IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra, and STATE OF OREGON, by and through Attorney General Ellen F. Rosenblum,

[Proposed] Plaintiff-Intervenors,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; The OFFICE OF MANAGEMENT AND BUDGET, and MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget,

Defendants.

Civil Action No. 1:17-cv-00253-RDM

# MOTION TO INTERVENE AS PLAINTIFFS

**MOTION TO INTERVENE AS PLAINTIFFS**

The States of California and Oregon (States) hereby move to intervene as party plaintiffs in the above-captioned action under Rule 24 of the Federal Rules of Civil Procedure and D.C. District Court Rule 7(j). As discussed in detail in the accompanying Memorandum of Points and Authorities, intervention as of right is warranted because the States' interests in challenging Executive Order 13771 and related guidance issued by the Office of Management and Budget will not be adequately represented by the non-state plaintiffs, and those interests will be harmed if the States are not permitted to intervene. Fed. R. Civ. P. 24(a)(2). Alternatively, the States move for permissive intervention under Federal Rule of Civil Procedure 24(b) on similar grounds.

In support of this Motion, the States submit: (1) the accompanying Memorandum of Points and Authorities; (2) the Proposed Complaint in Intervention; and (3) a (Proposed) Order.

Pursuant to D.C. District Court Rule 7(m), the States conferred with counsel for plaintiffs and defendants and were informed that plaintiffs do not oppose this motion, and defendants oppose it.

Dated: June 4, 2018

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**
**IN SUPPORT OF STATES' MOTION TO INTERVENE AS PLAINTIFFS**

# TABLE OF CONTENTS

**Page**

INTRODUCTION ..... 1

BACKGROUND ..... 2

I. The Executive Order and OMB's Guidance ..... 2

II. The Pending Lawsuit ..... 5

ARGUMENT ..... 6

I. The States Have a Right to Intervene ..... 6

A. The States' Intervention Application is Timely ..... 7

B. The States Have Significant Protectable Interests ..... 8

C. Disposition of this Action Will Impair or Impede the States' Ability to Protect Their Interests ..... 10

D. The NGO Plaintiffs do not Adequately Represent the States' Interests ..... 10

II. Alternatively, Permissive Intervention Should be Granted ..... 11

CONCLUSION ..... 13

# TABLE OF AUTHORITIES

**Page**

**CASES**

*100Reporters LLC v. U.S. Dep't of Justice*
307 F.R.D. 269 (D.D.C. 2014)....7

*Alaska v. FERC*
980 F.2d 761 (D.C. Cir. 1992)....8

*Am. Horse Prot. Ass'n, Inc. v. Veneman*
200 F.R.D. 153 (D.D.C. 2001)....10

*Cayuga Nation v. Zinke*
2018 U.S. Dist. LEXIS 28984 (D.D.C. 2018)....8

*Diamond v. D.C.*
792 F.2d 179 (D.C. Cir. 1986)....11

*DSMC, Inc. v. Convera Corp.*
273 F.Supp.2d 14 (D.D.C. 2002)....8

*Fund for Animals, Inc. v. Norton*
322 F.3d 728 (D.C. Cir. 2003)....11

*Hodgson v. United Mine Workers of Am.*
473 F.2d 118 (D.C. Cir. 1972)....7

*Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*
105 F.R.D. 106 (D.D.C. 1985)....7

*Jones v. Prince George's Cnty., Md.*
348 F.3d 1014 (D.C. Cir. 2003)....6, 8

*Massachusetts v. EPA*
549 U.S. 497 (2007)....9, 10

*Mova Pharm. Corp. v. Shalala*
140 F.3d 1060 (D.C. Cir. 1998)....6

*Natural Res. Def. Council v. Costle*
561 F.2d 904 (D.C. Cir. 1977)....10

# TABLE OF AUTHORITIES
**(continued)**

**Page**

*Nuesse v. Camp*
385 F.2d 694 (D.C. Cir. 1967)....................7, 12

*Roane v. Leonhart*
741 F.3d 147 (D.C. Cir. 2014)....................7

*SEC v. Prudential Sec. Inc.*
136 F.3d 153 (D.C. Cir. 1998)....................8

*Smuck v. Hobson*
408 F.2d 175 (D.C. Cir. 1969)....................12

*Spangler v. Pasadena City Bd. of Ed.*
552 F.2d 1326 (9th Cir. 1977)....................12, 13

*Trbovich v. United Mine Workers*
404 U.S. 528 (1972)....................11

*United States v. AT&T*
642 F.2d 1285 (D.C. Cir.1980)....................7, 11

*United States v. Morten*
730 F. Supp. 2d 11 (D.D.C. 2010)....................12

**STATUTES**

5 United States Code
§ 551 *et seq.*....................1
§ 706....................5

**COURT RULES**

Federal Rules of Civil Procedure
Rule 24....................6, 7
Rule 24(a)....................6, 10
Rule 24(a)(2)....................6, 8
Rule 24(b)....................6, 13
Rule 24(b)(1)....................11
Rule 24(b)(3)....................12

# TABLE OF AUTHORITIES
# (continued)

Page

**FEDERAL REGULATIONS**

74 Federal Regulation 66,496 (December 15, 2009) .......... 9

80 Federal Regulation 33,030 (June 10, 2015) .......... 4

82 Federal Regulation 3,854 (January 12, 2017) .......... 4, 9

83 Federal Regulation 24,850 (May 30, 2018) .......... 4

**OTHER AUTHORITIES**

Executive Order
12866 .......... 3
13771 .......... 1, 2, 4

Federal Practice and Procedure, § 1909 (1st ed.1972) .......... 11

https://www.epa.gov/laws-regulations/epa-deregulatory-actions (last visited June 4, 2018) .......... 4

https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/ (last visited June 4, 2018) .......... 3

https://oehha.ca.gov/climate-change/report-press-release-climate-change/impacts-climate-change-california-significant-and (last visited, June 4, 2018) .......... 9

## INTRODUCTION

California and Oregon (together, the States) can and do enact regulations to protect and benefit their citizens and interests; but, as sovereign states that have surrendered certain self-governing prerogatives to the federal government, they look to federal executive agencies like the U.S. Environmental Protection Agency (EPA) to enact and enforce regulations at the national level, to address pressing matters of public health, safety and the environment that the States themselves cannot wholly address.

On January 30, 2017, President Donald J. Trump up-ended the federal regulatory system on which the States rely by issuing Executive Order 13771, titled "Reducing Regulation and Controlling Regulatory Costs" (hereinafter Order). The Office of Management and Budget (OMB) subsequently issued interim and then final implementation guidance (together, Guidance) on February 2 and April 5, 2017, respectively. The Order's stated purpose is to manage the private costs of complying with federal regulations by requiring federal agencies to repeal at least two regulations to fully offset the cost of any new significant regulation as a pre-condition to issuing it. Further, the Order and Guidance purportedly authorize the OMB to block an agency rulemaking not in compliance with the Order. In so doing, the Order and Guidance impose arbitrary, substantive threshold requirements on agency rulemaking that have no nexus to the subject matter of the regulation and that compel the agency to concern itself with a regulation's cost while disregarding its public benefits.

In issuing the Order and Guidance, the President and OMB, respectively, have violated the separation of powers doctrine, the "Take Care" clause of the Constitution, and/or Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., and have generally acted *ultra vires*. And because of these violations, existing federal regulations will be repealed and new regulations have been and will be delayed or not issued at all – solely on the basis of regulatory costs – resulting in

harm to the health and well-being of the States' interests in their citizens, natural resources, infrastructure, institutions, and economies, among other interests. If left to stand, the Order will result in a hamstrung federal regulatory system that disregards Congressional mandates to consider public benefits as much as private burdens in favor of an arbitrary "two out, one in" slogan.

The States seek to intervene as party plaintiffs, because the disposition of this action will have lasting impacts on their proprietary and quasi-sovereign interests. Respectfully, this Motion to Intervene should be granted to allow States the opportunity to protect their interests – which are distinct from the interests of the existing plaintiffs – from harms resulting from the President and OMB's constitutional and statutory violations in issuing and implementing the Order and Guidance.

## BACKGROUND

### I. THE EXECUTIVE ORDER AND OMB'S GUIDANCE

President Trump issued Executive Order 13771 on January 30, 2017. The Order mandates that the cost of any new regulation "be offset by the elimination of existing costs associated with at least two prior regulations."[1] (Order, § 2(c).) Further, Section 3(d) of the Order directs the OMB to establish an agency-specific annual "incremental cost" cap, which effectively puts a ceiling on the cumulative cost of an agency's regulatory portfolio.

