members.

In order to demonstrate associational standing, Plaintiffs must establish that "at least one of [their] members would have standing to sue in his own right . . . ." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). As this Court previously recognized, "Plaintiffs cannot plausibly allege that the delay in finalizing the regulatory actions at issue here will *certainly* cause their members injury; instead the delay will, at most, *increase the risk* that the identified individuals might someday suffer an injury." *Public Citizen, Inc.*, 2018 WL 1129663, at *9. Indeed, the Court noted that this "governing standard is not easily met," and that the "challenge that Plaintiffs face is particularly daunting because they seek to set aside the Executive Order to

[3] This is the correct conclusion, as discussed *infra* § I.A.

facilitate the adoption of regulations by agencies in the hopes of compelling third parties to act in a manner that might mitigate risks posed to their members." *Id*. at *14.

Accordingly, with respect to their allegations of regulatory delay, Plaintiffs must establish that (1) an agency intended to issue a final rule, (2) that the rule is being delayed by the Executive Order, (3) that—focusing on the specific period of delay —a member will face a *substantial* probability of injury, and (4) that the period of delay would *substantially* increase the risk of harm. *Id.*[4] In addition, any sufficiently increased risk must be "redressable 'by a favorable decision.' Again, speculation will not suffice; rather, the plaintiff must allege (and must eventually prove) that it is 'likely' that judicial intervention will rectify or prevent the asserted wrong." *Id*. at *5.[5]

Applying this framework to the allegations in Plaintiffs' Second Amended Complaint makes clear that Plaintiffs' alleged bases for standing—old and new alike—are insufficient.

A. The Law of this Case Precludes Standing Arguments Based on Allegations in the Second Amended Complaint that Mirror the Allegations in the First Amended Complaint

In dismissing Plaintiffs' First Amended Complaint, this Court rejected each of the many theories Plaintiffs advanced to try to establish standing. *See Id.* at *1-2. Plaintiffs have

[4] Of course, Plaintiffs must satisfy the usual test to demonstrate standing, and show (1) injury, (2) causation and (3) redressability. *Lujan*, 504 U.S. at 560-61. However, with reference to Plaintiffs' allegations of delay, the Court specifically laid out the four requirements needed to establish injury and causation, and so the Government will follow the Court's analysis here, with the exception of Plaintiffs' claim related to DOT's withdrawal of a proposed rulemaking, because that claim is does not concern a delayed rulemaking. In any event, each of Plaintiffs' allegations fails to demonstrate standing under either test.

[5] Pursuant to this Court's Order of May 1, 2018, this motion is limited to Plaintiffs' standing to bring the Second Amended Complaint. Defendants reserve all arguments concerning the merits of Plaintiffs' claims and would intend to move to dismiss on those grounds other than standing identified in Defendants' original motion to dismiss.

abandoned at least one of those theories of associational standing, *compare* First Amended Complaint ("FAC") ¶¶ 110-118 (alleging standing based on regulatory determinations under the Endangered Species Act), *with* Proposed Second Amended Complaint ("SAC") (redline) at 47, ECF No. 64-2 (reflecting deletion of these allegations),[6] and many of Plaintiffs' other associational standing allegations remain materially unchanged in the Second Amended Complaint.

Those unaltered allegations fail to establish standing for the reasons this Court has already explained. For instance, Plaintiffs have added no new allegations about the injury they claim will result if the Environmental Protection Agency ("EPA") declines to adopt a rule regulating methylene chloride and NMethylpyrrolidone ("NMP") in paint removers. *See* SAC ¶¶ 119-23. As such, they have failed to address the "risk posed by occasional consumer use" of the chemicals, how often a member of the plaintiff organizations has used ever used products that contain the chemicals, or "whether consumer products are already available . . . that do not contain" the chemicals. *Public Citizen*, 2018 WL 1129663, at *17. Absent these kinds of specific allegations, it is the law of this case that Plaintiffs cannot make the increased-risk-of-harm showing necessary to establish standing. *See id.*; *Williams v. Obama*, 600 F. App'x 777, 779 (D.C. Cir. 2015) ("Any time that the court 'affirmatively decide[s an] issue, be it explicitly or by necessary implication,' that holding becomes law of the case.").

Elsewhere in the Second Amended Complaint, Plaintiffs have added nominally new allegations that nonetheless fail to correct the flaws this Court identified in its February 26 opinion. With respect to a proposed Department of Transportation rule regarding speed-limiting

[6] Because there are no remaining allegations against the Department of Commerce and the National Oceanic and Atmospheric Administration ("NOAA"), they should be dismissed as Defendants.

devices, for example, Plaintiffs allege that Public Citizen member Amanda Fleming "will for years have a child who rides a school bus and would like the bus to be equipped with a speed-limiting device." SAC ¶ 75. But that allegation says nothing specific "about the risk posed to Fleming's children and, more importantly, about the extent to which [any] delay in finalizing the speed-limiting device rule might increase that risk." *Public Citizen*, 2018 WL 1129663, at *19. As such, the addition of a conclusory allegation to the discussion of speed-limiting devices—and of similar conclusory allegations in other sections of the Second Amended Complaint, *see, e.g.*, SAC ¶ 102—cannot establish the requisite substantial risk of a concrete harm stemming from a delay in regulatory actions. *See Public Citizen*, 2018 WL 1129663, at *9.

Similarly, Plaintiffs have—by their own admission—failed to address the shortcomings this Court identified in their theory of organizational standing. As this Court explained, to satisfy the causation prong of the organizational standing inquiry, Plaintiffs must show that any decision not to advocate for a new rule is something other than a self-inflicted injury. *See Public Citizen*, 2018 WL 1129663, at *23. In other words, "chilling their own advocacy based on 'their fears of [a] hypothetical future harm'" is insufficient for standing. *Id.* (alteration in original) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013)). Plaintiffs concede that they "do not address this [second] basis for standing," *i.e.*, causation, in their Second Amended Complaint. Pl. Mot. at 4.

B. Plaintiffs' New Allegations Concerning Four Categories of Rules Are Premised on the Same Type of Speculative Assertions that This Court Previously Rejected as a Basis for Standing

The new standing allegations in the Second Amended Complaint center on four rulemakings that have purportedly been delayed or otherwise affected by the Executive Order, and which in turn have allegedly created a risk of harm to Plaintiffs' members: (1) a withdrawn DOT proposed rule concerning airline fees, (2) a DOT proposed rule concerning vehicle-to-

vehicle communications technology, (3) an OSHA rulemaking regarding workplace violence, and (4) DOE's proposed energy efficiency standards for stoves and ovens, as well as for commercial water heaters. In support, Plaintiffs have assembled a set of ten new declarations, in addition to those previously found wanting by this Court. Plaintiffs once again invite the Court to rely on their speculation about possible future events to determine whether Plaintiffs have established standing. As the following discussion demonstrates, they have not. Defendants will address each of Plaintiffs' cited rulemakings in turn.

