UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs Public Citizen, Inc., Natural Resources Defense Council, Inc. (NRDC), and Communications Workers of America (CWA) hereby move for partial summary judgment on the issue of standing, on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, plaintiffs submit the accompanying (1) memorandum, (2) statement of material facts as to which there is no genuine dispute, and (3) a proposed order. This motion is also based on declarations previously submitted by plaintiffs.

Dated: June 4, 2018

Respectfully submitted,

/s/

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PUBLIC CITIZEN, INC., et al.,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants.

Civil Action No. 17-253 (RDM)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This action seeks declaratory and injunctive relief with respect to Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs," issued by President Trump on January 30, 2017, and two Office of Management and Budget (OMB) Guidances regarding implementation of the Executive Order. The Executive Order and implementing OMB Guidances 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. The Order exceeds the President's constitutional authority, violates his duty under the Take Care Clause, U.S. Const. art. II, § 3, and directs federal agencies to engage in unlawful actions that harm plaintiffs and their members, as well as many other Americans.[1]

Executive Order 13771 directs that no agency may issue a new rule unless the agency offsets the costs of the new rule by rescinding two or more existing ones. In addition, the Executive Order directs that agencies may promulgate regulations only if, together with repealed regulations, the combined incremental costs do not exceed an arbitrary cost cap—which was $0 for fiscal year 2017 and is below $0 for fiscal year 2018. In implementing these requirements, agencies must net out costs at $0 or less, even if doing so reduces overall benefits. The OMB Guidances reinforce and elaborate on these requirements.

None of these requirements is authorized by any statute. Many statutes governing rulemaking address whether and how a regulatory agency may factor cost into rulemaking: Some allow agencies to consider the costs of a new rule in setting the level of protection, and others

[1] Exhibits A–C to the Second Amended Complaint are copies of Executive Order 13771 and the OMB Guidances.

allow agencies to consider cost-effective ways of providing protection under a new rule. But such consideration must always be within the four corners of the authorizing statutes that Congress has enacted and the regulatory programs that Congress has charged the agency with implementing. None of those statutes authorizes federal agencies to consider the costs of unrelated regulations when determining whether to promulgate new regulations. No statute authorizes any federal agency to withhold issuance of a new regulation unless it repeals existing regulations to offset the new regulation's costs.

In this suit, plaintiffs allege that, by imposing rulemaking requirements beyond and in conflict with both the statutes from which the federal agencies derive their rulemaking authority and the requirements of the Administrative Procedure Act (APA), the Executive Order exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Defendants have moved to dismiss, arguing that plaintiffs lack standing. Because plaintiffs' second amended complaint satisfies the requirement for establishing standing at the pleading stage and the declarations submitted by plaintiffs establish that plaintiffs satisfy the requirements for showing standing at summary judgment, the Court should deny defendants' motion and enter summary judgment for plaintiffs on the issue of standing. Because briefing on the merits of plaintiffs' claims was completed in July 2017, the Court should proceed expeditiously to decide the merits of the case based on the 2017 briefing; in the alternative, the Court should order expedited briefing on the merits.

BACKGROUND

Executive Order 13771 and the OMB Guidances

President Trump signed Executive Order 13771 on January 30, 2017. 82 Fed. Reg. 9339 (2017). The Executive Order directs that, when a federal agency proposes or promulgates a new regulation, it must identify at least two existing regulations to be repealed, and directs that the costs of new regulations be offset by eliminating existing costs associated with at least two prior regulations. The Order directed that, for fiscal year 2017, the total incremental cost of all new regulations would be no greater than zero. For future years, the Executive Order directed OMB to set cost caps for the next fiscal year: "No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director [of OMB]." Sec. 3(d). Executive Order 13771 requires agencies to offset the costs of a new regulation regardless of the benefits associated with the new rule, and regardless of whether the new rule or the existing rules designated for repeal have net benefits.

OMB has issued two guidance documents to implement the Executive Order: On February 2, 2017, OMB issued "Interim Guidance Implementing Section 2 of the Executive Order," which addresses regulations to be issued in fiscal year 2017. On April 5, 2017, OMB issued "Guidance Implementing Executive Order 13771," which "supplements" the Interim Guidance. The OMB Guidances reinforce that the benefits of both new rules and repealed rules are irrelevant to the cost-offset process required by Executive Order 13771. Indeed, the Guidances state that, in calculating the costs of a new rule that must be offset, an agency may not factor in the benefits, including cost savings.

Implementation of the Executive Order and OMB Guidances

In a September 7, 2017, memorandum from OMB concerning implementation of Executive Order 13771, OMB instructed federal agencies to "propose a net reduction in regulatory costs for FY2018" in their fall regulatory agendas. OMB, Memorandum 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. Following OMB's instruction that each agency's total incremental cost for fiscal year 2018 should be a net reduction from fiscal year 2017, each agency set a cost cap of $0 or less. *See* OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf (Dec. 2017).