The Order focuses exclusively on regulatory costs, without consideration of a proposed or existing regulation's corresponding public benefits. While OMB's Guidance states that, prior to

[1] For FY 2017, the Order explicitly required agencies to repeal two regulations for each new regulation it promulgated and to ensure that the total "incremental cost" of all new and repealed regulations is no greater than zero. (§ 2(b).) These requirements are incorporated by reference into Section 3 for FY 2018 and beyond.

issuing a regulation, agencies must complete any cost-benefit analysis required by Executive Order 12866,[2] agencies are to consider only regulatory costs and not benefits for purposes of complying with the Order. Additionally, although the Guidance states that an agency is to abide by any existing statutory mandate prohibiting the consideration of costs when issuing a regulation, the Guidance makes clear that it does not exempt the agency from the Order's requirement to offset any costs by taking at least two deregulatory actions.

While the Order applies only to "significant" rules[3] and is self-limiting in other respects, its harmful effects are evident: Since the Order was issued, hundreds of regulations proposed by federal agencies prior to the Order have been put on hold, while proposed deregulatory actions to delay, suspend or repeal existing regulations have been prioritized. The Administration itself has proclaimed the Order's effectiveness, stating that agencies are surpassing the "two-for-one" ratio and in fact "have issued 22 deregulatory actions for every new regulatory action"; that "agencies plan on achieving even more regulatory rollbacks in FY 2018 compared with FY 2017, and plan to issue at least three deregulatory actions for every one new regulation"; and that in "this Administration, agencies have withdrawn or delayed 1,579 planned regulatory actions."[4] Thus, for example, EPA advertises that one can read about its compliance with the Order at its

[2] Executive Order 12866 ("Regulatory Planning and Review") was issued by President Clinton in 1993. Among other things, it directs agencies to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

[3] As defined by E.O. 12866, an example of a "significant regulatory action" is one that may have an annual economic impact of at least $100 million or otherwise adversely affect the economy in a "material way."

[4] https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/ (last visited June 4, 2018).

Deregulatory Actions page,[5] wherein it lists dozens of "Deregulatory Actions under Development."

Many of the regulations that have been delayed or eliminated because of the Order address issues that are of critical importance to the States. These include a rule proposed by the Department of Energy (DOE) that would reduce the energy consumption and associated greenhouse gas (GHG) emissions of certain ubiquitous consumer products,[6] and a rule proposed by the National Highway Traffic Safety Administration (NHTSA) that would require vehicle-to-vehicle (V2V) communication technology to reduce the incidence of vehicle collisions on the nation's roadways.[7] The DOE and NHTSA proposed the respective regulations consistent with their statutory mandates, taking into account the various factors that Congress directed them to consider. Congress did not direct or permit the agencies to consider whether the proposed regulation would exceed an arbitrary cost cap set by OMB, or to withhold the regulation on that basis. But that is exactly what the President's Order and OMB's Guidance require them to do, and it appears the agencies have complied.[8]

By issuing and implementing this directive, the President and OMB, respectively, have acted in a manner that exceeds the scope of their constitutional and/or statutory authority. The President has violated the Constitution, which delineates a clear separation of powers, and

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[5] See https://www.epa.gov/laws-regulations/epa-deregulatory-actions (last visited June 4, 2018).

[6] *Energy Conservation Program: Energy Conservation Standards for Residential Conventional Oven*, 80 Fed. Reg. 33,030 (June 10, 2015). Docket No. EERE–2014–BT–STD–0005.

[7] *Federal Motor Vehicle Safety Standards; V2V Communications*, 82 Fed. Reg. 3854 (January 12, 2017). Docket No. NHTSA–2016–0126.

[8] Recently, EPA cited the Order as one of the bases for rescinding significant portions of its 2017 Accidental Release Prevention Requirements rule. 83 Fed. Reg. 24,850, 24,873 (May 30, 2018) ("Rescinding these provisions would also allow EPA greater flexibility to offset the incremental costs associated with other new regulations in accordance with E.O. 13771.")

requires that the President take care that the laws be faithfully executed. And the OMB, which is subject to the APA, has violated that statute's prohibition against agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or in excess of statutory jurisdiction. 5 U.S.C. § 706. Both have acted in a manner that is *ultra vires*.

## II. The Pending Lawsuit

On February 8, 2017, Public Citizen, Inc., Natural Resources Defense Council, and the Communications Workers of America, AFL-CIO (NGO Plaintiffs), filed suit in federal district court in Washington, D.C., against President Trump, the Director of the OMB, and numerous agency heads (together, Administration), challenging the Order and Guidance on the grounds that they violate: (1) separation of powers; (2) the President's constitutional duty to "take care that the laws be faithfully executed" (Take Care Clause); and, with respect to the Guidance only, (3) the APA; and because defendants acted and continue to act in a manner that is *ultra vires* in issuing, implementing and complying with the Order.

NGO Plaintiffs amended their complaint on April 21, 2017. The Administration answered with a motion to dismiss, and NGO Plaintiffs filed a cross-motion for summary judgment on May 15, 2017. Briefing ensued, including the submission of a number of amici briefs in support of both NGO Plaintiffs and the Administration. The Court ruled on the motions on February 26, 2018, granting the Administration's motion to dismiss (with leave to amend) and denying NGO Plaintiffs' motion for summary judgment, on the basis that they had not established standing to maintain the action. NGO Plaintiffs filed a second amended complaint on April 20, 2018. In an order of May 1, 2018, the Court, ruling on a motion to stay the proceedings on NGO Plaintiffs' expected motion for summary judgment, granted the motion in part and denied it in part, and ordered the parties to limit their briefing to questions going to the Court's jurisdiction to adjudicate NGO Plaintiffs' claims on the merits. The Administration filed its motion to dismiss

NGO Plaintiffs' second amended complaint on May 14, 2018, and NGO Plaintiffs' response is due June 4, with the Administration's reply due June 25, 2018. Pending the outcome of the Administration's motion to dismiss, the parties will brief the merits of their claims and defenses.

## ARGUMENT

The requirements for intervention in federal actions are set forth in Rule 24 of the Federal Rules of Civil Procedure. Under Rule 24(a), the States are entitled to intervene as a matter of right to protect their interests. Alternatively, if the Court determines that the States do not have a right to intervene, the Court should grant permissive intervention pursuant to Rule 24(b).

### I. THE STATES HAVE A RIGHT TO INTERVENE

Federal Rules of Civil Procedure 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In order to intervene pursuant to Rule 24(a)(2) (often referred to as the "interest" test), the proposed intervenor must show that: (1) the intervention application is timely; (2) the applicant has a significant protectable interest that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. *See*, *e.g.*, *Mova Pharm. Corp. v. Shalala,* 140 F.3d 1060, 1074 (D.C. Cir. 1998); *see also Jones v. Prince George's Cnty., Md.,* 348 F.3d 1014, 1017 (D.C. Cir. 2003) (listing the four elements of Rule 24(a) as "timeliness, interest, impairment of interest, and adequacy of representation").

Although the proposed intervenor has the burden of establishing these elements, courts interpret the elements liberally in favor of intervention. *See*, *e.g.*, *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109 (D.D.C. 1985), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986) ("[the] liberal formulation of the 'interest' test has repeatedly been reaffirmed in this jurisdiction"); *Nuesse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967) (the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process"); *Hodgson v. United Mine Workers of Am.,* 473 F.2d 118, 130 (D.C. Cir. 1972) ("The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard").

As discussed below, the States satisfy each of the four requirements.

### A. The States' Intervention Application is Timely

The timeliness of a motion to intervene must "be judged in consideration of all the circumstances." *United States v. AT&T,* 642 F.2d 1285, 1295 (D.C. Cir. 1980). "Though the time elapsed since the inception of the suit is relevant, measuring the length of time passed is not in itself the determinative test because [courts] do not require timeliness for its own sake." *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 275 (D.D.C. 2014), citing *Roane v. Leonhart,* 741 F.3d 147, 151 (D.C. Cir. 2014). "Instead, the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* "Thus, even where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention unfairly disadvantaged the original parties." *Id.*

NGO Plaintiffs filed the operative complaint in this action just six weeks ago, on April 20, 2018. At this stage of the proceedings, the Court has asked the parties to focus solely on the

threshold jurisdictional issues; the merits of Plaintiffs' claims or the Administration's defenses remain to be addressed at a later date.

The primary focus of the timeliness requirement is fairness to the parties. Because the operative complaint was filed just six weeks ago, and because the parties have not yet briefed the merits of that complaint (focusing instead on the threshold jurisdictional issues, as instructed by the Court), the States' intervention in this dispute at this time will not unfairly disadvantage the parties to the action in establishing the merits of their substantive claims or defenses.

### B. The States Have Significant Protectable Interests

Rule 24(a)(2) requires that a prospective intervenor "demonstrate a legally protected interest in the action." *SEC v. Prudential Sec. Inc.,* 136 F.3d 153, 156 (D.C. Cir. 1998). The requirement "means that the proposed intervener 'would suffer harm from an adverse decision on the merits.'" *DSMC, Inc. v. Convera Corp.*, 273 F.Supp.2d 14, 25 (D.D.C. 2002) (quoting *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992)). The proposed intervenor need not show more than that it has standing to satisfy the requirement. *See Cayuga Nation v. Zinke*, 2018 U.S. Dist. LEXIS 28984 at 15 (D.D.C. 2018) (citing *Jones v. Prince George's Cty., Maryland*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003)).