1. Airline Baggage Fees

Plaintiffs' first alleged basis for standing arises out of the withdrawal of a DOT supplemental notice of proposed rulemaking ("SNPRM"), issued on January 19, 2017, entitled "Transparency of Airline Ancillary Service Fees," 82 Fed. Reg. 7536-01. The SNRPM built on a proposal made in 2014, *see* 79 Fed. Reg. 29970, and proposed requiring carriers and ticket agents to disclose certain baggage fee information to consumers whenever fare and schedule information is provided. DOT suspended the public comment period for this proposed rule on March 2, 2017, in order to "allow the President's appointees the opportunity to review and consider this action." 82 Fed. Reg. 13572-01.

On December 14, 2017, DOT issued a notice stating that it was withdrawing this proposed rulemaking. *See* 82 Fed. Reg. 58778 (2017). The agency explained that "the Department is committed to protecting consumers from hidden fees and to ensuring transparency. However, we do not believe that Departmental action is necessary to meet this objective at this time." *Id*. DOT further concluded that the rulemaking was not necessary because "existing regulations already provide consumers some information regarding fees for

ancillary services." *Id.* The agency noted that the action "corresponds with the Department's and Administration's priorities and is consistent with Executive Order 13771." *Id.*

Amy Allina, one of Plaintiffs' members, now avers that the withdrawal of this proposed rulemaking caused her injury because she has "to continue spending time looking for the baggage fees so that [she] can compare prices before booking." Declaration of Amy Allina ("Allina Decl.") ¶ 5, ECF No. 64-4. However, even assuming that Ms. Allina has adequately alleged a concrete injury in fact—an assumption that would be misguided[7]—this allegation fails to establish standing because Plaintiffs cannot demonstrate that Executive Order 13,771 was the "likely cause" of the agency's withdrawal of the SNPRM, *Public Citizen*, 2018 WL 1129663 at *9, or that invalidation of the Executive Order would redress Ms. Allina's purported injury.

a. *Plaintiffs Cannot Demonstrate that the Executive Order Was the Basis for the Withdrawal of the SNPRM*

In the Second Amended Complaint, Plaintiffs allege only that the "Executive Order is delaying" a final rule related to baggage fees, ignoring the fact that the relevant SNPRM has been withdrawn. SAC ¶ 93. Indeed, Plaintiffs do not appear to make any allegation that the withdrawal was caused by the Executive Order, nor could they. According to DOT, the SNPRM was not "necessary" to the goal of "protecting consumers from hidden fees and to ensuring

[7] Even if the purported need to conduct one or more additional web searches could rise to the level of an Article III injury in fact, *but see Kushner v. Illinois State Toll Highway Auth.*, 575 F. Supp. 2d 919, 922-23 (N.D. Ill. 2008), Plaintiffs admit that this purported injury is readily cured by the availability of the information that Ms. Allina desires on certain websites. According to Plaintiffs, "[c]urrently, baggage-fee information is available on some websites but not others . . . ." SAC ¶ 90; *see also* Allina Decl. ¶ 3 ("Baggage-fee information is provided in different ways on each site, and it does not appear on the initial pages that list flights and fares."). The fact that the information is freely available on certain websites defeats any suggestion that Ms. Allina is suffering a cognizable injury. *See Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1282 (D.C. Cir. 2012); *Public Citizen*, 2018 WL 1129663, at *17 (faulting Plaintiffs for "say[ing] nothing" concerning whether their desired products "are currently available in the marketplace").

transparency[,]" given the fact that "existing regulations already provide consumers some information regarding fees for ancillary services." 82 Fed. Reg. 58778. Thus, DOT withdrew the SNPRM after the agency—including its new leadership—evaluated the rulemaking and concluded that it was not warranted. *Cf. Public Citizen*, 2018 WL 1129663, at *12-13 (noting that agencies could delay issuance of a rule because of "a change in administration and a shift in policy priorities" or because of "greater scrutiny of regulatory action or skepticism that the federal government should try to fix every problem").

It is, of course, true that the withdrawal notice states in passing that it is "consistent with Executive Order 13771," just as it states that it "corresponds with the Department's and Administration's priorities." *See* 82 Fed. Reg. 58778. However, the mere fact that regulatory action may be consistent with the Executive Order does not mean that the action was taken *because of* the Executive Order. Were it otherwise, then all agency actions that are "consistent with" executive orders concerning rulemaking, or any of the other myriad statutes or regulations that similarly apply, must be deemed to have been taken because of those directives. *See, e.g.*, Department of State, Temporary Modification of Category XI of the United States Munitions List, 82 Fed. Reg. 41172 (2017) (noting that the rulemaking is "consistent with the provisions of Executive Order 13563"); Department of Transportation, Inflation Adjustment of Civil Monetary Penalties, 81 Fed. Reg. 43101 (July 1, 2016) (explaining that the "interim final rule has been evaluated consistent with Executive Order 12866 . . . [and] 13563"). But the notion that a rule is issued by an agency *because of* Executive Order 12,866, or any other Executive Order, simply because a review has been performed consistent with the Order's terms, is illogical. As this Court has recognized, an agency action is instead judged on the basis of the agency's rationale

for the action, which here was the decision that the rulemaking was unnecessary. *See Public Citizen*, 2018 WL 1129663 at *13-14.

"Without some underlying factual basis for attributing" the withdrawal of the SNPRM to the Executive Order, "rather than to other factors," *Ass'n of Flight Attendants-CWA, v. U.S. Dep't of Transp.*, 564 F.3d 462, 469 (D.C. Cir. 2009), Plaintiffs cannot show that Executive Order 13,771 was the "likely cause" of the agency's withdrawal of the SNPRM. *Public Citizen*, 2018 WL 1129663 at *9. Accordingly, Plaintiffs lack standing on this basis.

b. *Plaintiffs' Injuries are Not Redressable*

Even if Plaintiffs could plausibly allege that DOT withdrew the SNPRM because of the Executive Order, they cannot demonstrate that the invalidation of the Order would provide them with any meaningful relief. "The redressability inquiry poses a simple question: '[I]f plaintiffs secured the relief they sought . . . would [it] redress their injury?'" *The Wilderness Soc. v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996)); *see also West v. Lynch*, 845 F.3d 1228, 1235 (D.C. Cir. 2017) (holding that it is incorrect to argue that "redressability necessarily 'follows from causation'"). Here the answer to that question is plainly no. The relief requested in Plaintiffs' Second Amended Complaint is the invalidation of the Executive Order, not an affirmative injunction requiring the promulgation of the rule identified in the SNPRM.[8] Accordingly, even

[8] Such relief would in any event be unavailable. Challenges to DOT rulemaking actions related to aviation must be brought in the court of appeals within 60 days. *See* 49 U.S.C. § 46110(a); *Nat'l Fed'n of the Blind v. United States Dep't of Transportation*, 827 F.3d 51, 54 (D.C. Cir. 2016). And even if Plaintiffs had brought a timely challenge to the withdrawal of the SNPRM, and even if that challenge had been successful, that at most would have resulted in a reinstitution of the rulemaking, and would not have guaranteed the issuance of a Final Rule.

if the Order were invalidated, the withdrawal of the SNPRM would remain final. The harm alleged by Ms. Allina would therefore be unaffected by a ruling of this Court.