Federal agencies, including the agency defendants, have implemented Executive Order 13771 and the OMB Guidances by withdrawing or delaying hundreds of pending rulemakings. *See* OMB, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, RegInfo.gov (Dec. 14, 2017), https://web.archive.org/web/20171215071216/https:/www.reginfo.gov/public/do/eAgendaMain; OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps (Dec. 14, 2017), https://www.reginfo.gov/public/do/eAgendaEO13771 (reporting "results" of implementation). OMB has directly attributed numerous withdrawn and delayed actions to Executive Order 13771. *See* OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps, *supra*.

STANDARD OF REVIEW

With respect to standing, general factual allegations of injury may suffice at the pleading stage, for on a motion to dismiss the Court presumes that general allegations embrace those specific

facts that are necessary to support the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To prevail on a summary judgment motion, the plaintiff must "set forth" by affidavit or other evidence "specific facts," Fed. R. Civ. P. 56(e), to prove those allegations. *Lujan*, 504 U.S. at 561; *see Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329–30 (1999) (affirming summary judgment for plaintiffs on standing). As with summary judgment motions generally, the moving party "bears the initial responsibility" of "identifying those portions" of the record that "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries that initial burden, the burden shifts to the nonmoving party to show that sufficient evidence exists for a reasonable jury to find in the nonmoving party's favor with respect to the "element[s] essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 322. The opposition must consist of competent evidence setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324.

ARGUMENT

I. Plaintiffs have standing because the Executive Order delays and prevents rules that would benefit them and their members.

The Executive Order is preventing, delaying, and weakening new rules that would protect public health, safety, and the environment, to the detriment of plaintiffs and their members. LeGrande Decl. ¶ 18 (Dkt. 16-2); R. Weissman Decl. ¶ 18 (Dkt. 16-3); Wetzler Decl. ¶ 11 (Dkt. 16-4); *see generally* Second Abbott Decl. (Dkt. 64-11); Allina Decl. (Dkt. 64-4); Bain Decl. (Dkt. 64-5); Blau Decl. (Dkt. 64-6); Fleming Decl. (Dkt. 16-7); Mastic Decl. (Dkt. 64-7); Mauer Decl. (Dkt. 64-8); Pontoriero Decl. (Dkt. 64-9); Quigley Decl. (Dkt. 16-12); Rivero Decl. ((Dkt. 64-10); Second R. Weissman Decl. (Dkt. 64-12); T. Weissman Decl. (Dkt. 16-10). This adverse impact

began immediately after the Executive Order was issued. For example, the Acting Principal Deputy Assistant Administrator for Water at the Environmental Protection Agency (EPA) stated in March 2017 that the Executive Order had "tied up" a Clean Water Act rule that would protect municipal water systems from discharges of mercury from dental filling material: "So right now we are moving to try to get that rule out, but since it was signed on Jan. 19, and it was not put in the Federal Register before the executive order, we will have to look at the two-for-one." *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017). DOT also made clear that the Executive Order had an immediate impact on the timing of 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 February." DOT, Significant Rulemaking Report Archive, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited May 31, 2018) (same for March 2017–July 2017).

Delays of rules that would benefit plaintiffs and their members have occurred and continue to occur across all agencies to which Executive Order 13771 applies. Since this case was filed on February 8, 2017, 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 was 1,579. *See* OMB, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, *supra*. OMB has directly attributed these actions to Executive Order 13771. *See* OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps, *supra*. And former senior regulators have submitted uncontested testimony that complying with Executive Order 13771 will delay rulemakings. *See* Jones Decl. ¶16 (Dkt. 16-15); Michaels Decl. ¶ 36 (Dkt. 16-16) (same); Reicher Decl. ¶ 14 (Dkt.

16-18) (same). 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" in fiscal year 2017. OMB, Regulatory Reform: Two-for-One and Regulatory Cost Caps, *supra*.

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 by 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 . . . 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 Executive Order is not just a public-relations stunt, and if the "entire regulatory scheme is [not] pointless," *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1335 (D.C. Cir. 1986), "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.").

Illustrating this point, plaintiffs have provided details about four rulemakings that an agency had intended to pursue but that are now delayed or withdrawn because of the Executive Order and OMB Guidances, and declarations showing that the Order's effects on those rulemakings have injured plaintiffs and their members. *See* Pltfs. Mot. for Leave to Amend (Dkt. 64). These examples, along with evidence submitted with plaintiffs' earlier summary judgment

motion (Dkt. 16), establish an injury to plaintiffs that is remediable by this Court. 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)).[2]

A. Public Citizen has standing based on the Department of Transportation's withdrawal of a rule to require disclosure of certain airline baggage fees.