In this case, the States will suffer harm as long as the Order remains in effect, because regulations that would have addressed matters of critical importance to them, such as the energy efficiency and V2V regulations described above, will remain in regulatory limbo, and/or will be repealed because of the Order. In the case of the energy efficiency standard, for example, the proposed regulation would have achieved reductions in GHG emissions equivalent to 26 million cars on the road annually. In 2009, the Environmental Protection Agency (EPA) found that

GHGs endanger public health and welfare, particularly insofar as they cause and contribute to climate change,[9] and the Supreme Court noted that the harms associated with climate change are serious and well recognized. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). Already, the States are experiencing serious adverse effects of climate change, including prolonged drought, diminished snowpack (which is critical to their water supply), a notable increase in average daily temperatures, rising sea level and coastal erosion, and an increase in the intensity and frequency of wildfires. California endured the worst fire season on record in 2017.[10] These impacts directly harm the States' interests in myriad ways, including by increasing the risk of adverse health impacts attributable to extreme heat events; decreasing agricultural yield attributable to diminished water supply; and increasing the risk of damage to state-owned lands and infrastructure because of coastal erosion and wildfires.[11] Without the nation-wide emission reductions that the energy efficiency regulation would have achieved, the States will continue to experience the detrimental impacts of climate change attributable to GHG emissions. *See Massachusetts*, 549 U.S. at 521.

The States are also harmed by the NHTSA's failure to finalize the V2V rule. The agency estimated that the technology could prevent 424,901–594,569 crashes and save 955–1,321 lives annually. Net positive benefits would be realized in 3-5 years, and by 2051, the proposed rule could reduce the costs resulting from motor vehicle crashes by $53 to $71 billion (expressed in today's dollars). 82 Fed. Reg. 3,854, 3,858-3,859, 4,007 (January 12, 2017). These benefits

[9] 74 Fed. Reg. 66,496 (December 15, 2009).

[10] See Office of Environmental Health Hazard Assessment, California Environmental Protection Agency, *Indicators of Climate Change in California* (May 2018), at S-1 to S-13, available at https://oehha.ca.gov/climate-change/report-press-release-climate-change/impacts-climate-change-california-significant-and (last visited, June 4, 2018).

[11] *Id.*

would accrue, in part, to states, because they bear a significant portion of the costs attributable to vehicle accidents, including costs related to health care, emergency response, damage to infrastructure, and lost economic activity.

By this motion, the States seek to exercise their right to sue to protect their interests in the health and well-being of their citizens. As the Supreme Court has recognized, it is well within the quasi-sovereign interests of states to sue as *parens patriae* to that end. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 n.17 (2007) (affirming "the long development of cases permitting States 'to litigate as *parens patriae* to protect quasi-sovereign interests—i.e., public or governmental interests that concern the state as a whole'").

### C. Disposition of this Action Will Impair or Impede the States' Ability to Protect Their Interests

In determining whether an applicant's interests will be impaired, courts look to the "practical consequences" that the applicant may suffer if intervention is denied. *See Natural Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C. Cir. 1977); *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001). If the Order remains in effect, regulations addressing pressing matters of public health, safety and the environment will be delayed or not issued at all, depriving the States of the significant benefits those regulations would have provided. In some instances, this will leave the States exposed to harms they may not have authority to address through state law; in others, the States will have to choose whether to enact and enforce their own regulations at significant cost to them, or to forego regulation and risk harm to their interests in public health and the environment.

### D. The NGO Plaintiffs Do Not Adequately Represent the States' Interests

The Supreme Court has explained that the adequate representation "requirement of [Rule 24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate;

and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735-36 (D.C. Cir. 2003). Similarly, the D.C. Circuit has described this requirement as "not onerous." *Diamond v. D.C.,* 792 F.2d 179, 192 (D.C. Cir. 1986); *see also United States v. AT&T,* 642 F.2d 1285, 1293 (D.C. Cir. 1980) (stating an applicant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'" (quoting 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 (1st ed.1972)).

Here, the States' interests are unique to their status as States. As described above, the Order illegally requires agencies to regulate in an arbitrary and capricious manner, in disregard of the APA's prohibition of such action, and in contravention of Congress' express directives in the statutes underlying regulations subject to the Order. No other plaintiff in this lawsuit relies on or engages with the federal regulatory system as the States do. The States have unique interests in the health and well-being of their citizens, natural resources, infrastructure, institutions, and economies, among other things, and these interests cannot be adequately represented by the NGO Plaintiffs. Allowing this matter to advance without the States as party plaintiffs would significantly impede their ability to protect their interests. For these reasons, the States should be permitted to intervene as a matter of right.

## II. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE GRANTED

If the Court finds that the States do not satisfy the requirements for intervention as of right, it should grant them permissive intervention.

Under Federal Rules of Civil Procedure 24(b)(1) the Court may liberally permit "anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R.

Civ. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Generally, an applicant who seeks permissive intervention must show that it meets three requirements: (1) that the court has an independent basis for jurisdiction over the applicant's claims; (2) that the applicant's motion is timely; and (3) that that the applicant has a claim or defense that has a question of law or fact in common with the main action. *See*, *e.g.*, *United States v. Morten*, 730 F. Supp. 2d 11, 16 (D.D.C. 2010). However, these "threshold" requirements are not to be strictly interpreted. *See*, *e.g.*, *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967) ("Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention"). It follows that whether to grant permissive intervention is within the court's broad discretion.

In exercising this discretion, the Court may consider additional factors, including but not limited to the nature and extent of the intervenor's interest; its standing to raise relevant legal issues; the legal position it seeks to advance and its probable relation to the merits of the case; whether the intervenor's interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether the party seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *See Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977), citing, *inter alia*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

The States meet the three threshold requirements. First, given that the States' claims arise under federal law, the Court has an independent basis for jurisdiction over them. Second, as

discussed above, the States' motion is timely. The States satisfy the third prong of the test because their claims are virtually identical to those asserted by the NGO Plaintiffs, albeit they relate to the harm the Order and Guidance inflict on the States' unique interests as states.

Further, a number of the additional considerations suggested by the *Spangler* court weigh heavily in favor of granting intervention. This case is about the rules governing our federal system. As sovereign states within that system, the States have an important interest in ensuring that the federal executive branch abides by those rules. As discussed above, their interests cannot adequately be represented by the NGO Plaintiffs; their participation will not unduly prolong or delay the litigation; and it provides greater perspective of the Order's wide-reaching effects. Additionally, intervention by the States in *this* action conserves judicial resources relative to the States pursuing an independent action in the forum of their choosing.

The States meet each of the threshold requirements for permissive intervention under Rule 24(b) and the equities strongly favor granting this motion.

## CONCLUSION

For the foregoing reasons, the States ask that the Court grant this motion and order the clerk to file the proposed Complaint in Intervention, attached hereto as **Exhibit A**.

Dated: June 4, 2018

Respectfully submitted,

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OK2018950006

# Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra, and STATE OF OREGON, by and through Attorney General Ellen F. Rosenblum,

Plaintiff-Intervenors,

**v.**

DONALD J. TRUMP, in his official capacity as President of the United States; The OFFICE OF MANAGEMENT AND BUDGET, and MICK MULVANEY, in his official capacity as Director of the Office of Management and Budget,

Defendants.

Civil Action No. 1:17-cv-00253-RDM

**[PROPOSED] COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. The State of California, by and through its Attorney General Xavier Becerra, and the State of Oregon, by and through its Attorney General Ellen F. Rosenblum (together, Plaintiff States), bring this action for declaratory and injunctive relief to challenge (1) Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs," hereinafter Order), dated January 30, 2017 and published in the Federal Register on February 3, 2017 (82 Fed. Reg. 9,339); and (2) the Office of Management and Budget's (OMB) interim guidance to assist agencies in implementing the Order, dated February 2, 2017, and final guidance, dated April 5, 2017 (together, Guidance). The Order and Guidance are in effect, and agencies are complying with them.

2. The Order's core requirement is that an agency fully offset the cost of any new regulation by repealing existing regulations that impose equal or greater costs. For purposes of complying with the Order, agencies are not to consider the public benefits of either the new or existing regulations in their accounting, just the costs. The Order also imposes an annual, agency-specific "incremental cost" cap, which limits the cumulative cost of an agency's regulatory portfolio.

3. Unlike past Executive Orders that required agencies to "consider" or analyze the economic impacts of a proposed rule, or to review their regulations to identify potentially outdated regulations—this Order *requires* that agencies repeal at least two regulations, outdated or otherwise, to fully offset the cost of a new regulation. The Order precludes agency rulemakings not in compliance with its arbitrary mandates and purports to authorize the OMB to block such rulemakings. These actions exceed the President's constitutional authority, violate the separation of powers doctrine and the President's duty under the "Take Care" clause, and are generally *ultra vires*. Further, in issuing the Guidance to implement the Order, the OMB acted in excess of statutory jurisdiction, among other things, in violation of the Administrative Procedure Act (APA). 5 U.S.C. § 706.