It would be pure speculation to assume that the invalidation of the Executive Order would cause DOT to revisit the SNPRM, particularly in light of the agency's determination that it is unnecessary. And where "conjecture is necessary, redressability is lacking." *West*, 845 F.3d at 1237. Because Plaintiffs cannot show that their injuries would likely be redressed by a favorable decision here, they accordingly lack standing.

2. Vehicle-to-Vehicle Communications

Plaintiffs' next attempt at establishing standing is actually just a recycling of a theory that this Court has already rejected. They allege that certain of their members will suffer injury due to the purported delay of a proposed rule by DOT concerning "vehicle to vehicle communications." SAC ¶ 76. Specifically, on January 12, 2017, DOT issued a Notice of Proposed Rulemaking, which concerned a mandate for "vehicle-to-vehicle (V2V) communications for new light vehicles and to standardize the message and format of V2V transmissions." 82 Fed. Reg. 3854 (2017). In their First Amended Complaint, Plaintiffs alleged that Executive Order 13,771 was causing DOT to delay issuing a final rule on this subject, and that members Amanda Fleming and Terri Weissman would be injured by that delay. *See, e.g.*, FAC ¶ 68. This Court rejected those allegations of injury, noting that Plaintiffs "say nothing about 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." *Public Citizen*, 2018 WL 1129663, at *19.

Rather than provide any new facts to cure the deficiencies identified by the Court, Plaintiffs merely reuse the same declarations from Ms. Fleming and Ms. Weissman. The only difference is that Plaintiffs have tweaked their legal argument about why these allegations are sufficient to establish standing. *See* Pl. Mot. at 11 ("[T]he Court did not address the type of injury on which plaintiffs rely to establish standing . . . ."). Plaintiffs should not be permitted to use the process of amendment to reargue an issue that this Court has already decided. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) ("[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*."). However, even if this Court were to allow Plaintiffs another bite at this apple, it is clear that Plaintiffs' new legal arguments do nothing to undermine the correctness of this Court's prior analysis.

a. *Plaintiffs Cannot Demonstrate that DOT Intends to Issue a Final V2V Rule or that Executive Order 13,771 is Causing Any Delay*

In its prior opinion, this Court explained that to establish injury and causation for each purportedly delayed rulemaking, Plaintiffs must first show that the agency actually intended to issue a favorable final rule on a given subject. *Public Citizen*, 2018 WL 1129663, at *9. This Court previously held that because DOT had issued the V2V NPRM there existed a "plausible basis to conclude that" it did intend to finalize the proposed rule, *id*. at *19, and that it was plausible to assume that the Executive Order was causing a delay, in the absence of any other explanation, *id.* at *13.

However, following the close of briefing, on November 8, 2017, DOT issued a statement concerning the V2V rulemaking. The agency emphasized that it has "not made any final decision on the proposed rulemaking concerning a V2V mandate." DOT, V2V Statement,

https://www.nhtsa.gov/press-releases/v2v-statement (Nov. 8, 2017). DOT explained that, "[i]n response to the proposal, NHTSA is still reviewing and considering more than 460 comments submitted and other relevant new information to inform its next steps." *Id.* The agency thus made plain that it has made no decision as to whether it intends to issue a final rule and that it is a substantive evaluation of the rule, rather the Executive Order, that is responsible for any delay. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) ("Since the proposed rule was simply a proposal, its presence meant that the Department was *considering* the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it."); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 830 (D.C. Cir. 2016) (holding that after agency issued a proposed rule "[i]t remains unclear whether the FDA will issue a final rule, and what it would say"). As a consequence, Plaintiffs cannot demonstrate that DOT intends to issue a final rule, or that such a rule is being delayed by Executive Order 13,771. *See Public Citizen*, 2018 WL 1129663, at *13 (noting that agencies could delay issuance of a rule due to "greater scrutiny of regulatory action").

b. *Plaintiffs Have Failed to Demonstrate a Substantial Probability of Injury from Any Delay*

In its prior opinion, this Court held that Plaintiffs must further show that any delay of a V2V rule substantially increases their members' risk of future injury. *Public Citizen*, 2018 WL 1129663, at *9. As this Court recognized, "[i]t is far from clear . . . how delay of the rule is likely to affect Fleming or Weissman." *Id.* at *19. Moreover, Plaintiffs "sa[id] nothing" about the relative risks of being involved in an auto accident or how that risk would be affected by the deployment of V2V technology, and thus Plaintiffs could not establish that they face a "substantial probability of harm." *Id.*

Plaintiffs argue that the Court misinterpreted their allegation of injury, which is purportedly not based on the "increased 'risk' of suffering an accident," but rather is based on Ms. Fleming and Ms. Weissman "being deprived of the opportunity to purchase vehicles with a particular desired feature." Pl. Mot. at 11. In other words, Plaintiffs apparently argue that their members do not desire V2V technology for its potential safety benefits, but instead solely because of their subjective preferences for a car that contains such technology.

The declarations of Ms. Fleming and Ms. Weissman do not support this curious argument. The relevant sections of both declarations make clear the basis for the declarants' injury: "Auto safety is important to me, particularly because I have two children. I have read about vehicle-to-vehicle technology, which the National Highway Traffic Safety Administration says will prevent car accidents and save lives." Declaration of Amanda Fleming ("Fleming Decl.") ¶ 5, ECF No. 16-7; Declaration of Terri Weissman ("Weissman Decl") ¶ 4, ECF No. 16-10. Both declarants further state their belief that the Executive Order will "negatively affect" their ability to purchase "a new car with this safety system." *Id*. Ms. Fleming and Ms. Weissman accordingly declare that they desire V2V technology in their next car in order to avoid a "higher risk of injury or death . . . ." *Id.* Although their declarations briefly mention the "ability to purchase the vehicle [they] desire," the declarations provide no indication that Ms. Fleming or Ms. Weissman seek a vehicle simply because it is equipped with V2V technology, as opposed to a vehicle that makes them safer on the roads. *Id*.

Even if Plaintiffs are permitted to recast their prior declarations in this counterfactual and implausible fashion, the allegation of a desire to purchase a vehicle with V2V technology would still fail to establish standing. First, Plaintiffs cannot show that they are or will be prevented from purchasing a car with V2V technology. Indeed, in early 2017 Cadillac began offering V2V

technology as a standard feature of its CTS sedan. *See* Cadillac, *V2V Safety Technology Now Standard on Cadillac CTS Sedans* (March 9, 2017), http://media.cadillac.com/media/us/en/cadillac/news.detail.html/content/Pages/news/us/en/2017/mar/0309-v2v.html. In addition, Toyota recently announced that in mid-2021 it will offer V2V technology in Toyota and Lexus vehicles. *See* Andrew Krok, CNET, *Toyota, Lexus to Launch 'Talking' Vehicles in 2021* (April 16, 2018), https://www.cnet.com/roadshow/news/toyota-lexus-v2v-v2i-dsrc-communication-2021. Thus, if Ms. Fleming and Ms. Weissman in fact wish to purchase a new vehicle with V2V technology in the next five years, they may be able to do so, regardless of whether DOT issues a final V2V rule. *See Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1282 (D.C. Cir. 2012) (finding no injury where desired product was "readily available").

