UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE STATE OF MISSOURI, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 4:21-cv-00287-AGF

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' opposition brief confirms that at least "[a]t present, this case is riddled with contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam). "The President, to be sure, has made clear his desire" that agencies use the Interim Estimates in rulemaking, *id.*—though only when doing so is already authorized by law. But the problem for Plaintiffs is that, until some agency actually takes some specific action, relying on the Interim Estimates, which affects regulated parties outside the Executive Branch, "[a]ny prediction how the Executive Branch might eventually implement this general statement of policy is no more than conjecture at this time." *Id.* And in the absence of a concrete application of the Executive Order, in a particular, final agency action that harms Plaintiffs, the Court cannot reach the merits.

"The case-by-case approach that this requires is understandably frustrating to" Plaintiffs, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990), who would prefer to invalidate Section 5 of the Executive Order and the Interim Estimates in their entirety and all at once. But that case-by-case approach "is the traditional, and remains the normal, mode of operation of the courts." *Id.* Article III courts "intervene in the administration of the laws only when, and to the extent that, a specific final agency action has an actual or immediately threatened effect." *Id.* (quotation omitted). Here, because that time has not yet come, the Court lacks subject-matter jurisdiction.

If the Court were to reach the merits, Plaintiffs' claims—which have narrowed and morphed as briefing has proceeded—would fare no better. Despite opening this case with allegations that the Executive Order "comes as a wolf," Am. Compl. ¶ 1, and "tears at the fabric of liberty," *id.* ¶ 5, Plaintiffs' latest brief hardly discusses the separation of powers at all. Plaintiffs all but concede their notice-and-comment claim. And they reduce their remaining claims to a conclusory assertion that the Executive Order and the Interim Estimates are *ultra vires*—citing no applicable statutory prohibition and failing to account for the President's (and OIRA's) explicit instructions to agencies to stay within any applicable statutory guardrails.

Whether for lack of standing or ripeness, the absence of a cause of action, or because they lack merit, all of Plaintiffs' claims should be dismissed.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION.

The two most obvious problems with Plaintiffs' claims—standing and ripeness—"each originat[e] in the case-or-controversy requirement of Article III." *Trump v. New York*, 141 S. Ct. at 535. Both require dismissal of the complaint in its entirety.

A. Plaintiffs lack Article III standing.

Plaintiffs have not carried their burden to establish "the irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Although Plaintiffs challenge Section 5 of Executive Order 13990 and the Interim Estimates, their alleged injuries are (1) speculative; (2) caused by future hypothetical agency regulations (rather than the Executive Order or the Interim Estimates); and (3) not likely to be redressed by the court order they seek.

1. Plaintiffs have not alleged a concrete, particularized, and actual or imminent injury-in-fact.

To support standing, "an injury must be concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). Plaintiffs' theory of injury assumes that they will be harmed by future agency regulations issued in reliance on the Executive Order and the Interim Estimates. It is thus undisputed that "a number of things must occur before [they] will suffer an actual or even an imminent injury." *Johnson v. Missouri*, 142 F.3d 1087, 1090 (8th Cir. 1998). To mitigate that problem, Plaintiffs invoke "commonsense," Pls.' Opp'n 14, and suggest Defendants have "exhibit[ed] a naiveté," *id.* at 15, in arguing that Plaintiffs' anticipated injuries are not "*certainly* impending," *Clapper*, 568 U.S. at 409. Article III demands more than such rhetoric.

For one, the Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 413. That is what Plaintiffs ask of this Court. Which agency might harm Plaintiffs? When? By what means? Under what authority? Relying in what way (if at all) on the Interim Estimates? Plaintiffs never say, because they do not (and cannot) know. Instead, Plaintiffs seem to assume that it is enough to predict

that, at some point, some agency will inevitably issue some rule that relies in some way on the Interim Estimates. *See* Pls.' Opp'n 20 (asserting "the U.S. Government averages roughly 4,000 rules a year").