4. The Order and Guidance cannot lawfully be enforced under any circumstances. While agencies generally have authority to rescind or repeal obsolete or unnecessary regulations (provided they satisfy the requirements of their governing statutes and/or the APA), an agency would be in violation of its statutory mandate(s) were it to take any action—or to not take action, as the case may be—to comply with the Order, and neither the President nor the OMB can require that it do so.

5. Plaintiff States have quasi-sovereign and proprietary interests in effective and robust federal rulemaking to protect the health and well-being of, among other things, their citizens, natural resources, infrastructure, institutions, and economies. In addition, the Plaintiff States have substantive and procedural interests in ensuring that members of the federal executive branch respect the bounds of their constitutional and statutory authority and do not hamstring agencies' ability to execute Congressional mandates. In issuing and implementing the Order and Guidance, the President and OMB, respectively, acted beyond the scope of their authority. As a result, numerous federal regulations addressing matters of public health, safety, welfare, and the environment have been and will continue to be revised, delayed, withdrawn, or repealed to comply with the Order's arbitrary mandates; and new rules will be delayed or not proposed at all. This deprives Plaintiff States of the benefits those regulations would have provided, in some instances leaving them exposed to harms they may be unable to adequately address themselves.

6. The Order and Guidance are unlawful on their face. Implementation, enforcement of, and compliance with the Order and Guidance should be enjoined, and the Order and Guidance should be set aside.

**JURISDICTION AND VENUE**

7. Jurisdiction lies in this Court pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States). This Court also has jurisdiction under the APA, 5 U.S.C. §§ 701-706. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 705-706.

8. Venue is proper in this district because a substantial part of the events or omissions giving rise to the claim occurred in this district, insofar as Plaintiff States seek relief against federal officials acting in their official capacities. 28 U.S.C. § 1391(e)(1).

## PARTIES

### I. PLAINTIFFS

9. The State of California is a sovereign state in the United States of America. The State of California brings this action by and through Attorney General Xavier Becerra. The Attorney General is the chief law officer of California (Cal. Const., art. V, § 13), and is authorized to file civil suits directly involving the state's rights and interests or deemed necessary by the Attorney General to protect public rights and interests. Cal. Gov't Code § 12511; *Pierce v. Super. Ct.*, 1 Cal.2d 759, 761-62 (1934). This challenge is brought pursuant to the Attorney General's independent constitutional, statutory, and common law authority to bring suit and obtain relief on behalf of the State of California.

10. The State of Oregon is a sovereign state in the United States of America. The State of Oregon brings this action by and through its Attorney General, Ellen F. Rosenblum, its chief legal officer. Or. Rev. Stat. § 180.210. Her powers and duties include acting in federal court on matters of public concern to Oregon. Or. Rev. Stat. § 180.060(1)(d)).

### II. DEFENDANTS

11. Defendant Donald J. Trump is President of the United States. President Trump issued the Order challenged in this complaint. Plaintiff States sue President Trump in his official capacity.

12. The OMB is an office within the Executive Office of the President (31 U.S.C. § 501), and an "agency" under the APA. 5 U.S.C. § 551(1). The OMB issued the Guidance that Plaintiff States challenge by way of this complaint.

13. Defendant Mick Mulvaney is the Director of the OMB (Director) and OMB's highest-ranking official. The Director is charged with the supervision and management of all actions of the OMB, including execution of the mandates set forth in the Order. Plaintiff States sue Director Mulvaney in his official capacity.

## BACKGROUND

### I. Scope of Executive Power

14. The President purports to have issued the Order "by the authority vested in [him] as the President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101, *et seq*.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code."

15. The executive power is vested in the President. U.S. Const., art. II, § 1. The primary function of the President is understood to be cabined in the "Take Care" clause: "[H]e shall take care that the laws be faithfully executed." U.S. Const., art. II, § 3. The President's additional powers and duties are specifically enumerated in sections 2 and 3 of Article II. None of those additional powers and duties can be construed to authorize the President to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits.

16. The President does not have, under the Constitution or otherwise, an undefined "inherent" power, even in "emergency" circumstances. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

17. No provision in the Budget and Accounting Act of 1921 (31 U.S.C. 1101, *et seq*.), which the President cited as a basis of authority to issue the Order, authorizes the President to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits.

18. The President cannot delegate authority he does not have. 3 U.S.C. § 301.

19. 3 U.S.C. section 301, which the President cited as another basis for his authority to issue the Order, does not authorize the President to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing regulations and/or consider the cost of the new regulation in isolation of its benefits.

20. The President may issue Executive Orders to manage the internal operations of the federal government, including to direct agencies to exercise their regulatory discretion consistent with priorities of the administration. Executive Orders have the force of law.

21. The President cannot direct an agency, by Executive Order or otherwise, to take any action that would violate a Constitutional or statutory mandate, or otherwise run afoul of Congressional intent.

## II. THE POWERS AND DUTIES OF THE OFFICE OF MANAGEMENT AND BUDGET

22. The powers and duties of the OMB are limited by statute, and largely relate to assisting in development and administration of the federal budget. Those powers include

"establish[ing] governmentwide financial management policies for executive agencies" and "[r]eview[ing] and, where appropriate, recommend[ing] to the Director changes to the budget and legislative proposals of agencies to ensure that they are in accordance with financial management plans of the [OMB]." 31 U.S.C. § 503(a).

23. Congress has also directed the OMB to "coordinate with agencies to develop priority goals to improve the performance and management of the Federal Government," including "outcome-oriented goals covering a limited number of crosscutting policy areas." 31 U.S.C. § 1120(a)(1)(A). The statute also sets forth the process by which agencies are to develop their own priority goals. The OMB, however, is given no role in developing the priority goals of individual agencies; its role is limited to coordinating that *process* among agencies: "The Director of the Office of Management and Budget shall determine the total number of agency priority goals across the Government, and the number to be developed by each agency." *Id.* at § 1120(b)(1).

24. Nothing in these authorities, or any other authority, can be construed to authorize the OMB to preclude a federal agency from promulgating a regulation or to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits.

## III. ADMINISTRATIVE RULEMAKING

25. Administrative agencies are creatures of statute and have only such power and authority as are conferred upon them by statutory enactment. One mechanism by which agencies exercise their statutory authority and/or accomplish their legislative goals is by promulgating and implementing regulations.

26. Federal agencies are generally required to undertake reasoned and evidence-based decision-making when exercising their delegated authority to promulgate rules. The APA, for one, provides that a reviewing court *shall* "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

27. It follows that "[t]he process by which [an agency] reaches [a] result must be logical and rational." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Further, agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 42 (1983). An agency must consider the factors that Congress has directed it to consider, and cannot "rel[y] on factors which Congress has not intended it to consider." *Id.* at 43.

28. A number of legal authorities, including enabling statutes and Executive Order 12866, require agencies to weigh the relative costs and benefits of a proposed regulation before promulgating it. These requirements are consistent with agencies' existing duty to make rational regulatory decisions based on their review of the relevant data and any statutory Congressional directives.

29. No statute authorizes or permits an agency to consider the number of total regulations in an agency's regulatory portfolio, or the cumulative cost of those regulations, in evaluating the necessity or wisdom of an additional regulatory measure.

## IV. States' Reliance on Federal Regulation

30. Plaintiff States have proprietary interests in ensuring that agencies of the federal government perform their statutory duties to regulate in matters directly impacting states' sovereign territory and natural resources, institutions, and infrastructure.

31. Further, Plaintiff States have quasi-sovereign interests independent of and behind the titles of their citizens in all the earth and air within their domains and in the health and well-being, both physical and economic, of their citizens, which interests are similarly impacted by the federal government's performance of its statutory duties to regulate. While States retain significant powers under our federal system of government, on entering the Union, Plaintiff States "surrender[ed] certain sovereign prerogatives" which "are now lodged in the Federal Government." *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). In keeping with the federal government's end of the bargain, Congress orders agencies to achieve certain legislative goals for the benefit of all states, including Plaintiff States. Agencies fulfill these statutory mandates by promulgating and enforcing regulations. The need for updated or new regulations is driven by external factors such as population growth, climate change, and technological innovation that do not cease to occur in deference to a political desire to deregulate to reduce private costs without consideration of public benefits. Thus, the Order and Guidance's direct interference with agencies' performance of their obligations is harming Plaintiff States' interests.

32. One function federal regulation often serves is to create a regulatory "floor" to protect public health and the environment and to safeguard against a race to the bottom among states and other regulatory jurisdictions. For example, by imposing standards that limit the amount of certain air pollutants a new, modified or reconstructed source can emit, section 111 of the Clean Air Act both serves to reduce pollution and to set a level playing field for a given set of sources (i.e., businesses that emit regulated pollutants) across the country. Without such federal

standards setting the floor, Plaintiff States would be forced to decide whether to provide that basic level of protection for public health, safety, and the environment on their own, or to forego such protections in the hopes that lax regulation would attract a given industry.