1. 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. Consumers who submitted comments overwhelmingly supported the proposed rule, 82 Fed. Reg. 7536, 7537 (2017), which DOT referred to as the "Consumer Protection NPRM." *Id*. at 7536.

[2] 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.").

On January 19, 2017, DOT issued a Supplemental Notice of Proposed Rulemaking (SNPRM) on the same topic. The SNPRM proposed to require air carriers and ticket agents, at all points of sale, to clearly disclose 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 for 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). And each month from February 2017 through July 2017, DOT published a statement on its website that Executive Order 13771 was delaying 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 Report Archive, *supra*. 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 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 the September 7, 2017, memorandum from OMB, *see supra* p. 4, 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. On December 5, 2017, DOT withdrew its "Consumer Protection" proposal to require air carriers and ticket agents to clearly disclose to consumers certain information about fees 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.*

Because DOT halted the rulemaking, baggage-fee information continues to be unavailable on some websites and unavailable 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 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. They 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). After all, "[t]ime is money," and "time a person spends doing one thing is time that person cannot spend doing something else." *United States v. Berkowitz*, 927 F.2d 1376, 1390 (7th Cir. 1991).

2. Defendants do not seriously contest that plaintiffs have demonstrated injury, addressing the point only in a footnote by suggesting that individuals could find pertinent information with multiple web searches. Defs. Mem. 11 n.7. This suggestion, however, only confirms that, in the absence of the DOT rule, consumers are injured by having to waste their time, and it ignores DOT's own conclusion that the disclosure "would save consumers time and enable them to make better informed purchasing decisions," 82 Fed. Reg. at 7556–57.

Instead, while not directly denying that DOT's decision was attributable to the Executive Order, defendants say that DOT "concluded that [the rule] was not warranted." Defs. Mem. 12. The causal link between DOT's conclusion and the Executive Order, however, is established by DOT's own statements—including the agency's repeated statements over six months concerning evaluation of ongoing rulemakings "in accordance with Executive Order 13771," DOT, Significant Rulemaking Report Archive, *supra*, and the Federal Register notice withdrawing the rulemaking with two references to Executive Order 13771 and one cursory statement that contradicts the

findings in the SNPRM. The timing reinforces the causal link: DOT moved the rulemaking to "long term" for the spring 2017 agenda that OMB celebrated for showing the large number of delayed actions in light of Executive Order 13771, and DOT withdrew the rulemaking following OMB's instruction to show "a net reduction in regulatory costs for FY2018" in their fall regulatory agendas. *See supra* p. 4; *see also* Mem. Op. 26–30 (Dkt. 63) (finding it plausible that the Executive Order has delayed rulemakings by DOT and other agencies).

Defendants also argue that the injury is not redressable because DOT did not delay but withdrew the rulemaking, and the withdrawal could be challenged only within 60 days of that action. Defs. Mem. 13 & n.8. Yet if plaintiffs obtain a favorable ruling in this case, Public Citizen could petition DOT to adopt a baggage fee rule, relying on the substantive invalidity of the withdrawal of the rulemaking based on the Executive Order. DOT would have to respond to that petition either by granting it or by providing a lawful ground for denying it—a ground not based on Executive Order 13771. *See Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990) ("[A] claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition."); *accord Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1213–14 (D.C. Cir. 1996). In this way, Public Citizen's members would obtain redress of their injury—consideration of the rule untainted by Executive Order 13771. *See Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005) (finding standing to challenge agency action where ruling for plaintiff would impact permitting proceedings but would not guarantee plaintiff's desired outcome); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 178 (D.D.C. 2015) (finding standing to challenge agency's consideration of one factor among several, where enjoining consideration of that factor would increase likelihood of plaintiff

obtaining relief). Thus, defendants' assertion—that eliminating Executive Order 13771 would not guarantee issuance of the rule—"does not by itself support the notion that federal courts lack jurisdiction to determine whether that [Executive Order 13771] conforms to law." *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

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

B. Public Citizen has standing based on the Department of Transportation's delay of a rule to require vehicle-to-vehicle communications.

1. 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 billion 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. *Id*. at 3858. Stating the benefits in terms of dollars, NHTSA "estimate[ed] 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*. 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 noted above, each month from February 2017 through July 2017, DOT acknowledged that Executive Order 13771 was delaying 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 (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD34. 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 because, 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. Those sufficient allegations are supported, as described above and below, by "specific facts," Fed. R. Civ. P. 56(e), proving those allegations. *See Lujan*, 504 U.S. at 561.

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; Fleming Decl. ¶ 5. Yet 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). In focusing only on whether the members' declarations demonstrated an increased "risk" of suffering an accident, the Court did not address the injury on which plaintiffs rely to establish standing concerning this rulemaking: deprivation of the opportunity to purchase vehicles with a particular desired feature. The declarations of Ms. Fleming and Ms. Weissman both establish such an injury, *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).