That is not enough. "[A]llegations of future injury" must "be particular and concrete." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). If the bar were as low as Plaintiffs suggest, then the plaintiffs in *Summers v. Earth Island Institute* would have had standing.[1] After all, there was presumably little doubt in *Summers* that, at some point in the future, at least once, the Forest Service would make use of the challenged "regulations that exempt[ed] small . . . timber-salvage projects from the notice, comment, and appeal process used by the [agency] for more significant" actions. 555 U.S. 488, 490 (2009). Nonetheless, the Court granted certiorari to "determine whether respondents ha[d] standing to challenge the regulations in the absence of a live dispute over a concrete application of those regulations." *Id.* Its answer was no: "the plaintiffs lacked standing because they had failed 'to allege that any *particular* timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete' interest of the plaintiffs in the national forests." *Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 43 (D.D.C. 2015) (quoting *Summers*, 555 U.S. at 495) (emphasis altered). The Court rejected as insufficient for standing an affidavit about one individual's "plans to visit several unnamed national forests in the future," among other reasons "because it [did] not identify any *particular* site" or "*particular* timber sale." *Summers*, 555 U.S. at 495 (emphases added). Plaintiffs have (at least) the same problem—"in the absence of a live dispute over a concrete application" of the Interim Estimates in a *particular* agency action that has caused them (or will cause them) actual or imminent harm, *id.* at 490, Plaintiffs cannot carry their burden to demonstrate an Article III injury.[2]

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[1] Plaintiffs' response to the lengthy discussion of *Summers* (*see* Defs.' Br. 16-17) addresses only the separate point that bare procedural harms do not provide standing. *See* Pls.' Opp'n 9.

[2] Plaintiffs cite one proposed rule in which EPA "referenc[ed]" the Interim Estimates. Pls.' Opp'n 13 (citing 86 Fed. Reg. 27150). But EPA did not actually *rely on* the Interim Estimates to support that proposed rule, nor do Plaintiffs allege that the proposed rule has caused them any harm (or even that it *will* cause them harm, if finalized in the same form), so EPA's proposal has no bearing here. In any event, as Plaintiffs acknowledge, "*Congress* mandated that EPA reduce hydrofluorocarbon emissions by 85% in 15 years," and this proposed rule is just a first step in implementing that congressional command. Pls.' Opp'n 13 (emphasis added). The proposed rule offers no suggestion that E.O. 13990 in any way motivated or justified the agency's (proposed) action. *See* 86 Fed. Reg. at

Plaintiffs argue that "*Clapper* does not apply here because instead of merely authorizing the injury, . . . the Executive Order mandates the Interim Values." Pls.' Opp'n 14. Plaintiffs misunderstand the analogy to *Clapper*, in which plaintiffs lacked standing to challenge surveillance laws that "at most *authorize*[*d*]—but [did] not *mandate* or *direct*—the surveillance that respondents fear[ed]," making their allegations "necessarily conjectural." 568 U.S. at 412. Even if the Executive Order "mandates" the Interim Estimates, that is not the source of Plaintiffs' alleged injury. Instead, Plaintiffs fear future agency regulations. But neither the Executive Order nor the Interim Estimates "mandate or direct" issuance of any particular regulation. So *Clapper* forecloses Plaintiffs' theory of injury.[3]

Plaintiffs try to tighten the relevant causal chain by suggesting that "an agency promulgates a rule using the Interim Values because the President ordered it." Pls.' Opp'n 14. That description is both inaccurate and incomplete: although the President, by Executive Order, mandated publication of the Interim Estimates, he never "ordered" any agency to promulgate any "rule using the Interim Values"—let alone any particular rule that has caused (or imminently will cause) Plaintiffs harm. Nor do Plaintiffs account for the possibility that an agency will "use" the Interim Estimates, for example, solely to comply with the internal Executive Branch requirements of E.O. 12866 (*i.e.*, without relying upon a cost-benefit analysis to justify the rule). *See* Defs.' Br. 19-21.