33. Where Congress expressly preempts state authority or enacts comprehensive legislation occupying an entire field, states must rely on the federal agencies to implement the will of Congress through the adoption of regulations. Thus, for example, regulation of securities and commodities exchanges, regulation of employee benefit plans, and the issuance and regulation of patents, trademarks, and copyrights lie exclusively with the federal government, or nearly so.

34. Even where a state is not preempted from regulating, in other instances, the scope of states' regulatory jurisdiction may not be sufficient to fully address issues that pose a significant threat to the health and well-being of their citizens, natural resources, infrastructure, institutions, and economies. The emission of greenhouse gases (GHG) is one example. GHGs emitted in other states accumulate in the atmosphere and contribute directly to an array of climate change impacts in Plaintiff States. Where Congress has directed federal agencies to enact regulations reducing such emissions on a national basis, and those agencies fail to adopt regulations implementing that directive, Plaintiff States are harmed. *See Massachusetts*, *supra*, 549 U.S. at 521.

35. Plaintiff States have a particular interest in federal rulemaking to the extent federal regulations may directly impact state lands and natural resources or touch on the state's management of those resources. For example, the quality and quantity of freshwater available in downstream states depends in large part on the management of water resources in upstream states, which is governed in large part by regulations under the federal Clean Water Act.

Similarly, a state's air resources may be adversely impacted by pollutants emitted in neighboring states, a harm the downwind state may be unable to adequately address.

36. Further, each of Plaintiff States has federally managed lands within their territory. In California, more than 46 million acres, or nearly 46% of the state, are administered by the federal government. More than 32.6 million acres of Oregon's land, which is over half the state, is administered by the federal government. Plaintiff States may be directly impacted by rules promulgated and enforced by the federal agencies responsible for those intra-state federal lands. The development of fossil fuel resources on federal lands is an example of an activity that likely results in air and water pollution both on federally managed lands within their boundaries and that spills over into neighboring state lands.

37. As key participants in a federal system, Plaintiff States also have an interest in ensuring that the federal government, and each of its branches, acts within the defined bounds of its constitutional authority; and they have a concomitant legal right not to be injured by *ultra vires* executive action. This is particularly true in matters implicating the administration of federal rules on which Plaintiff States rely to protect their proprietary and quasi-sovereign interests.

## V. Executive Order 13771 and OMB's Guidance Memoranda

38. President Trump signed Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") on January 30, 2017. 82 Fed. Reg. 9339 (2017). The Order cited the Constitution, the Budget and Accounting Act of 1921 (31 U.S.C. 1101, *et seq*., and specifically § 1105), and 3 U.S.C. § 301 as the bases of the President's authority.

39. The stated purpose of the Order is to manage the *private* costs of complying with federal regulations: "In addition to the management of the direct expenditure of taxpayer dollars

through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." Sec. 1. The Order then states, in relevant part, "Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination." *Id.*

40. For Fiscal Year (FY) 2017, the Order sets forth two separate mandates. The first is that an agency must repeal two regulations for each new regulation it promulgates. Sec. 2(a). The second is that the agency must ensure that the total "incremental cost" of all new and repealed regulations is no greater than zero. Sec. 2(b).

41. The requirements are essentially the same for FY 2018 and beyond: the cost of any new regulation must "be offset by the elimination of existing costs associated with at least two prior regulations." Sec. 3(a) (referencing the requirements set forth in Section 2(c)).

42. The Order also directs the OMB to establish an annual, agency-specific "incremental cost" cap, which limits the cumulative cost of the agency's regulatory portfolio. For 2018, the caps vary by agency from zero to *negative* $196 million in annualized costs.[1] The cap may be adjusted from year to year.

43. On February 2, 2017, the OMB issued "Interim Guidance Implementing Section 2 of the EO of January 30, 2017." It issued the final "Guidance Implementing Executive Order 13771" on April 5, 2017. The final guidance states that it is consistent with the interim guidance, but clarifies that where there is a conflict between the two memoranda, the final guidance supersedes the interim guidance.

[1] OMB, Regulatory reform: Two-for-One Status Report and Regulatory Cost Caps, 1-2 (2017) (hereinafter "*Two-for-One Report*"), available at https://mobile.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf (last visited June 4, 2018).

44. The Order does not require that there be a nexus between the proposed regulation and the two regulations proposed for repeal, other than that the saved costs of the latter offset the cost of the former. With OMB approval, offsets can even be transferred between agencies. Neither the Order nor the Guidance attempt to provide a logical basis for the requirement that "two" regulations be repealed, as opposed to one or three or any other number.

45. The fact that the societal benefits of a proposed rule far exceed its *private* costs is immaterial under the Order; an agency must still offset its cost. Also immaterial are the net benefits of the rules proposed for repeal to offset the cost of any new regulation. It follows that the Order will likely compel rulemaking actions that result in a net loss of benefits to society.

46. By its terms, the Order does not apply to regulations related to certain government functions (military, national security, or foreign affairs); intra-agency administration; or "other categories" exempted by the OMB guidance. The Order also contains legal disclaimers ("unless otherwise required by law") and a statement that it "shall not be construed to impair or otherwise affect" an agency's legal authority. The Guidance issued by the OMB further clarifies that the Order applies only to "significant" rules[2]; does not apply to independent agencies; cannot stop agencies from issuing statutorily mandated regulations; and cannot force agencies to take cost into consideration for rules whose underlying laws prohibit it.

47. Where an agency is required to issue regulations by statute, the Order acknowledges that it cannot—and does not—"change the agency's obligations under [such a] statute." This

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[2] As defined by Executive Order 12866 (1993), a "significant" regulatory action is one that (1) may have an annual economic impact of at least $100 million or adversely affect "in a material way" the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or sub-national governments or communities; (2) be inconsistent with another agency action; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues.

does not, however, relieve the agency of the obligation to eventually offset the cost of the required regulations.

48. Where an agency believes a rule otherwise subject to the Order "qualifies for an exemption," the Order directs the agency to submit an exemption request to the Office of Information and Regulatory Affairs (OIRA), prior to submitting the proposed regulation to OMB for review. The Guidance lists four categories of circumstances under which an exemption may apply, including that (1) the rule is expressly exempt; (2) there is an emergency; (3) the rule is statutorily or judicially required; or (4) the rule will have *de minimis* costs. The Guidance further notes, "These categories are not exhaustive," suggesting that an agency may apply for relief on another basis. The Guidance does not clarify what criteria OMB will consider in determining whether to grant an exemption.

49. Where an agency cannot comply with the Order's mandates—that is, where it cannot identify at least two regulations to repeal and/or to fully offset the cost of any new rule—the Order implicitly prohibits the agency from issuing the rule and/or purports to authorize the OMB to block the rulemaking. In a required submission to the OMB, agencies are to identify any regulation that "increases incremental cost" and the existing regulations proposed to offset that cost. Each regulation approved by the Director shall be included in the Unified Regulatory Agenda. An agency may not issue a regulation that has not been included in the Unified Regulatory Agenda or otherwise approved in writing by the Director.

50. The Order constitutes a significant departure from the efforts of previous administrations to cull unnecessary regulations. The majority of past Executive Orders addressing this issue required agencies to "consider" or analyze the economic impacts of a proposed rule. Two Orders imposed a mandatory substantive requirement, including Executive

Order 12,291 (issued by President Reagan in 1981), which purported to preclude regulatory action "unless the potential benefits to society … outweigh the potential costs to society," and Executive Order 12,861 (issued by President Clinton in 1993), which required executive departments to "eliminate not less than 50 percent of its civilian internal management regulations that are not required by law within 3 years."

51. This Order is of an entirely different character. Not only does it direct agencies to repeal outdated regulations, but it requires that they repeal *two* regulations, outdated or otherwise, as a pre-condition to issuing any new one. Where an agency, in its discretion, cannot or will not repeal two regulations, the Order purports to authorize OMB to prevent the agency from issuing a new regulation. This Order is also unique in that it focuses solely on the compliance costs of regulation with no consideration of the corresponding public benefits.

52. Neither the Order nor the Guidance provides a mechanism for notifying the public whether and when a proposed (or possible) regulatory action might be delayed or abandoned due to the requirements of the Order. The Guidance further precludes agencies from publicly stating that the Order was the "basis or rationale, in whole or in part," for taking or not taking any regulatory action. By design, the Guidance thus leaves the public in the dark about the actual effect of the Order on agency rulemaking.

53. No constitutional or statutory provision cited by the President in the Order authorizes him to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits, and no such provision exists.

54. The OMB cannot lawfully deny an agency's request for exemption from this Order or otherwise prevent an agency from issuing a rule on the basis that the agency has not complied with the terms of this Order.

55. Together, the Order and the Guidance are self-executing in that they represent the Executive Branch's final word on the subject, and federal agencies must now comply with their substantive mandates.