The D.C. Circuit has long recognized that consumers have standing "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 that NHSTA has determined they 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 Center for Auto Safety v. NHTSA*, 793 F.2d at 1331–35 (finding organization had standing to challenge NHTSA's failure to adopt a meaningful fuel-efficiency standard, based on reduced consumer choice of fuel-efficient vehicles); *accord Public Citizen v. NHTSA*, 848 F.2d 256, 262–63 (D.C. Cir. 1988); *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).

2. Defendants' challenge to plaintiffs' showing of injury misconstrues the declarations and plaintiffs' argument. *See* Defs. Mem. 17. Plaintiffs are *not* asserting that their members want vehicles with V2V technology for a reason other than safety benefits. However, the injury they allege is not a risk of injury, but the frustration of their desire to purchase V2V vehicles. The reason they want to purchase such vehicles is not integral to the claim of injury. In this respect, their standing parallels the plaintiffs' standing in *Public Citizen v. Foreman*, 631 F.2d 969, 974 n.12 (D.C. Cir. 1980). There, Public Citizen and its members had standing to challenge an agency decision concerning use of nitrates as a preservative in bacon based on their desire to buy nitrate-free bacon, without proving that consuming nitrate-free products would provide a safety benefit. *Id.*; *see also Orangeburg, S.C.*, 862 F.3d at 1077–78. Likewise, here, the Court need not evaluate Ms. Fleming's and Ms. Weissman's motivation to buy V2V vehicles, because the injury is the lack of reasonable access to the desired product.

Citing *Coalition for Mercury-Free Drugs*, 671 F.3d at 1282, where the court found that the plaintiffs were not injured because the desired mercury-free products were "readily available," defendants counter that two luxury car brands and Toyota may offer V2V technology by 2021. Defs. Mem. 18. But here, NHTSA has determined that a federal standard is needed for a "critical mass" of V2V-equipped vehicles ever to develop. 82 Fed. Reg. at 3854. As the D.C. Circuit has stated, "a 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); *see Public Citizen v. NHTSA*, 848 F.2d at 262–63 (finding standing to challenge NHTSA action that "will diminish the types of fuel-efficient vehicles and options available" (quoting *Center for Auto Safety*, 793 F.2d at 1332)).

For the same reason, defendants are wrong to suggest that the lost opportunity to purchase V2V-equipped vehicles lacks a nexus to a legally cognizable interest. Defs. Mem. 20. Several cases in this Circuit have considered on the merits challenges to NHTSA motor vehicle standards, including standards related to safety. *See Public Citizen v. NHTSA*, 374 F.3d at 1253 (challenge to NHTSA airbag standard); *Competitive Enter. Inst.*, 901 F.2d at 113 (challenge to fuel-economy standard on safety ground); *see also Center for Auto Safety*, 793 F.2d at 1323 (challenge to NHTSA fuel-economy standard). In fact, defendants themselves quote *Competitive Enterprise Institute*, 901 F.2d at 113, for the point 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.'" Defs. Mem. 21. As that decision confirms, plaintiffs can claim standing based on frustration of their ability to purchase vehicles with desired safety features, without having to prove that they face a quantifiable risk of injury in the absence of those features.

Defendants also argue that any injury from lack of access to vehicles with V2V technology is speculative because the value of the technology requires that "a sufficient mass" have adopted it. Defs. Mem. 21. This argument does not go the injury claimed by plaintiffs—unavailability of a product they want to purchase—but only to whether, in the government's view, it makes sense for a person to want to be an early adopter of the product. Even if the argument were relevant, however, it fails on the facts: The phase-in schedule that NHTSA had proposed, which would make V2V

technology mandatory in new vehicles by an increasing percentage each year, would ensure an ever-increasing "mass" of V2V-equipped vehicles. *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).

For this reason, and because the phase-in schedule for a federal motor vehicle safety standard would apply to every automaker (not only to Cadillac, Lexus, and Toyota), defendants are wrong to suggest (at 19) that a final rule might not provide Ms. Weissman and Ms. Fleming, when they next purchase a new car, with a choice of more V2V-equipped vehicles than those that may potentially be offered by three automakers. Further, these members' plans to buy new vehicles (5–7 years and 5 years, respectively) easily fit within a reasonable time frame for issuing a V2V standard, including a phase-in period, were the delay caused by Executive Order 13771 to cease, even taking into account the delay that has already occurred. "A district court order setting aside [the Executive Order] doubtless would significantly affect these ongoing proceedings." *Nat'l Parks Conservation Ass'n*, 414 F.3d at 7. "That is enough to satisfy redressability. 'A significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered' will suffice for standing." *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