In sum, Plaintiffs are surely correct "that federal agencies will follow an executive order from the President of the United States." Pls.' Opp'n 3. But that is not enough to show a "*certainly* impending" future injury, *Clapper*, 568 U.S. at 409, from a "concrete application" of the Executive

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27201. That is no surprise—often, "the Interim Estimates will have made no substantive difference to the outcome" of a rulemaking, and thus will have caused no injury. Defs.' Br. 19.

[3] In *Clapper*, the Supreme Court also noted that plaintiffs could "only speculate as to whether the Government will seek to use § 1881a-authorized surveillance (rather than other methods)," given that "[t]he Government has numerous other methods of conducting surveillance, none of which [was] challenged [t]here." 568 U.S. at 412-13. Much the same could be said here: Plaintiffs do not dispute Defendants' explanation of why it will be rare that the Interim Estimates will be outcome determinative in any rulemaking, *see* Defs.' Br. 19-21, given "the way that cost-benefit analysis is used—or, more often, not used—to justify agency rules" within the Executive Branch, *id.* at 21.

Order and the Interim Estimates, *Summers*, 555 U.S. at 494, in a "particular" agency action, *id.* at 495. Accordingly, Plaintiffs cannot show injury in fact.

2. Any injury would be traceable to future, hypothetical agency actions, not to the Executive Order or the Interim Estimates.

Even if Plaintiffs could show a certainly impending future injury, it would not be "fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Instead, all of Plaintiffs' alleged injuries will be caused, if at all, by future, hypothetical agency actions—not the Executive Order or the Interim Estimates. *See* Defs.' Br. 21-23.

Plaintiffs' latest brief (like the amended complaint, *see id.* at 23) is full of references to harms that Plaintiffs assume they will suffer from *future agency regulations*—rather than harms that have actually been caused (or will imminently be caused) by the Executive Order. For example, Plaintiffs assert that "they will imminently suffer future injury to their sovereignty and their pocketbooks *from future agency actions* using the Interim Values." Pls.' Opp'n 5-6 (emphasis added). Even excusing the speculation (and the unjustified use of the word "imminently"), that is a claim about harm "from future agency actions," *id.*—not the Executive Order. Likewise, even accepting uncritically "that *future regulations* will increase the costs on all manner of products Plaintiff States use to provide services," *id.* at 12 (emphasis added), that is no help to Plaintiffs' standing in *this* lawsuit, which challenges Executive Order 13990 and the Interim Estimates, not any specific or identified "future regulations."[4]

Citing *California v. Trump*, No. 19-cv-960-RDM, --- F. Supp. 3d ---, 2020 WL 1643858, at *9 (D.D.C. Apr. 2, 2020), Plaintiffs argue that their alleged future injuries can be traceable to the Executive Order and the Interim Estimates even if those things are not "but-for" causes of their injuries. Pls.' Opp'n 16. In *California*, states challenged an Executive Order that required agencies, when proposing a new regulation, to also identify two existing regulations to be repealed. *See* Exec. Order No. 13771 (Jan. 30, 2017). But there, though the plaintiffs alleged harm from *specific* agency actions they claimed had been affected by the Executive Order, the court still dismissed for lack of

[4] *See, e.g.*, Pls.' Opp'n 2 ("future agency rulemakings"); *id.* at 3 ("future rulemakings"); *id.* at 4 ("future agency proceedings"); *id.* ("future agency rulemakings"); *id.* at 5 ("future rulemakings of other agencies"); *id.* at 14 ("future agency regulation").

standing because the plaintiffs could not show "that any material delay in action or any agency action was caused by the Executive Order." *California v. Trump*, 2020 WL 1643858, at *8; *see also Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 12 (D.D.C. 2018) (dismissing a similar lawsuit for lack of standing because, among other reasons, plaintiffs "fail[ed] to allege facts sufficient to show that the relevant agency would have issued the rule absent the Executive Order"). Here, Plaintiffs do not even try to make that causal showing—indeed, they have not identified a single agency action that they claim harms them (let alone plausibly alleged that any such harm is traceable to the Executive Order or the Interim Estimates).