## VI. IMPACTS OF THE ORDER AND OMB'S GUIDANCE

56. The Order—which was now issued over one year ago—has harmed and will continue to harm Plaintiff States in that it has the effect of preventing, delaying and/or discouraging the promulgation of federal regulations that would address important public health and safety issues and/or environmental concerns with which Plaintiff States are grappling.

57. Numerous regulations that were proposed by various federal agencies during the Obama Administration have not been finalized under the Trump Administration. The failure of agencies to finalize many of these regulations is attributable to the Order. The Administration itself has proclaimed the Order's effectiveness, stating that agencies are surpassing the "two-for-one" ratio and in fact "have issued 22 deregulatory actions for every new regulatory action"; that "agencies plan on achieving even more regulatory rollbacks in FY 2018 compared with FY 2017, and plan to issue at least three deregulatory actions for every one new regulation"; and that in "this Administration, agencies have withdrawn or delayed 1,579 planned regulatory actions."[3] Recently, EPA cited the Order as one of the bases for rescinding significant portions of its 2017 Accidental Release Prevention Requirements rule. 83 Fed. Reg. 24, 850, 24,873 (May 30, 2018)

[3] https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/ (last visited June 4, 2018).

(“Rescinding these provisions would also allow EPA greater flexibility to offset the incremental costs associated with other new regulations in accordance with E.O. 13771”).

### A. Specific Harms Resulting from Regulatory Actions (and Inactions) Attributable to the Order

58. Many of the proposed regulations that have not been finalized, at least in part as a result of the Order, address issues that are of critical importance to Plaintiff States. These include several rules to address energy conservation and GHG emissions and rules to improve vehicle safety on our nation’s roadways, as discussed below.

#### 1. Rules to Address Energy Conservation and GHG Emissions

59. In 2007, the Supreme Court held that Congress, in adopting the Clean Air Act, intended to create a statute that would adapt to new pollutants and new threats, such as GHG emissions and the threat of climate change. *See Massachusetts*, *supra,* 549 U.S. at. 532. Previously, in 1975, Congress passed the Energy Policy Conservation Act, which endeavored in part to reduce energy consumption. These are just two examples of statutes in which Congress vested substantial authority and responsibility in federal agencies to address pressing matters of national concern, namely the conservation of energy and the reduction of harmful pollutants.

60. Federal agencies’ delay or abandonment of energy efficiency measures is a failure to address increased energy demand. As energy demands increase, such failures to mandate more efficient use of energy by regulations will result in Plaintiff States expending greater resources to meet the demand. For example, Plaintiff States will be required to invest resources in energy infrastructure that is proportional to energy demand, both to produce energy and to transmit it to consumers. Regardless of the source, producing and transmitting energy generally poses some risk of harm to public health, safety, and/or the environment, and additional state resources must

be expended to mitigate these risks. Moreover, inefficient use of energy resources leads to additional energy costs for consumers and businesses.

61. Particularly with respect to fossil fuels, inefficient use of energy resources also leads to greater emissions of pollutants associated with the production, transmission and burning of those fuels, including GHGs. In 2009, the Environmental Protection Agency (EPA) found that GHGs endanger public health and welfare, particularly insofar as they cause and contribute to climate change.

62. The harms suffered by Plaintiff States from GHG emissions include:

a. increased heat deaths and illnesses due to intensified and prolonged heat waves;

b. increased ground-level ozone pollution, with concomitant increases in asthma, bronchitis, heart disease, and emphysema, as well as coughing, throat irritation, and lung tissue damage;

c. beach erosion, temporary and permanent inundation of portions of coastal state property, damage to publicly owned coastal facilities and infrastructure, and salinization of water supplies from accelerated sea level rise;

d. more frequent flooding from more severe rains and higher storm surges resulting in property damage and hazard to human safety;

e. diminished water supplies and adverse impacts to agriculture due to reduced snowpack and more frequent and severe droughts;

f. deaths, property damage, and impairment of air and water quality from increasingly more severe and damaging wildfires;

g. additional state emergency-response costs caused by more frequent and intense storm surges, floods, and wildfires; and

h. widespread loss of species and biodiversity, including the disappearance of hardwood forests from the northern United States.

63. These impacts are inflicting substantial social and economic costs on Plaintiff States. The adverse health impacts attributable to rising temperatures and diminished air quality impose a significant burden on state health care systems. Additionally, Plaintiff States have spent and will continue to spend significant resources addressing threats to critical infrastructure and preparing for and responding to ever-more-frequent and intense natural disasters.

64. In California, drought conditions beginning in 2012 left reservoirs across the state at record low levels, often no more than a quarter of their capacity. The Sierra snowpack—critical to California's water supply, tourism industry, and hydroelectric power—was the smallest in at least 500 years. The resulting water cutbacks threatened the livelihoods of farmers and fishermen alike. In the Central Valley, the drought cost California agriculture about $2.7 billion and more than 20,000 jobs in 2015 alone. In addition, the drought led to land subsidence, due to reduced precipitation and increased groundwater pumping, and contributed to the stress on forests threatened by pest invasions and fire. California has also documented a notable increase in average daily temperatures, rising sea level and coastal erosion, and an increase in the intensity and frequency of wildfires, including the worst fire season on record in 2017.

65. As with California, Oregon has experienced the ill-effects of climate change caused by global warming. It has seen an increase of number, intensity, and duration of wildfires over the last several decades, and has declared four drought emergencies in Oregon counties in 2018. Oregon faces increasingly higher temperatures, which results in low snowpack, and

correspondingly lower stream flow. Additionally, Oregon's coast faces similar risks as California's: increased erosion and flooding caused by sea level rise.

66. Plaintiff States have taken significant measures to reduce their own GHG emissions, but such efforts do not obviate the need for meaningful reductions on a national scale, nor do they relieve federal agencies of their statutory responsibilities to address the issue.

67. Methane emissions are a particular concern. Methane is 86 times more potent than carbon dioxide over a 20-year time period. By reducing methane emissions now, we can more quickly slow or reverse the rate of climate change in the near-term, buying time to develop adaptive strategies.

68. Federal rulemaking in this area has been and will be impacted by the Order. In some instances, the Administration has sought to delay or repeal existing rules and to shelve proposed rules that would reduce GHG emissions. For example, while EPA has final regulations to reduce emissions from municipal solid waste landfills under the Clean Air Act,[4] it has failed to comply with its duty to implement them and purports to be "reconsidering" them, and EPA included a stay of the rules on a list of "Completed Deregulatory Actions."[5] Similarly, while the Bureau of Land Management (BLM) has a final rule to reduce the waste of methane from the oil and gas operations, BLM has twice attempted to delay or suspend the regulation, and has classified the suspension as "deregulatory" for purposes of the Order.

69. Yet another example is the Federal Highway Administration's (FHWA) recent repeal of the Greenhouse Gas Performance Measure (GHG Measure) for the national highway system. The FHWA issued the final GHG Measure on January 18, 2017, and it became effective on

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[4] 81 Fed. Reg. 59276 (Aug. 29, 2016); 81 Fed. Reg. 59332 (Aug. 29, 2016).
[5] *See* https://www.epa.gov/laws-regulations/epa-deregulatory-actions (last visited June 4, 2018).

February 17, 2017. 82 Fed. Reg. 5,970 (January 18, 2017). Pursuant to the GHG Measure, state transportation departments were to track on-road GHG emissions within their jurisdictions and set locally appropriate targets for GHG emissions on national highways. According to the FHWA, it adopted the GHG Measure because, by incentivizing the funding of lower-GHG emitting transportation strategies, the rule would result in reduced national GHG emissions. *See, e.g.*, 82 Fed. Reg. at 6,001 (January 18, 2017) (anticipating that GHG Measure will influence decision-making and reduce GHG emissions); *id.* at 5,996-97 (agreeing that policies to reduce GHG pollution from transportation, such as the GHG Measure, are "essential to minimize the impacts from climate change"). But on May 31, 2018, the FHWA published notice of its repeal of the GHG Measure, stating "The FHWA initiated this rulemaking [to repeal the Measure] after reviewing existing and pending regulations pursuant to Executive Order 13771 and 13777." 83 Fed. Reg. 24,920, 24,922 (May 31, 2018).

70. In other instances, the Administration has failed to follow through with proposed rules, even after the agencies and stakeholders, including Plaintiff States, have expended considerable resources in developing them. The agencies' failures to complete these rulemakings are attributable to the Order, and the harms these failures cause Plaintiff States are plain. An example is set forth below.

#### 2. Energy efficiency standards for residential conventional cooking products

71. 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. Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy

efficiency that is technologically feasible and economically justified, and result in a significant conservation of energy. 42 U.S.C. § 6295(o)(3)(A) & (B).

72. In June 2015, the DOE proposed a rule under the EPCA to amend the energy efficiency standards for residential conventional cooking products, such as stoves and ovens. 80 Fed. Reg. 33030 (June 10, 2015). In doing so, the DOE confirmed that the proposed standard met the statutory criteria, that is, it (1) would result in significant conservation of energy; (2) was technologically feasible, and (3) was cost effective.