Finally, defendants contend that invalidating the Executive Order would not redress plaintiffs' injury because doing so would not result in DOT's prompt issuance of a V2V standard.[3] Given that the rulemaking has not been withdrawn, however, eliminating a barrier to its progress would redress plaintiffs' injury and make the outcome they desire more likely. "When, as here, the

[3] Defendants reference a November 2018 statement by NHTSA that it has not withdrawn the rulemaking and is reviewing the comments submitted in response to the proposed rule. Defs. Mem. 16. This statement does not suggest that the Executive Order is not causing delay.

party seeking judicial review challenges an agency's regulatory failure, the [party] need not establish that, but for that misstep, the alleged harm certainly would have been averted." *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014); *see Hawai'i v. Trump*, 859 F.3d 741, 763, 767 n.8 (9th Cir.) (finding standing where challenged executive order posed a barrier that delayed or prevented issuance of visas, notwithstanding existence of other barriers), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Nat'l Parks Conservation Ass'n*, 414 F.3d at 7 (finding standing to challenge agency action where ruling for plaintiff would affect ongoing proceedings, although not guarantee plaintiff's desired outcome).

Defendants do not deny that Executive Order 13771 and the OMB Guidances contribute to the delay, nor could they: Because of those directives, DOT has a negative regulatory cost cap of –$35 million in annualized costs for fiscal year 2018, representing a present value of –$500 million. OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, at 1, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf ("This chart presents each agency's regulatory cost cap under Executive Order 13771 for Fiscal Year 2018."). The Executive Order thus makes virtually impossible a new safety standard estimated to cost $2 billion or more each year for the first several years.

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 injuring plaintiff Public Citizen's members.

C. CWA has standing based on the Occupational Safety and Health Administration's delay of a safety standard addressing prevention of workplace violence in healthcare.

1. In January 2017, the Occupational Safety and Health Administration (OSHA) granted citizen petitions from Nurses National United and other labor unions requesting that OSHA adopt a safety standard to address prevention of workplace violence in healthcare. *See* DOL/OSHA,

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." 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); 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).

The agency had earlier issued a request for information concerning a workplace-violence 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* p. 4, OSHA moved the workplace-violence-prevention rulemaking to "long term actions," listing the next action as "Undetermined" on a date "To Be

Determined." DOL/OSHA, Prevention of Workplace Violence in Healthcare, *supra*. After plaintiffs discussed this rulemaking in their second amended complaint and an accompanying declaration, DOL's Spring 2018 regulatory agenda listed the next action as "Initiate SBREFA" on "01/00/2019." DOL/OSHA, Prevention of Workplace Violence in Health Care and Social Assistance, RegInfo.gov (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1218-AD08. 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 those members in two ways.

First, one feature of a standard on preventing workplace violence would be 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 at 973 ("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.

2. Defendants' primary response is that the assumption that OSHA intended to issue a safety standard is "premature." Defs. Mem. 25. This assertion contradicts the agency's own finding, stated by the Administrator himself, that "workplace violence is a serious occupational hazard that presents a significant risk for healthcare and social assistance workers," and the announcement that the agency's decision to grant the citizen petitions that requested issuance of a standard. *See supra* p. 21.

Defendants nonetheless briefly argue that plaintiffs cannot show that the Executive Order is the cause of the delay. But OSHA currently lists the rulemaking as a "long-term action," "for which the agency does not expect to have a regulatory action"—including an action "to determine whether or how to initiate rulemaking"—"within the 12 months after publication of" the Unified Agenda. OMB, *Spring 2018 Unified Agenda* (Apr. 2018), https://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GET_PUBLICATION&showStage=longterm&currentPubId=201804 (describing "long-term actions"); Regulatory Information Service Center, GSA, *Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, May 9, 2018, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201804/Preamble_8888.html (distinguishing "long-term actions" from "active rulemakings," which include those at the "prerule stage"). This fact, in combination with the President's and OMB's statements about the impact of Executive Order 13771 on more than 1,500 rulemakings, including 700 moved to long-term as of December 2017, *see supra* p. 4, and DOL's negative regulatory cost cap—set at –$137 million this year, with a present value of –$1.957 billion (OMB, Regulatory Reform: Cost Caps, *supra*)—

belies defendants' suggestion that the Executive Order and OMB Guidances do not contribute to the delay.