Nor can Plaintiffs demonstrate that DOT's final rule would have required the manufacture of more cars with V2V technology by the time that Ms. Fleming and Ms. Weissman would purchase a car. That is, Plaintiffs cannot show that the Executive Order substantially increases their risk of harm during the period specified by the declarations. Plaintiffs assert that a final rule would require "50 percent of new cars to have V2V communications in the first year and 100 percent in the third year," Pl. Mot. at 11, but that statement is misleading. The proposed rule for V2V technology included "two years of lead time" following the promulgation of a final rule in 2019 before any mandates would apply. Federal Motor Vehicle Safety Standards; V2V Communications, 82 Fed. Reg. 4006 (proposed January 12, 2007) (to be codified at 49 C.F.R. pt. 571). Thus, even under the proposed rule's speculative timeline, no car company would be required to comply with the proposed rule until 2021 at the earliest. And even that timeframe was far from certain, as the agency had specifically requested comments as to whether "the proposed lead times are reasonable[,]" and "[w]hat type of adjustments, if any, should [the]

agency make." *Id.* at 4007; *see also Comment from Alliance of Automobile Manufacturers, Inc.*, https://www.regulations.gov/document?D=NHTSA-2016-0126-0417 (arguing that the "proposed 2-year lead time with a 3-year phase-in period is more aggressive than recent rulemaking activities with much less complexity and NHTSA should consider a longer time period").[9]

As this Court previously recognized, these timeframes are important, because the declarations submitted by Plaintiffs note that they intend to purchase their next car in "the next five years or so," for Ms. Fleming and "in the next 5-7 years" for Ms. Weissman. *See* Fleming Decl. ¶ 5; Weissman Decl. ¶ 4. As an initial matter, the prospect of the declarants purchasing a vehicle at least five years into the future is not sufficiently imminent to make an alleged injury stemming from any such purchase "certainly impending." *See Clapper*, 133 S. Ct. at 1147. It is entirely unknown whether, for any number of reasons (an existing car breaks down, financial circumstances change, and so on), the declarants will end up purchasing a car outside the date range they roughly estimate. But even assuming the declarants' professed intentions are sufficiently definite, their hypotheses about what the market for vehicles with V2V technology will look like in five years or more are not. The lengthy period that would precede any compliance from manufacturers, following the promulgation of a hypothetical final rule, reinforces that the alleged harm to the declarants is purely speculative. Thus, just as the Court found in its prior opinion, Plaintiffs have not shown 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." *Public Citizen*, 2018 WL 1129663 at *19.

[9] DOT also noted that there were numerous contingencies outside of its control that could delay the installation of V2V technology, such as public rejection of the product and the possibility that a court might enjoin the rule. *See* 82 Fed. Reg. at 3920.

Indeed, the D.C. Circuit has never held that a plaintiff who wants to purchase a particular product has standing to challenge agency inaction or delay (much less an executive order whose effect was allegedly to cause that delay), without more. And for good reason. When an agency directly regulates a product, and that regulation has a concrete impact on a plaintiff's ability to purchase the desired product at a desired price, there is a greater likelihood that plaintiff may be able to show a direct harm. *See Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990). However, that showing becomes exponentially more difficult when, instead of challenging a particular regulatory determination affecting the product, the plaintiff claims that agency delay itself inflicts an injury. Here, it is purely speculative to assert that DOT's alleged inaction creates a substantially increased risk traceable to the Executive Order such that particular members of Plaintiffs' organizations will not be able to purchase the cars of their choice, equipped with V2V technology, within the next five years. Plaintiffs thus cannot establish an imminent injury on this basis.

Finally, even if Plaintiffs were prevented from purchasing this technology due to the period of delay, they cannot demonstrate a legally cognizable injury in being denied the opportunity to purchase V2V technology. As the D.C. Circuit has recognized, a lost opportunity to purchase a desired product may constitute an injury-in-fact where the product has some nexus with a legally cognizable interest of the petitioner. *See Orangeburg, S.C. v. Fed. Energy Regulatory Comm'n*, 862 F.3d 1071, 1078 (D.C. Cir. 2017) (holding that petitioner city's lost opportunity to "receive both the most reliable and lowest cost power" constitutes an "injury-in-fact"). But Plaintiffs here set forth no tangible or intangible harm that they would suffer if they were unable to purchase a car with V2V technology, apart from their own purported disappointment. *Accord New England Anti-Vivisection Soc'y v. United States Fish & Wildlife*

Serv., 208 F. Supp. 3d 142, 171 (D.D.C. 2016) (rejecting theory of injury based on plaintiffs' "dashed hopes" concerning the care of certain animals); *accord Competitive Enter. Inst.*, 901 F.2d at 113 (finding that "a lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements" where the desired vehicles enhanced vehicle "safety, comfort, and performance").

Whatever the injury found by courts in the cases cited by Plaintiffs, it is another matter entirely to assert injury from an inability to have technology in one's vehicle that will not serve its intended function—namely, to substantially reduce the risk of an accident—until a sufficient mass of individuals have adopted the technology, or until safety applications have been developed to make that technology functional. *See, e.g.*, 82 Fed. Reg. at 3869 (noting that "[i]f consumers do not accept a required safety technology, the technology will not create the safety benefits that the agency expects"); 82 Fed. Reg. at 3858 (explaining that DOT did not "propose to mandate any specific safety applications at this time, instead allowing them to be developed and adopted as determined by the market"). Thus, even if Plaintiffs could show that they would be deprived of the opportunity to purchase V2V technology, absent a showing of concrete harm from that deprivation, Plaintiffs have not established a cognizable injury.

c. *Plaintiffs Cannot Show that Overturning the Executive Order Would Redress Their Injuries*

Finally, Plaintiffs lack standing on the basis of the V2V rulemaking because they cannot establish that if the Executive Order were enjoined, then DOT would speedily promulgate a final rule, which in turn would cause car manufacturers to install the technology in the near future, thus permitting Plaintiffs an opportunity to buy a V2V-equipped car. As the D.C. Circuit has held, "[i]f the challenged conduct is at best an indirect or contributing cause of the plaintiff's

injury . . . the plaintiff faces an uphill climb in pleading and proving redressability." *See West*, 845 F.3d at 1236.

To establish redressability here, Plaintiffs must show at the very least that, if the Executive Order were enjoined, DOT would (1) decide to issue a final rule in this area, which (2) mandates installation of the technology sought by Plaintiffs' members; (3) the rule would not be subject to delay for any other reason during the rulemaking process; and (4) the rule would mandate that car manufacturers install V2V technology within the next few years, the time in which Plaintiffs' members wish to buy a car. In other words, Plaintiffs must show that invalidating the Executive Order would somehow cause DOT to stop its ongoing substantive evaluation of the rulemaking and immediately issue a Final Rule, *and* that the Final Rule would contain requirements sufficient to remedy their alleged injuries. By this argument, "Plaintiffs ultimately ask the court to 'pile conjecture on conjecture,'" in arguing that removal of the Executive Order will likely result in their members' increased access to V2V technology. *See Siegel v. United States Dep't of Treasury*, No. CV 16-2288 (RDM), 2018 WL 1542138, at *7 (D.D.C. Mar. 28, 2018) (citation omitted) (Moss, J.); *Renal Physicians Ass'n v. United States HHS*, 489 F.3d 1267, 1278 (D.C. Cir. 2007) (citing *Nat'l Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 939-40 (D.C. Cir. 2004) (noting circumstances where "undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces"). Plaintiffs' "unadorned speculation" does not suffice to carry their burden, and standing is accordingly lacking. *See Abulhawa v. United States Dep't of the Treasury*, 239 F. Supp. 3d 24, 37 (D.D.C. 2017) (Moss, J.).