73. To establish that the latter criterion was met, the DOE was required to determine that the standard's benefits exceeded its costs according to seven specific statutory factors: (1) the economic impact of the standard on manufacturers and consumers of the products subject to the standard; (2) the savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard; (3) the total projected amount of energy (or as applicable, water) savings likely to result directly from the standard; (4) any lessening of the utility or the performance of the covered products likely to result from the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard; (6) the need for national energy and water conservation; and (7) other factors the Secretary of Energy considers relevant. 42 U.S.C. §§ 6295(o)(2)(B)(i)(I)-(VII); 6313(a)(6)(B)(ii).

74. In proposing the rule, the DOE estimated that the lifetime energy savings from residential conventional cooking products purchased over a 30-year period would amount to 0.76 quadrillion British thermal units (roughly equivalent to the energy consumed by 21 million

homes in the U.S. in a year), a savings of 5.9 percent relative to the energy use of products in a no-new-standards case.

75. The net benefits of the standard were also significant. The DOE estimated that the standard would impose an additional $42.6 million in increased equipment costs annually, but result in a *net* annual benefit of more than $339 million per year (using a seven percent discount rate). 81 Fed. Reg. at 60789. This annualized net benefit included more than $293 million in energy-bill savings for consumers, and more than $88 million in reduced air pollution benefits. (Using a three percent discount rate, annualized net benefits would be $429 million.)

76. These benefits included significant savings associated with reduced GHG emissions, including reduced carbon dioxide emissions (associated with the decrease in energy needed to power electrical appliances) and reduced methane emissions (associated with decreased natural gas consumption for gas appliances). By increasing the energy efficiency standard (i.e., reducing the energy consumption) of the subject appliances, the DOE projected that the proposed rule would reduce total GHG emissions by about 125 million metric tons per year (81 Fed. Reg. 60,784, 60,859), equivalent to the annual emissions of more than 26 million cars. Using the Social Cost of Carbon (a metric developed by a federal interagency working group), the DOE estimated that the present monetary value of the $CO_2$ emissions reductions alone (not taking into account, for example, the $CO_2$ equivalent emissions of methane and other GHGs) was $300 million to $4.5 billion. A significant portion of these benefits would have accrued to Plaintiff States in reduced costs attributable to climate-change impacts.

77. In September 2016, DOE issued a supplemental notice of proposed rulemaking. 81 Fed. Reg. 60,784 (2016). DOE was required by statute to publish a final rule no later than two

years after the original proposal—that is, by June 2017. 42 U.S.C. § 6295(m)(3)(A). To date, it has not done so.

78. In the Fall 2017 edition of the Unified Agenda, the DOE reported that the proposed rule is "Major," "Economically Significant," and subject to the Order.[6] As such, before the DOE can finalize the rule—and despite the fact that the rule's economic benefits outweigh its costs nine to one—the DOE must identify for repeal two existing regulations whose regulatory costs would offset the costs imposed by the rule. In doing so, the DOE would not take into account the regulatory benefits of the rules identified for repeal (which would almost certainly be greater than their costs). Were the DOE to complete this exercise—finalizing the rule at issue here and repealing two existing rules to offset its costs—the cumulative result would likely be a net loss of regulatory benefits.

79. Plaintiff States are generally preempted from imposing energy efficiency standards for residential conventional cooking products (among other consumer products) that are more stringent than the existing federal standard. 42 U.S.C. § 6297(b). Plaintiff States may petition for a waiver of federal preemption for products sold in their states; but, they cannot rely on this as a option with any certainty. It *may* apply only in unique circumstances, and in making such a petition, Plaintiff States must show that there are "unusual and compelling State or local energy … interests." 42 U.S.C. § 6297(d).

80. Each day the rule is delayed, an additional 342,500 metric tons of GHGs is emitted into the atmosphere, aggravating the climate change-related harms to Plaintiff States that are discussed above.

[6] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1904-AD15

81. In addition, by failing to impose the highest energy-efficiency standard that that is technologically feasible and economically justified, as required by law, the DOE is exacerbating the strain on Plaintiff States' energy resources and putting public health, safety, and the environment at risk.

### 3. Rules to Address Motor Vehicle Safety

82. Another example where states themselves cannot fully address an important public safety issue is in the area vehicle safety. By their very nature, vehicles can and do cross state lines; thus, even assuming a state were able to require a particular safety feature on vehicles sold in that state, this would not address vehicles sold elsewhere, and traveling in the state. Accordingly, states rely on federal standards to more fully address safety concerns. In the absence of federal safety standards, states will suffer proprietary injuries in the form of increased health care costs (which they bear for a substantial portion of their population), among other things.

83. The Motor Vehicle Safety Act was enacted "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. The Act mandates motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. *Id.* § 30111(a). "Motor vehicle safety standard" means a minimum performance standard for motor vehicles or motor vehicle equipment. When prescribing such standards, the National Highway Traffic Safety Administration (NHTSA) must consider all relevant, available motor vehicle safety information, and whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. *Id.* § 30111(a), (b).

84. In pursuit of its statutory mandate, and having carefully considered all of the required factors, the NHTSA in January 2017 proposed to require all new light vehicles to include V2V crash-avoidance technologies, 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. 3,854, 3,855–57 (January 12, 2017). When it proposed the rule, NHTSA claimed that V2V technology "has the potential to revolutionize motor vehicle safety … [and to] reduce the number and severity of motor vehicle crashes." *Id*. at 3,855. Further, NHTSA expects V2V technology to advance development of vehicle automation. *Id.* If finalized, the safety standard will be phased in over time, with costs that change over that period.

85. The total estimated vehicle costs per year range from $2 to $5 billion ($135–$300 per vehicle). *Id*. at 3,858. On the benefit side, NHTSA estimated that the technology "could potentially prevent 424,901–594,569 crashes and save 955–1,321 lives [annually] when fully deployed throughout the light-duty vehicle fleet." *Id*. NHTSA found that net positive benefits would be realized in 3-5 years, and by 2051, the proposed rule could reduce the costs resulting from motor vehicle crashes by $53 to $71 billion (expressed in today's dollars). 82 Fed. Reg. 3,854, 3,858-3,859, 4,007.

86. The benefits of the rule would accrue, in part, to Plaintiff States, considering that States bear a significant portion of the costs attributable to vehicle crashes. These include costs associated with health care, emergency response, damage to infrastructure, and lost economic activity.

87. Despite the net benefits to society, including benefits to Plaintiff States and their citizens, the DOT will not be able to promulgate this safety standard without repealing two or more existing regulations that impose equivalent or greater costs. (Though it does not matter if

the costs of the repealed rules are borne by entities other than the entities that will bear the costs of the new rule.)

88. In proposing the V2V rule, NHTSA stated, "Without 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.

89. Promulgation of the rule has been delayed or abandoned as a result of the Order. In February 2017—shortly after the Order was issued—DOT stated, "As DOT rulemaking priorities are being evaluated in accordance with Executive Order 13771, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of February." This entry was repeated for the months of March through July 2017.[7] Later, DOT moved this rulemaking from its "current agenda" to its list of "long term actions," listing the next action as "Undetermined" on a date "To Be Determined."

90. It would take years for the NHTSA to aggregate cost-savings sufficient to offset the cost of the proposed V2V rule, thus to issue the rule in compliance with the Order. Meanwhile, it could issue no other regulation and would have to focus exclusively on deregulatory actions to generate the necessary cost-savings.

91. During this delay, the Plaintiff States are deprived of the benefits identified in the proposed rule, and will incur costs associated with the additional demand on their health care and emergency-response systems, among other harms.

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[7] *See* DOT, Significant Rulemaking Reports by Year, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited June 4, 2018).

### B. Other Impacts of the Order on Plaintiff States

92. The number of present and future agency actions and inactions potentially predicated on this Order are myriad and diverse. The existence of this unlawful Order calls into question the lawfulness of agencies' decisions to repeal regulations as well as their inaction on any new regulation. That, in turn, places an additional burden on Plaintiff States to: (1) review agencies' actions and to identify failures to act, to determine if a legal challenge is appropriate; (2) determine whether to invest resources in developing and issuing their own rules to fill the regulatory vacuum; or (3) shoulder the burden of lost public health and environmental benefits resulting from agencies repeal or foregoing of regulation.

93. Collectively, Plaintiff States have already expended significant resources challenging discrete agency actions taken pursuant to the Order. These include unlawful actions to delay or suspend validly promulgated regulations. For example, one or more Plaintiff States are challenging EPA's failure to implement and enforce final regulations that seek to reduce emissions from municipal solid waste landfills under the Clean Air Act, as well as the Department of the Interior's unlawful "suspension" of regulations to reduce methane emissions from the oil and gas sector.

## FIRST CAUSE OF ACTION

## (Violation of Separation of Powers Doctrine)

94. The foregoing allegations are re-alleged herein by reference.

95. The President's powers are limited to those specifically conferred on him by the Constitution and federal statutes, and do not include any undefined residual or inherent power.