Although OSHA has not retreated from its earlier findings on this topic, defendants question the harm caused by the delay. First, they suggest that the failure to issue a rule does not substantially increase the risk of harm. As explained above, however, OSHA has long interpreted the Act as "requiring safety standards to … substantially reduce a significant risk of material harm." 58 Fed. Reg. at 16613. OSHA's determination to grant the rulemaking petition on workplace violence thus establishes that CWA members such as Ms. Abbott, an emergency room nurse, are exposed to "significant" risks that an OSHA standard on prevention of workplace violence in healthcare and social assistance would "substantially reduce." Second, defendants argue that plaintiffs cannot rely on the expectation that an OSHA standard would require education and training in the workplace. But OSHA itself has called workplace education and training "an essential element of a workplace violence prevention program." 81 Fed. Reg. at 88160. Defendants' litigation position that the agency would omit an "essential element" from its safety standard is thus a suggestion that OSHA would issue a standard inadequate to the task. Defendants cite no decisions holding that unions representing affected workers lack standing to challenge the delay in promulgating an OSHA health or safety standard aimed at reducing a demonstrated significant risk.[4]

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.

[4] Defendants also reprise the same redressability argument discussed with respect to the V2V standard, addressed above. *See supra* pp. 19–20.

D. NRDC and Public Citizen have standing based on the Department of Energy's delay of rules to establish new energy-efficiency standards.

1. 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 to set more stringent 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, while producing 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/EE, 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 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, *supra* (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/EE, Energy Conservation Standards for Residential Conventional Cooking Products, *supra*, and https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD15 (Spring 2018 agenda).

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 energy-efficiency labeling rules do not currently 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, and come in a limited selection of features, sizes, and brands. *See* Mauer Decl. ¶¶ 8–13.[5]

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 has stated, the dissemination of "reliable and comparable product operating cost information" and "access to improved products with new features and comfort attributes" are "benefits resulting from appliance … standards." DOE, *Saving Energy and Money with Appliance and Equipment Standards in the U.S.*, Jan. 2017.[6] Furthermore, according to DOE, 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*, *supra*. Because DOE's "efficiency standards have pushed manufacturers to develop high-

[5] Defendants refer to Ms. Mauer as "a quasi expert witness." Defs. Mem. 35. They do not identify any defect in her expertise, *see* Fed. R. Evid. 702, however, and her testimony is undisputed.

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

efficiency equipment for cost-competitive prices," Berkeley 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 purchasers 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*, 793 F.2d at 1332, 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…. 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, the delay in issuing DOE's final cooking-appliance standard injures plaintiffs' members and Public Citizen, by making energy-efficient, affordable residential cooking products less accessible. *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). After all, "[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 at 974 n.12.

Commercial water heaters: In May 2016, DOE proposed a rule under EPCA to strengthen the energy-efficiency standards for commercial water heating equipment. 81 Fed. Reg. 34440 (2016). By law, DOE was supposed to 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 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 huge net benefits, Executive Order 13771 requires DOE to offset the proposed standard's costs, and to repeal at least two prior regulations, as a condition of

promulgating the standard. *See* OMB, Regulatory Reform: 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*. DOE has since estimated that it will issue the rule in October 2018. *See* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Spring 2018), www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD34.

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; Second Am. Compl. ¶ 143. 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. 16–18 (citing cases).

2. Defendants respond that Executive Order 13771 and the OMB Guidances cannot delay these energy-efficiency standards because the Order and Guidances state that agencies should continue to comply with statutory deadlines. *See* Defs. Mem. 30. With respect to these rules, however, DOE has already violated the statutory deadline. The Executive Order's instruction with respect to deadlines did not prevent that ongoing violation. And there is no dispute that the Order's

instruction that the agency offset the costs of every new rule and the associated DOE negative regulatory budget of –$80 million for FY2018, *see supra* p. 27, apply to DOE energy-efficiency standards. Those aspects of Executive Order 13771 necessarily impede DOE's promulgation of new rules, including the residential cooking products standard and the commercial water heater standard, that impose significant costs. Although defendants argue that DOE's publication of an energy-efficiency standard for walk-in coolers and freezers shows that the Executive Order does not delay standards issuance, Defs. Mem. 30, issuance of one rule in no way demonstrates that the Executive Order is not delaying other rules. Moreover, defendants ignore that DOE published that one rule only after being sued by NRDC for its failure to do so. *See NRDC v. Perry*, No. 3:17-cv-03404 (N.D. Cal.) (complaint filed June 13, 2017).[7]

Defendants also argue that the injury to plaintiffs and their members is not "certainly impending" because the declarations attest to plans to purchase products in the future—not tomorrow. Defs. Mem. 32. But plaintiffs did not present testimony of members with immediate purchase plans because an energy-efficiency standard, once issued by DOE, will not be effective immediately. And an injury does not need to be immediate to be sufficiently imminent or impending to satisfy Article III. *See Mass. v. EPA*, 549 U.S. at 522–23 (relying on injuries expected to accrue "over the course of the next century"); *Nuclear Energy Inst. v. EPA*, 373 F.3d, 1251, 1266 (D.C. Cir. 2004) (holding that plaintiff's member's "claimed injury to his ground-water supply is neither hypothetical nor conjectural," although "radionuclides escaping from the Yucca repository may not reach Goedhart's community for thousands of years"). The declarations