3. Workplace Violence Rulemaking

Plaintiffs' third purported basis for standing relates to an OSHA rulemaking concerning workplace violence. In December 2016, OSHA issued a Request for Information, seeking information concerning a potential standard to prevent workplace violence in healthcare and social assistance settings. *See* Prevention of Workplace Violence in Healthcare and Social Assistance, 81 Fed. Reg. 88147 (proposed Dec. 7, 2016) (to be codified at 29 C.F.R. pt. 1910). Shortly thereafter, in January 2017, OSHA also granted citizen petitions, affirming that it was initiating rulemaking proceedings on this topic. *See* DOL, Prevention of Workplace Violence in Healthcare and Social Assistance, RegInfo.gov (Fall 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId =201710&RIN=1218-AD08 (unified agenda).

Plaintiffs allege that the Executive Order is delaying the promulgation of a final rule on this topic, and that this delay injures member Denise Abbott. Previously Ms. Abbott declared that she would be injured by a delay in OSHA's promulgation of an infectious disease standard, without mentioning her concerns about workplace violence. Because the infectious disease standard rulemaking had not reached the proposed rule stage, this Court rejected it as a basis for standing, and Plaintiffs offer no new material allegations on this subject. *Public Citizen*, 2018 WL 1129663 at *15-16.

However, the very same deficiencies that precluded standing based on Ms. Abbott's concerns about the infectious disease standard apply with equal weight to her new allegations about workplace safety. For that and other reasons discussed more fully below, this Court should reject Plaintiffs' second attempt to establish standing based on Ms. Abbott's allegations.

a. *Plaintiffs Cannot Establish that OSHA Intends to Issue a Final Rule on Workplace Violence*

As this Court previously held, Plaintiffs must first show that OSHA in fact intends to issue a final rule concerning workplace violence in the healthcare industry in order to establish injury resulting from delay of that rule. *Id*. at *9. Plaintiffs cannot make such a showing.

In rejecting standing for Plaintiffs based on a purported delay in OSHA's infectious disease rulemaking, this Court found that Ms. Abbott's allegations "barely, if at all, clear [the] first hurdle" of showing that OSHA actually intended to issue a final infectious disease rule. *Id*. It so held even though the agency had already issued a Request for Information, reviewed the received comments, conducted a meeting with stakeholders, completed the review panel process required by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), and had set an initial date for the promulgation of an NPRM. *Id.* at *11.

If the infectious disease standard barely cleared the first hurdle, the workplace violence rulemaking has only just moved past the starting line. Indeed, the only rulemaking actions taken by the agency on this subject were to issue a Request for Information in December of 2016 and hold an initial stakeholder meeting. *See* DOL, Prevention of Workplace Violence in Healthcare, RegInfo.gov (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId =201804&RIN=1218-AD08 (unified agenda). OSHA has not yet even convened a SBREFA panel, though it announced its intention to "initiate" the SBREFA process in January 2019, as a panel is required for all OSHA rules which may have a significant economic impact on a substantial number of small entities, *see* 5 U.S.C. §§ 609(b), (d). There is accordingly no basis to conclude that, at this early stage in the rulemaking process, a workplace violence standard "would have been issued but for the Executive Order." *Public Citizen*, 2018 WL 1129663 at *11.

OSHA's decision to grant petitions for rulemaking on this subject in January of 2017 does not alter this conclusion. Pl. Mot. at 12. The APA does not obligate an agency to promulgate a final rule simply because it grants a petition for rulemaking. *See* 5 U.S.C. §§ 553(e), 555(e). Absent some legal requirement to issue a rule in a given area, rulemaking proceedings, initiated by petition or otherwise, inherently preserve the agency's "discretion to promulgate a rule or decline to do so[.]" *See Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1325 (D.C. Cir. 2013) (holding that a requirement to "conduct a rulemaking" in fact "does not *require* EPA to promulgate a new, stricter rule"). The mere grant of a petition thus obligates an agency only to "enter a final decision [on the rulemaking] subject to judicial review . . . within a reasonable time." *See In re A Cmty. Voice*, 878 F.3d 779, 785 (9th Cir. 2017) (citation omitted); *Public Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1153-54, 1158 (D.C. Cir. 1983) (holding that an agency is required only to "conclude within a reasonable time a matter presented to it"). To reach a final decision regarding the instant rulemaking, OSHA must determine whether a rule concerning workplace violence is "reasonably necessary or appropriate" within the meaning of the Occupational Safety and Health Act. 29 U.S.C. § 652(8). To reach this conclusion, the Agency must first determine whether there is a significant risk of harm from a particular hazard in the workplace, whether there is a standard which will substantially reduce that risk, as required under the statute, and whether that standard is both economically and technologically feasible, among other requirements. *See UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994); *see also* Pl. Mot. at 14. These determinations require additional consideration on the part of the agency, and also that the agency take into account feedback from a required SBREFA panel, which has not yet occurred. Indeed, OSHA could reasonably determine that a workplace violence rule is not warranted or appropriate. It is thus premature to assume that OSHA intends

to issue a final rule on the subject of workplace violence, and that it would do so absent Executive Order 13,771.

b. *Plaintiffs Cannot Show that Executive Order 13,771 Will Delay a Final Rule on Workplace Violence*

Even if Plaintiffs could establish that OSHA definitively intends to issue a final rule on this subject, they cannot make the further showing that the Executive Order will cause it to be delayed. The only evidence for Plaintiffs' claim of delay here is that OSHA listed this rulemaking as a "long term action" and has not set a date for the next regulatory action. Pl. Mot. at 13. This is far less than the evidence this Court previously accepted as a basis for delay, such as multiple instances of a rule being postponed, public statements by a given agency concerning implementation of the Executive Order, and the required offsets for a given rule. *Public Citizen*, 2018 WL 1129663 at *13.

It is entirely speculative as to how the Executive Order might impact any final rulemaking in this area. At this early point in the rulemaking process, Plaintiffs cannot even guess as to the potential costs of a workplace violence standard, and thus what offsets might be required pursuant to the Executive Order. Indeed, OSHA's decision to initiate the SBREFA process in January 2019 belies any suggestion that this rulemaking is being delayed as a result of the Executive Order. *See* DOL, Prevention of Workplace Violence in Healthcare, RegInfo.gov (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1218-AD08 (unified agenda). Plaintiffs' "unsupported presumptions . . . and guesswork" about the basis for any potential postponement, as well as the effects of any postponement on a hypothetical final rule as it relates to Ms. Abbott, are certainly "insufficient to support a claim of standing." *See Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 25 (D.C. Cir.