Plaintiffs try to water down the causation requirement, purporting to quote the Supreme Court as having said that the "alleged injury need only be fairly traceable, not directly traceable." Pls.' Opp'n 16 (purportedly quoting *Collins v. Yellen*, No. 19-422, 594 U.S. ---, slip op. at 19 (June 23, 2021)). In fact, no such language appears in *Collins*, which describes the requisite showing in stricter terms—even using the word "directly." 141 S. Ct. 1761, 1779 (2021) ("[B]ecause the shareholders' concrete injury flows *directly* from that amendment, the traceability requirement is satisfied.") (emphasis added). Regardless, although the Supreme Court has elsewhere used the phrase "fairly traceable," Plaintiffs still must allege an "injury . . . that is fairly traceable *to the challenged conduct* of the defendant." *Spokeo*, 136 S. Ct. at 1547 (emphasis added); *accord Collins*, 141 S. Ct. at 1779. That showing requires a more direct causal link than Plaintiffs allege here.

None of this should be news to Plaintiffs, nine of whom were on the wrong side of this very issue before the Supreme Court just last month. In *California v. Texas*, the Supreme Court dismissed a challenge to the Affordable Care Act for lack of standing because the statutory provision that the plaintiffs challenged—the individual mandate to buy health insurance—was *not* the provision that actually caused their alleged injuries. *See* 141 S. Ct. 2104, 2119 (2021) ("To show that the [individual mandate] is unconstitutional would not show that enforcement of any of these other provisions violates the Constitution. . . . The Government's conduct in question is therefore not 'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain . . . .") (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Justice Alito—in dissent—relied on the same sort of

argument (and the same interpretation of *Allen*) that Plaintiffs do here. *Compare California v. Texas*, 141 S. Ct. at 2130 (Alito, J., dissenting), *with* Pls.' Opp'n 16. But that view attracted only two votes. And here, the disconnect is far wider: although it is Section 5 of the Executive Order and the Interim Estimates that Plaintiffs argue is unlawful, their alleged injuries (if any) would stem from future "more restrictive regulatory policies in innumerable areas" across the Executive Branch. Am. Compl. ¶ 129. Accordingly, Plaintiffs cannot show traceability.[5]

3. Plaintiffs' alleged injuries are not redressable by a victory in this lawsuit.

a. Even if Plaintiffs could show injury in fact and traceability, they would still lack standing, because it is not "*likely*, as opposed to merely speculative, that the[ir] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotations omitted, emphasis added). Plaintiffs hardly dispute the core premises of Defendants' redressability argument. They confirm that the only relief they now seek is an order requiring the Interim Estimates to be considered non-binding. *See* Pls.' Opp'n 18. Plaintiffs also seem to accept that "with or without any binding directive, agencies often may (and sometimes must) consider the social costs of greenhouse gases." Defs.' Br. 24. Likewise, they seem to acknowledge that, in the absence of a uniform approach set by the President, "Plaintiffs could face higher social-cost estimates." Pls.' Opp'n 18 (quoting Defs.' Br. 18). These concessions compel the conclusion that Plaintiffs have failed to establish that it is likely (rather than speculative) that their alleged injuries will be redressed by an order that the Interim Estimates are not binding.

Instead, Plaintiffs primarily argue that none of this matters. In their view, even if the result of a "victory" in this case is that agencies decide to use estimates identical to or higher than those set by the Working Group, "[t]hat is irrelevant to claims that it is unlawful to bind all federal agencies with these Interim Values." *Id.* Plaintiffs are mistaken. Although the possibility that this lawsuit has no

[5] On both injury and causation, Plaintiffs rely on *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), but the unusual circumstances of that case—about efforts to add a citizenship question to the census—have little relevance here. There, the Supreme Court concluded that "the District Court did not clearly err in crediting *the Census Bureau's* [*own*] *theory* that the discrepancy [in response rates was] likely attributable at least in part to noncitizens' reluctance to answer a citizenship question." *Id.* at 2566 (emphasis added). Defendants have made no analogous concession here. *See also California v. Texas*, 141 S. Ct. at 2219 (distinguishing *Department of Commerce* on similar grounds).