[7] Defendants briefly suggest that if DOE has delayed issuing standards, plaintiffs' remedy would be a suit against DOE under the APA. Defs. Mem. 31. The possibility that plaintiffs might have an additional remedy, however, says nothing about the question here: whether DOE's delay is caused by Executive Order 13771 and whether that delay is injuring plaintiffs.

establish that plaintiffs' members intend to purchase new residential cooking products, would like to buy energy-efficient products, and will be injured if the delay in issuing a new standard continues. *See* Blau Decl. ¶ 5 (two to three years); Bain Decl. ¶ 5 ("as soon as I can save up enough money" which she estimates to be approximately two years); Pontoriero Decl. ¶¶ 7, 8 (describing plans to make repeated purchases, for multiple properties, "over the next five years"); Rivero Decl. ¶¶ 2-6 (describing plans to install energy-efficient appliances in multiple new homes "every year or two for the foreseeable future," one of which will be "in the next two to three years"); Second R. Weissman Decl. ¶ 7 (stating that he directed postponement of purchase in the hope of continuing to use existing range "until the new energy-efficiency standard is in effect"); *see also* Second Am. Compl. ¶¶ 14, 138, 139, 143. Defendants quote the Court's statement that "a 'profession of an intent' to purchase new appliances *at some point* … 'is simply not enough.'" Defs. Mem. 32 (quoting Mem. Op. 38 (quoting *Lujan*, 504 U.S. at 564)). But the declarations do not make vague statements of intentions "without any description of concrete plans, or … of *when* the some day will be." Mem. Op. 38 (quoting *Lujan*, 504 U.S. at 564). They state specific plans, within specific time frames.

Defendants question whether the declaration of R.J. Mastic establishes injury. Mr. Mastic runs an energy-efficiency consulting business, and his clients—commercial property owners—hire him to help them obtain energy-efficient products that meet their needs. Mastic Decl. ¶¶ 3–4. Given his experience with his business, *id.* ¶¶ 2–4, Mr. Mastic is amply qualified to evaluate how a change in an energy-efficiency standard will affect his business. He has explained that "a new standard … increases my business" and why: When a new standard issues, his clients "cannot simply buy the same model they had previously bought" and so employ his company "to help them find a different model that meets the new standard, is cost effective, and satisfies their other

requirements." *Id.* ¶ 5. A "wider selection of products" better enables his company to do so. *Id.* ¶ 6.

Defendants state that the existence of some energy-efficient cooking products and water heaters shows that the rules' delay can cause no harm. Defs. Mem. 34. They fail to acknowledge, however, DOE's findings that the proposed cooking products rule, if finalized, would result in lifecycle-cost savings for all product classes, 81 Fed. Reg. at 60786, that the proposed water heater rule would provide annual benefits of $367 million in reduced equipment operating costs, 81 Fed. Reg. at 34445, and DOE's statement, outside of litigation, 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.*, *supra*; *see also* Mauer Decl. ¶ 4.

Moreover, as plaintiffs have explained, even if some cooking appliances that meet DOE's proposed energy-efficient standard are available, plaintiffs' members cannot readily identify them because the products are not labeled as such. Mauer Decl. ¶ 7; *see also* Rivero Decl. ¶ 5 (describing difficulty identifying an energy-efficient oven); Blau Decl. ¶ 4 (same). Defendants respond that, because the labeling is not within DOE's domain, a new standard will not result in energy-efficiency labeling for these products. Defs. Mem. 37. Plaintiffs, however, do not contend that a new energy-efficiency standard will require new labels for cooking products. Rather, as plaintiffs have explained, if DOE issues a new standard, *all* cooking products will be required to meet it. *See* Pltfs. Mot. for Leave to Amend at 17; *see also* Mauer Decl. ¶¶ 6–7. Therefore, despite the absence of labeling, plaintiffs' members would know that *any* product they buy meets the energy-efficiency standard. That result would redress their injury.

Finally, defendants argue that plaintiffs cannot guarantee that, absent the delay, DOE would issue new standards that would go into effect. Defs. Mem. 38. Here, defendants suggest that

DOE might decide not to issue standards. Yet defendants do not contest that DOE has already concluded that the statutory factors for issuing new standards have been met, *see* 80 Fed. Reg. 33030; 81 Fed. Reg. 34440, that EPCA contains an anti-backsliding provision, 42 U.S.C. §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I), and that the agency's proposal to issue these standards triggered a statutory deadline, *id*. §§ 6295(m)(3)(A), 6313(a)(6)(C)(iii)(I). Although DOE obliquely suggests that, even if it issued a standard, the standard might be invalidated in a court challenge or by Congress, the same is true for any case brought to challenge unreasonable delay under the APA, 5 U.S.C. § 706(1), and yet the courts often entertain such cases. *See*, *e.g.*, *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999); *In re Int'l Chemical Workers Union*, 958 F.2d 1144. Defendants themselves elsewhere suggest that such a case would be an appropriate avenue for plaintiffs to seek a remedy. *See* Defs. Mem. 31. And, again, "[w]hen, 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." *Sierra Club v. EPA*, 755 F.3d at 973.