2015); *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) ("Our authority to reject as speculative allegations of future injuries is well-established.").

c. *Plaintiffs Can Show Neither a Substantial Risk of Harm, Nor a Substantially Increased Risk of Harm Caused by a Delay*

Plaintiffs cannot establish standing for the additional reason that they cannot show that any delay caused by the Executive Order would "substantially increase the risk of harm" of workplace violence to Ms. Abbott, and that, with the delay taken into account, Ms. Abbott would face a substantial probability of exposure to workplace violence. *Public Citizen*, 2018 WL 1129663 at *9. As an initial matter, Ms. Abbott fails to allege that she is subject to a substantial risk of workplace violence. Further, as this Court correctly held with reference to Ms. Abbott's prior allegations, in attempting to show injury from the delay of a rulemaking, "[t]his undertaking is never an easy one, but it borders on the impossible in the present context, where the Court does not have the text of a proposed rule before it. The Court, as a result, does not know what the putative NPRM would say and, even if an earlier draft of the NPRM might be produced, the Court has no way of knowing whether the [agency] would have modified the draft before it issued." *Id*. at *15.

The same reasoning applies with equal force here. Ms. Abbott declares that she "would like to receive the training and education from my employer on preventing workplace violence that an OSHA standard would have required." Second Declaration of Amy Abbott ("Abbott Decl.") ¶ 8, ECF No. 64-11. Yet OSHA has not issued any defined proposals for "training and education," nor determined whether an employer like Ms. Abbott's would have to provide training and education, what that training and education would encompass, or whether it would have to be provided to someone in Ms. Abbott's position. *Id*. In sum, without even an NPRM concerning an OSHA workplace violence standard, neither Plaintiffs nor this Court can guess as

to what a final rule on this subject could potentially require, whether it would apply to Ms. Abbott, and how it might decrease her risk of exposure to workplace violence. *See Public Citizen*, 2018 WL 1129663, at *15 ("Speculating about whether and how [a hypothetical NPRM] might have been modified, moreover, constitutes the type of judicial intrusion into the policymaking process that the Supreme Court and the D.C. Circuit have counseled federal courts to avoid."). Plaintiffs thus cannot establish that Ms. Abbott's risk of violence in the workplace would be substantially increased by any delay in issuance of an OSHA standard.

d. *Plaintiffs Cannot Establish Redressability*

Plaintiffs cannot demonstrate standing on this basis for the final reason that they cannot show redressability. Similar to the other rulemakings described above, Plaintiffs have no support for the notion that if the Executive Order were enjoined, then OSHA would promulgate a workplace violence standard without further delay. Especially at this embryonic stage of the process, where the agency must undertake numerous steps before even promulgating an NPRM, Plaintiffs cannot offer more than speculation as to what might happen if the Executive Order were enjoined. *See West*, 845 F.3d at 1237 (finding no redressability because even if the court were to enjoin executive guidance, it "would not and could not compel" subsequent agency action); *Smith v. United States*, 715 F. App'x 10, 11 (D.C. Cir. 2018) (finding no redressability where plaintiff "provided no evidence that obtaining the requested relief" would redress alleged injuries).

4. Plaintiffs Cannot Establish Standing Based on the DOE Energy Standard Rulemakings

Plaintiffs' final attempt at establishing standing arises out of proposals issued by the Department of Energy ("DOE"), under the Energy Policy and Conservation Act ("EPCA"), regarding two sets of energy efficiency rules: (1) for residential conventional cooking products

such as ranges and ovens ("cooking products"), and (2) for commercial water heaters. In June of 2015, DOE published an NPRM to amend the existing efficiency standards for cooking products, *see* Energy Conservation Program: Energy Conservation Standards for Residential Conventional Ovens, 80 Fed. Reg. 33030 (proposed June 10, 2015) (to be codified at 10 CFR pt. 430), and then filed a supplemental NPRM on the rule in September of 2016, *see* Energy Conservation Program: Energy Conservation Standards for Residential Conventional Cooking Products, 81 Fed. Reg. 60784 (proposed September 2, 2016) (to be codified at 10 CFR pts. 429, 430). In 2017, DOE informed the public that another supplemental NPRM is anticipated to be published in October of 2018. 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.

Similarly, with regard to the commercial water heater standard, DOE published a proposed rule amending these efficiency requirements in May 2016, *see* 81 Fed. Reg. 34440 (May 31, 2016), and in the 2017 fall regulatory agenda moved this rulemaking to "long term actions." *See* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Fall 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1904-AD34. However, in its most recent regulatory agenda, DOE moved this rulemaking out of "long term actions" and estimated that a final rule would be promulgated in October 2018. *See* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD34.

Plaintiffs argue that the alleged delay of these proposed amendments to the existing energy efficiency standards causes harm to Plaintiffs' members. Pl. Mot. at 15-19.

Notwithstanding Plaintiffs' multiple declarations addressing these rulemakings, they have not established standing for several independent reasons that this Court identified in its prior opinion.

a. *Plaintiffs Have Not Shown that the Executive Order is Causing the Alleged Delay*

Plaintiffs cannot establish that any delay in concluding these efficiency standards rulemakings is being caused by Executive Order 13,771. The Second Amended Complaint states that "DOE must periodically review already established energy conservation standards . . . ." SAC ¶ 134. In other words, Plaintiffs suggest that DOE is required by statute to review the cooking products standard and the water heater standard every six years. 42 U.S.C. §§ 6295(m), 6313(a)(6)(A)(ii)(II). And in doing so, the Secretary must determine in that time whether or not to amend these efficiency standards. *Id*. Plaintiffs thus allege that DOE is "required by statute" to publish a final rule on these topics in accordance with a certain schedule. SAC ¶ 136.

The Executive Order cannot delay issuance of a regulation beyond the deadline required by statute. As the OMB Guidance explained, "EO 13771 does not prevent agencies from issuing regulatory actions in order to comply with an imminent statutory or judicial deadline, even if they are not able to satisfy EO 13771's requirements by the time of issuance." April Guidance ¶ Q33. Plaintiffs do not claim that OMB or Defendant agencies are failing to follow the language of the Executive Order and its accompanying guidance.[10] In fact, DOE has already promulgated a significant, similar amended energy efficiency standard, for walk-in coolers and freezers, on July 10, 2017–a standard that was also required by statute. *See* DOE, Energy

[10] To the extent that Plaintiff argues that EO is causing agencies to violate statutory timing requirements—notwithstanding the explicit disclaimer to the contrary in both the EO itself and the guidance—such argument is not proper in this facial challenge to the EO. *See Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008) (citing *Sullivan v. Everhart*, 494 U.S. 83, 94 (1990) ("[I]n facial challenges to regulations courts must presume agencies will implement them in good faith").

Conservation Program: Energy Conservation Standards for Walk-In Cooler and Freezer Refrigeration Systems, 82 Fed. Reg. 31808 (July 10, 2017). Plaintiffs cannot plausibly argue that DOE is delaying, pursuant to the Executive Order, the issuance of rules required by statute when the applicable guidance explicitly permits issuance of such rules.