96. Agencies derive their rulemaking authority from statutes enacted by Congress, which prescribe the manner in which agencies are to regulate.

97. No constitutional or statutory provision authorizes the President to condition an agency's ability to exercise its statutory rulemaking authority on the requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits.

98. Any instance where the President, by Executive Order or otherwise, directs an agency to take an action that runs afoul of a statute or the legislative intent of Congress is a violation of the Separation of Powers doctrine.

99. The Order directs federal agencies to take actions that would violate Constitutional and statutory mandates, or otherwise run afoul of Congressional intent in several respects:

a. In promulgating a rule, an agency may not consider factors other than those Congress intended it to consider, as articulated in the enabling statute(s) and the APA. No statute authorizes an agency, in promulgating a new regulation, to consider the costs of other regulations issued in the same fiscal year or of regulations issued in prior years when determining whether to take regulatory action. Nor does any statute authorize federal agencies to condition issuance of a new regulation on the repeal of existing regulations to offset the new regulation's cost. The Order thus requires agencies to act in contravention of statutory authority.

b. The APA directs a reviewing court to set aside any agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). The Order requires an agency, in issuing a new rule, to consider factors (a) that Congress did not intend for it to consider; (b) that have no nexus to the substantive merit of the proposed rule; and/or (c) for which neither the Order nor the Guidance provide any logical basis, among other things. The Order thus

requires an agency, in promulgating a new regulation, to act in a manner that is inherently arbitrary and capricious, subjecting the regulation to mandatory set-aside under the APA.

c. Congress often grants agencies discretion to determine whether action is warranted to fulfill their statutory mandates. This discretion may be general, as where the legislature directs an agency to "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of a given statute (*see*, e.g., 26 U.S.C. § 989(c) (Secretary of the Treasury)), or specific, as where the Clean Air Act directs EPA to "review, and revise as necessary" standards for emission of hazardous air pollutants. 42 U.S.C. 7412(d)(6). The basis for this discretion (and, often, the basis for judicial deference to the agency's action on review) is the agency's deep expertise in a given area. The Order impermissibly commandeers an agency's discretionary authority by requiring that, instead of making decisions on the basis of its expertise and judgment, it act instead to fulfill arbitrary and irrelevant substantive requirements not set forth in the governing statute(s).

d. Many existing mandates direct agencies to weigh the relative costs and benefits of a proposed regulation before promulgating it, consistent with agencies' statutory duty to be logical and rational in their rulemaking. The Order imposes a cost analysis that requires an agency to consider the cost of a proposed regulation in relation not to that regulation's expected benefits, but to the costs of existing regulations in the agency's regulatory portfolio, shifting the regulatory focus from maximizing the net societal benefits of regulations to minimizing the private costs, in contravention of agencies' statutory duty.

e. An agency cannot take steps to comply with the Order (including considering the Order's mandates in any decision to propose, issue, or repeal a rule, or to revise or

delay a proposed rule) without violating the agency's enabling statutes or the APA. No judicial deference would be due an agency action taken under influence of the Order.

100. This court is authorized to enjoin any action by the Executive that "is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment." *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952).

101. Plaintiff States are irreparably harmed by the President's violation of the Separation of Powers doctrine insofar as the Order has caused and will cause the delay or abandonment of numerous federal regulations that would otherwise safeguard the health and well-being of Plaintiff States' citizens, natural resources, infrastructure, institutions, and economies, among other things.

102. By declaring the Order unlawful and setting it aside, this Court can redress this injury.

**SECOND CAUSE OF ACTION**
**(Violation of Take Care Clause)**

103. The foregoing allegations are re-alleged herein by reference.

104. The President has a constitutional duty to "take care that the laws be faithfully executed." U.S. Const., art. II, § 3. The Take Care Clause is violated where executive action undermines statutes enacted by Congress and signed into law.

105. The Order undermines the APA and those statutes that direct, authorize, or otherwise enable an agency to exercise discretion to achieve certain legislative goals.

106. The stated purpose of the Order is to manage the private costs of complying with federal regulations. By requiring agencies to make cost a primary concern of any regulatory

action, without regard for the countervailing societal benefits, the Order subjugates legislative goals related to public health, safety, and the environment to the interests of regulated entities.

107. The President's action issuing the Order thus violates the Take Care Clause.

108. This Court is authorized to enjoin any action by the Executive that "is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment." *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952).

109. Plaintiff States are irreparably harmed by the President's violation of the Take Care Clause insofar as the Order causes the delay or abandonment of federal regulations that would otherwise safeguard the health and well-being of Plaintiff States' citizens, natural resources, infrastructure, institutions, and economies, among other things.

110. By declaring the Order unlawful and setting it aside, this Court can redress this injury.

**THIRD CAUSE OF ACTION**
**(*Ultra Vires* action)**

111. The foregoing allegations are re-alleged herein by reference.

112. Neither the President nor an agency can take any action that exceeds the scope of their constitutional and/or statutory authority.

113. The Order and Guidance purport to prohibit agency rulemaking not in compliance with the Order and/or to authorize the OMB to reject or disapprove any proposed regulation where the agency has not complied with the Order's substantive requirements.

114. No authority—constitutional, statutory or otherwise—authorizes the President or the OMB to condition an agency's ability to exercise its statutory rulemaking authority on the

requirement that it offset the cost of any new rule by repealing at least two existing rules and/or consider the cost of the new rule in isolation of its benefits.

115. By issuing the Order and the Guidance, the President and the Director of the OMB, respectively, have acted outside the scope of their constitutional and statutory authority.

116. Any action taken by the OMB to *enforce* the Order or to otherwise preclude an agency from issuing a regulation on the basis that it has not complied with the Order would similarly be *ultra vires*.

117. The APA authorizes challenges to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

118. The OMB is an agency under the APA. 5 U.S.C. § 551(1).

119. This court is authorized to enjoin any action by the Executive that "is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment." *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952).

120. Plaintiff States have an interest in ensuring that the federal government, and each branch of it, acts within the defined bounds of its constitutional authority and a concomitant legal right not to be injured by *ultra vires* executive action.

121. Plaintiff States are irreparably harmed by these *ultra vires* actions insofar as the Order causes the delay or abandonment of federal regulations that would otherwise safeguard the health and well-being of Plaintiff States' citizens, natural resources, infrastructure, institutions, and economies, among other things.

122. By declaring the Order and Guidance unlawful and setting them aside, this Court can redress this injury.

**FOURTH CAUSE OF ACTION**
**(*Violation of the APA*)**

123. The foregoing allegations are re-alleged herein by reference.

124. The APA requires this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

125. The OMB is an agency under the APA. 5 U.S.C. § 551(1).

126. The OMB issued Guidance to assist agencies in complying with the Order.

127. Together, the Order and the Guidance represent the Executive Branch's final word on the subject, and purport to be binding on federal agencies, which must now comply with its dictates. As such, the Guidance constitutes a final "agency action" and is subject to review under the APA. 5 U.S.C. §§ 551(1), (13), 704.

128. The Guidance assists agencies in complying with the Order's directive to repeal two regulations for each new regulation they promulgate and to ensure that the total "incremental cost" of all new and repealed regulations is no greater than zero. These are substantive requirements that have no nexus whatsoever to the substance of the rulemaking and thus are arbitrary and capricious.

129. For the OMB to preclude an agency from issuing a rule otherwise authorized by statute on the bases that the agency has not repealed two existing regulations or that the agency has not offset the cost of the proposed rule is inherently arbitrary and capricious.

130. In issuing and enforcing the Guidance, the OMB has acted in a manner that is arbitrary, capricious, otherwise not in accordance with law; contrary to constitutional right,

power, privilege, or immunity; or in excess of statutory jurisdiction, authority, or limitations, and/or short of statutory right, in violation of the APA. 5 U.S.C. § 706.

131. Plaintiff States are irreparably harmed by the OMB's violation of the APA insofar as the Order causes the delay or abandonment of federal regulations that would otherwise safeguard the health and well-being of Plaintiff States' citizens, natural resources, infrastructure, institutions, and economies, among other things.

132. By declaring the Guidance unlawful and setting it aside, this Court can redress this injury.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully request that this Court:

1. Issue a declaratory judgment that the Order and the Guidance are unlawful on their face;

2. Issue a declaratory judgment that Defendants exceeded their authority in issuing the Order and the Guidance;

3. Issue a mandatory injunction compelling Defendants to set aside the Order and the Guidance;

4. Issue a mandatory injunction enjoining federal agencies from taking action to comply with the Order and the Guidance;

5. Award Plaintiff States their costs, expenses, and reasonable attorneys' fees; and

6. Award such other relief as the Court deems just and proper.

Dated: June 4, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on June 4, 2018, I caused a copy of the States' Motion to Intervene, Memorandum of Points and Authorities in Support, and Proposed Order to be filed electronically and that these documents are available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Megan K. Hey
MEGAN K. HEY
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