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.

II. Plaintiffs have standing because the Executive Order substantively conflicts with plaintiffs' missions and injures their advocacy activities.

As plaintiffs argued in the earlier round of briefing, Executive Order 13771 and the OMB Guidances also adversely affect plaintiffs' ability to advocate on behalf of their members, by forcing plaintiffs to make an untenable choice between 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 the need to repeal existing ones. *See* Wu Decl. ¶¶ 4, 7 (Dkt. 64-13); *see also* R. LeGrande Decl. ¶ 17; R. Weissman Decl. ¶ 8; Wetzler Decl. ¶ 11. This cognizable harm is occurring now. *Cf. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 739–40 (2011) (striking down campaign financing scheme that forces speaker to change its message, not speak, or trigger funding of opponent); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (holding that self-censorship is a harm that can support standing).

Moreover, the declaration of Mae Wu resolves the Court's earlier concern that plaintiffs had failed to establish that they had refrained from petitioning activity because of the Executive Order. *See* Mem. Op. 47. As that declaration states, plaintiff NRDC "decided not to pursue a rulemaking petition to EPA specifically because of the Executive Order." *See* Wu Decl. ¶ 7. Plaintiffs recognize that the Court also ruled against them on a legal question related to causation with respect to this basis for standing, Mem. Op. 48–51, but they renew their argument here to narrow the basis of the Court's ruling on the issue while preserving questions as to the legal sufficiency of this claim of standing for possible appeal.

Citing a sentence from plaintiffs' motion for leave to amend, defendants state that plaintiffs "conceded" in their motion for leave to file an amended complaint that the second amended complaint does not address this basis for standing. Defs. Memo. 9. Defendants are mistaken. As plaintiffs explained in that motion (at 4 (Dkt. 64)), "[t]he 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."

III. Plaintiffs' facial challenge is a live case or controversy.

Seeking to avoid judicial review of this facial challenge, defendants suggest that plaintiffs should proceed by challenging delays of individual rulemakings. Defs. Mem. 2. At argument before this Court, however, defendants stated that information on delayed or abandoned actions "will not be public." *See* Mem. Op. 7 (quoting Tr. Oral Arg. 64 (Dkt. 56 at 64)). The experience of the 10 months since then bears that out: Although OMB has stated that Executive Order 13771 has impacted more than 1,500 rulemakings, *see supra* p. 6, it has not listed them, and agencies have rarely acknowledged that an action or inaction was caused by the Executive Order. Thus, the constitutionality of the Executive Order and OMB Guidances is best considered, and likely can be considered only, through a facial challenge.

Importantly, defendants do not suggest that the Executive Order's unlawful impact is too speculative for review. Defendant President Trump has touted the significant impact of the Executive Order: "We ordered that for every one new regulation, two old regulations must be eliminated. … Within our first 11 months, we cancelled or delayed over 1,500 planned regulatory actions." Remarks by President Trump on Deregulation, Dec. 14, 2017, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation/. Defendant OMB has likewise attributed the delay or withdrawal of hundreds of rulemakings to the Executive Order. *See supra* pp. 4, 6. And defendants do not contest that the Executive Order affects agency decisionmaking across the board, because every decision whether to issue a significant new rule, every decision about the content of the rule, and every decision about repealing a rule must be made under the

shadow of the Order's mandate to identify and repeal two regulations to offset the cost of any one regulation issued.

In these circumstances, plaintiffs have alleged a case or controversy that is concrete, ongoing, and adequately developed for judicial review. *See Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 516 F. Supp. 2d 90, 106, 107–08 (D.D.C. 2007) (holding challenge to executive order ripe where Archivist's reliance on order caused delay that adversely affected plaintiffs and plaintiffs' claim was "not made in a vacuum with respect to [relevant provision of executive order] as requested documents are pending review"); *see also Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1133 (D. Haw. 2017) (entertaining facial challenge to executive order barring noncitizens from entering the country notwithstanding the government's argument that individuals could potentially qualify for visa waivers). In these cases, considering the issues presented here in the context of a "concrete" application of the Executive Order would not "assist the court in analyzing [plaintiffs'] facial challenge." *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995).

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion to dismiss and grant plaintiffs' motion for partial summary judgment by holding that plaintiffs have standing to pursue this action and that the Court has subject matter jurisdiction over plaintiffs' claims. The Court should then expeditiously consider the merits on the 2017 briefing or, in the alternative, order expedited briefing on the merits.

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Respectfully submitted,

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