If the basis for Plaintiffs' alleged injury is the purported failure of DOE to satisfy rulemaking deadlines under the EPCA, then Plaintiffs, in fact, have a specific cause of action with which to challenge rules that are "unlawfully withheld" or "unreasonably delayed," under 5 U.S.C. § 706(1); *see also* 42 U.S.C. §§ 6305(a)(3), 6313(b)(1); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (noting that "the failure to promulgate a rule or take some decision by a statutory deadline" constitutes a "discrete action" which may be challenged under the APA). Yet Plaintiffs have brought no direct challenge to the delay of these rules, and instead implausibly challenge the Executive Order for somehow delaying these rulemakings.

b. *Plaintiffs Have Not Demonstrated that a Member Will Face a Substantial Probability of Increased Injury from the Operation of Executive Order 13,771 with Respect to the DOE Rules*

i. *Plaintiffs Do Not Allege Any Imminent Harm from the Operation of the Order*

Even if Plaintiffs could demonstrate that the Executive Order is causing some delay, Plaintiffs' declarants cannot establish a substantially increased risk of injury traceable to that delay. Critically, they fail to allege that they intend to purchase new cooking products in the immediate future. *See e.g.*, Declaration of Barbara Blau ("Blau Decl.") ¶ 5, ECF No. 64-6 (two to three years); Declaration of Karen Bain ("Bain Decl.") ¶ 5, ECF No. 64-5 ("as soon as I can save up enough money" which she estimates to be approximately two years); Declaration of Eduardo Pontoriero ("Pontoriero Decl.") ¶ 7 ("I expect to purchase a new oven and stove . . . over the next five years."); *see id.* ¶ 8 ("I also plan to purchase a new oven and stove for newly

purchased units over the next five years.")[11] As this Court has recognized in reviewing equivalent allegations in the First Amended Complaint, "[a] 'profession of an intent' to purchase appliances *at some point*, however, 'is simply not enough'" to establish standing. *Public Citizen*, 2018 WL 1129663 at *17, (quoting *Lujan*, 504 U.S. at 564) (emphasis in original). Instead, injury must be "certainly impending." *See Clapper*, 133 S. Ct. at 1147 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.") (quoting *Lujan*, 504 U.S. at 565 n.2). Plaintiffs' new declarations have not demonstrated "certainly impending" harm concerning a cooking products rule beyond the equally insufficient showing in the declarations submitted with Plaintiffs' prior Motion for Summary Judgment, ECF No. 16, which the Court has already held to be insufficient. *Public Citizen*, 2018 WL 1129663 at *17.[12]

Similarly, the sole declarant claiming injury stemming from the commercial water heaters rulemaking fails to establish an imminent injury. R.J. Mastic offers the bare allegation that a "new standard" for commercial water heater efficiency "increases" his business. Declaration of R.J. Mastic ("Mastic Decl.") ¶ 5, ECF No. 64-7. However, the only support offered for this claim is conclusory speculation. Mr. Mastic does not set forth any imminent impact on his

[11] Mr. Pontoriero also qualifies his intent to purchase new products, stating that he "*usually* replace[s] the existing appliances" when he purchases a home. Pontoriero Decl. ¶ 6 (emphasis added).

[12] Indeed, any amended standard for cooking products—if DOE, in fact, determines to amend the existing standards—would only apply following "three years after publication of the final rule establishing such amended standard." 42 U.S.C. § 6295(b)(3)(C). Any desired standard thus would not apply within the one to three year timeframe required by certain of Plaintiffs' members. *See* Declaration of Robert Weissman ¶ 7, ECF No. 64-12 ("this year"); Rivero Decl. ¶ 4 ("next two or three years"); Blau ¶ 5 ("within the next three years"); Bain Decl. ¶ 5 ("two years").

business from the delay of a new standard. Rather, he argues that if a new standard is promulgated, and certain clients wish to purchase new equipment governed by that standard, they may employ his company to help them find equipment "that meets the new standard, is cost effective, and satisfies their other requirements." *Id.* Yet, Mr. Mastic says nothing about whether a new standard actually causes potential clients to use his company's services due to this purported need for consultation. Nor does he claim that, absent a new commercial water heater standard, these clients would refrain from improving the efficiency of their equipment for other reasons, such as public pressure or cost savings. Mr. Mastic thus provides no basis to conclude that a new commercial water heater standard would "increase" his business.

Mr. Mastic also argues that a stricter energy efficiency standard benefits his company because it "increases the selection of energy efficient products," and thereby "means that we are more likely to find an energy efficient product that works best for our clients' budget and also includes other desired features[.]" Mastic Decl. ¶ 6. Again, these conclusory statements are left unsupported. The Declaration offers no reason as to why more efficient heaters would also be more affordable or include features such as "allowing the client to monitor the product through a phone-based app[.]" *Id.* And even if these assertions were supported, they arguably would be in tension with Mr. Mastic's claim that clients hire his business because they "have a hard time finding [desirable energy efficient] products on their own." *Id.* ¶ 4. If that is true, then a standard that allegedly would "increase the selection" of energy-efficient commercial water heaters could actually make it *easier* to find versions of that product with the desired features, thereby decreasing the demand for Mr. Mastic's services. Alternatively, a new standard could propel new entrants into the market for energy-efficiency consultants, potentially crowding out Mr. Mastic's business. Which of these (or any other) outcomes would result from the

publication of a final rule is a matter of pure speculation. Accordingly, Mr. Mastic has not set forth a plausible, concrete injury sufficient to establish standing.

ii. Plaintiffs Cannot Show that Energy Efficient Cooking Products and Water Heaters are Not Currently Available

The second fatal flaw in Plaintiffs' attempt to establish standing based on the DOE proposed rules was also identified in the Court's prior opinion. The Court held that Plaintiffs lack standing based on the delay in the DOE cooking products proposal because "Plaintiffs say nothing about whether energy-efficient cooking products that already meet the proposed standards are currently available in the marketplace." *Public Citizen*, 2018 WL 1129663 at *17. Indeed, Plaintiffs' Motion concedes the point, recognizing that "some cooking appliances that meet DOE's proposed energy-efficient standard are available[.]" Pl. Mot. at 17 (citing 81 Fed. Reg. at 60789-90). Moreover, in the September 2016 supplemental NPRM, DOE affirmed that "products achieving these standard levels are already commercially available for at least some, *if not most*, product classes covered by this proposal." 81 Fed. Reg. at 60789-90 (emphasis added). Two of Plaintiffs' declarants with experience in purchasing appliances on a regular basis (R.J. Mastic, Eduardo Pontoriero), fail to allege that energy efficient cooking products or water heaters are currently unavailable. Further, both Ms. Bain and Mr. Weissman identify as needing replacements for cooking products dating from 1995, but do not allege that, despite the intervening 23 years, no more efficient cooking products have been developed. Bain Decl. ¶ 5, Weissman Decl. ¶ 3.[13] Consequently, Plaintiffs have not demonstrated any harm from the

[13] Ms. Blau may move into her home, Mr. Pontoriero may upgrade appliances, and Ms. Bain may have enough money to purchase a stove before any final rule would have been issued (or would be issued after a court ruling) even absent the Executive Order. Indeed, no declarant says that she intends to wait for energy efficiency rules before she makes such a purchase, as all list energy efficiency as only one of many factors that they consider in making a purchasing

absence of a final DOE rule (which may or may not require newly manufactured products to meet a more demanding standard). *Coal. for Mercury-Free Drugs*, 671 F.3d at 1283.

Relatedly, Plaintiffs frame their harm as not being just the absence of energy-efficient products (which they never explicitly define), but rather energy-efficient products that *also have various other features* (e.g., affordability). But any amended DOE efficiency standards would directly regulate only efficiency, and their delay could not cause Plaintiffs' injuries in not being able to locate a product with multiple desired features. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) ("The more attenuated or indirect the chain of causation between the government's conduct and the plaintiff's injury, the less likely the plaintiff will be able to establish a causal link sufficient for standing.").

Plaintiffs offer the Declaration of Joanna Mauer, as a quasi-expert witness opining that the adoption of a new energy efficiency standard for cooking products will result in the increased availability of cooking products that are both affordable and energy efficient. Declaration of Joanna Mauer ("Mauer Decl.") ¶¶ 9-10, ECF No. 64-8. But nearly all of Ms. Mauer's assertions are conjectural, or based on evidence outside of her personal knowledge.[14] For example, she opines that even if consumers were able to identify an efficient gas oven, "they *likely* would not be able to find a model with a more efficient ignition system with all of their preferred features."

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decision. For example, Ms. Bain's declaration suggests that cost is her primary consideration, which would mean that she would be better off purchasing before the standards go into effect, as Plaintiffs note that the initial cost of a stove is predicted to rise following the rule. *See* Mauer Decl. ¶ 13 (noting DOE's estimation that "the additional cost to the consumer for products meeting the proposed standards is less than $10, and for gas cooking tops, the estimated additional cost is $15").

[14] *See Wellborn v. IRS*, 218 F.Supp. 3d 64, 80 (D.D.C. 2016) ("[W]hen considering a motion to dismiss for lack of subject matter jurisdiction, a court cannot rely on conclusory or hearsay statements contained in affidavits.").

Id. ¶ 9 (emphasis added). And she also speculates that "some of the features that [currently] improve the efficiency of cooking products *may* only be available in higher-end" models. *Id.* ¶ 8 (emphasis added). But Ms. Mauer is unequivocal on one point: energy efficient cooking products are currently on the market. *Id.* ¶ 9.

Similarly, Plaintiffs say nothing about whether commercial water heaters are currently available that meet their desire for some unspecified level of efficiency. Indeed, Mr. Mastic does not claim that his business has suffered due to limited selection, or that he has experienced any difficulty finding efficient commercial water heaters sought by his clients. Absent any allegation that Plaintiffs are unable to purchase sufficiently efficient water heaters or cooking products, they cannot demonstrate injury from the lack of a new efficiency standard.[15]

On this point, Plaintiffs' reliance on *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322 (D.C. Cir. 1986), Pl. Mot. at 18, is misplaced. Plaintiffs urge that just as the D.C. Circuit found standing there to challenge established fuel economy standards, this court should find standing to challenge the Executive Order because it has purportedly delayed amended efficiency standards for cooking products and water heaters. However, in *Center for Auto Safety*, the Court found that the then-existing fuel-efficiency technology was not generally available due to disincentives caused by the regulatory scheme. *See id*. at 1332-33. Distinct from *Center for Auto Safety*, DOE has noted that that "some, if not most, product classes covered by this proposal" already meet the proposed higher standard. 81 Fed. Reg. at 60789-90. Plaintiffs fail to allege facts to contradict that conclusion or otherwise to

[15] Similarly, statements by declarants that they are harmed by the lack of a more demanding energy efficiency standard because they "care about the environment," Bain Decl. ¶ 4; Blau Decl. ¶ 7, are irrelevant. Purely ideological interests such as this are no more than a generalized grievance and hence insufficient to establish Plaintiffs' standing. *Lujan*, 504 U.S. at 571.

allege that DOE has disincentivized the sale of more efficient products. Thus, Plaintiffs cannot show that they are harmed by the absence of energy efficiency rules governing cooking products or water heaters.

c. *Any Purported Harm that Is Based on the Absence of Energy Labels Is Not Traceable to the Cooking Products Rule*

Specifically with regard to the cooking products standard, Plaintiffs complain that notwithstanding the energy efficient cooking products currently on the market, "consumers cannot readily and reliably select them, because DOE's energy-efficiency labeling rules do not apply to cooking products." Pl. Mot. at 17, (citing Mauer Decl. ¶ 7; Declaration of Jose Rivero ("Rivero Decl.") ¶ 5, ECF No. 64-10; Blau Decl. ¶ 4). But the Energy Policy and Conservation Act tasks the Federal Trade Commission ("FTC"), not DOE, with prescribing labeling rules for "kitchen ranges and ovens." 42 U.S.C. §§ 6294(a); 6292(10). Moreover, that directive to the FTC does not apply if the FTC determines that labeling is "not technologically or economically feasible." 42 U.S.C. § 6294(a)(1). And, in fact, the FTC made such a determination to exempt cooking products and ovens from labeling due to the marginal difference in energy costs between the least and most efficient models.[16]

Consequently, even if DOE were to adopt a new energy efficiency standard for cooking products, that determination would not result in the FTC issuing a label for these products in the absence of an FTC rulemaking on that issue. It is entirely speculative to guess at what effect a new DOE cooking products standard would have on the FTC's exercise of its section 6294(a) labeling authority. *Siegel*, 2018 WL 1542138, at *7 (court will not pile "conjecture on

[16] *See* Rule for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act, 44 Fed. Reg. 66466, 66468–69 (Nov. 19, 1979).

conjecture" to find standing) (citation omitted). And as an independent agency, the FTC is not required to follow Executive Order 13,771, and hence a ruling invalidating the Executive Order would have no effect on the FTC's regulatory choices. *See* April Guidance ¶ Q20.

d. *Plaintiffs Cannot Establish Redressability*

Plaintiffs also cannot demonstrate redressability because a judicial ruling invalidating the Executive Order will not, by itself, ensure the adoption of a new and more stringent cooking products or water heaters rule. Even in the absence of the Executive Order, it is entirely speculative to conclude that the agency would decide to issue formal standards in a form that would alleviate the harms that Plaintiffs allege. *See Ass'n of Flight Attendants-CWA*, 564 F.3d at 469 (absent a basis to attribute harm to defendant's conduct, as distinct from other factors, plaintiffs' statement is conclusory). The assumption that more stringent regulations in these areas would have been ensured or likely in the absence of Executive Order 13,771 is highly unrealistic given the realities of APA and EPCA rulemaking, judicial review and Congressional oversight, since at any point in that process, the rule could be withdrawn, invalidated or significantly altered. *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (chain of causation fails both because of the uncertainty of several individual links).

CONCLUSION

For the foregoing reasons, this Court should dismiss the Second Amended Complaint.

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