real-world impact (even if Plaintiffs prevail) may be irrelevant to the *merits*, it is not irrelevant to standing. "Redressability is met where a favorable decision avoids, or at least delays, a regulatory burden." *City of Kennett v. EPA*, 887 F.3d 424, 432 (8th Cir. 2018) (quotation omitted). This case might do neither—even if the Court were to write an opinion agreeing with Plaintiffs on the law, the ultimate "regulatory burden" on Plaintiffs could be unchanged (or increased). But "[t]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Accordingly, it is "merely speculative," *Lujan*, 504 U.S. at 561, that prevailing in this lawsuit will actually redress Plaintiffs' injuries, and so they lack standing.[6]

b. As for Plaintiffs' claims against the President, there is no longer much (if any) disagreement. Plaintiffs "agree that an injunction may not issue against the President" and confirm that they "have not sought one against him." Pls.' Opp'n 19. And although Plaintiffs seem to think that they may nevertheless seek redress against the President through a declaratory judgment (contrary to the teachings of *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010)), the Court need not resolve that question here. All agree that (1) "the President cannot be compelled" by court order to take discretionary acts, Pls.' Opp'n 19, but (2) Plaintiffs can obtain an order against the President's subordinates (assuming, counterfactually, that the Court had jurisdiction, that Plaintiffs had a cause of action, and that Plaintiffs' claims had merit). Accordingly, Plaintiffs' claims against the President are not redressable, and the President should be dismissed as a Defendant.

4. Plaintiffs' remaining, miscellaneous bases for standing are meritless.

Plaintiffs also continue to assert other miscellaneous standing theories. Those theories all fail—even considered on their own terms, and ignoring all of the threshold problems discussed above.

[6] Plaintiffs overread *FEC v. Akins*, 524 U.S. 11 (1998), *see* Pls.' Opp'n 18, which arose in the unique context of informational standing. The Supreme Court recently clarified that *Akins* applies only when a plaintiff challenges the "denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (citing *Akins*, 524 U.S. at 11). In any event, there was no Article III standing in *TransUnion* because "the plaintiffs ha[d] identified no downstream consequences from failing to receive the required information." *Id.* (quotation omitted). Similarly here, in the absence of any likely real-world consequences from a ruling in their favor, Plaintiffs lack standing.

a. "[A]s a general matter, a State does not have standing as *parens patriae* to bring an action against the Federal Government." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 176 (D.C. Cir. 2019) (quotation omitted); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 354 (8th Cir. 1985). That well-settled principle—the so-called "*Mellon* bar"—is significant here, because many of Plaintiffs' standing-related allegations are not about direct injury to the Plaintiff States, but rather focus on potential harms to in-state businesses, state residents, or state economies, *see, e.g.*, Am. Compl. ¶ 184—none of which would be cognizable without a *parens patriae* hook. *See* Defs.' Br. 26-27. So, Plaintiffs try to rehabilitate their argument that *parens patriae* standing could apply here. *See* Pls.' Opp'n 4, 10, 12-13. In doing so, Plaintiffs rely almost entirely on one footnote from *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007), which they claim "squarely permitted," Pls.' Opp'n 4, this standing theory. In particular, Plaintiffs "read[] the footnote as establishing an exception to the *Mellon* bar for litigation in which a State does not challenge the validity of a federal statute but instead sues the federal government to assert the State's own rights or those of its citizens under federal statutes." *Gov't of Manitoba*, 923 F.3d at 181 (quotation omitted); *see* Pls.' Opp'n 4, 12-13.

Plaintiffs misread *Massachusetts v. EPA*. While that opinion references *parens patriae* standing in footnote 17, the Court found that Massachusetts had standing because of evidence of "a particularized injury [it suffered] in its capacity *as a landowner*." 549 U.S. at 522 (emphasis added). In particular, the Supreme Court relied on unchallenged affidavits demonstrating that Massachusetts owned, operated, and maintained "a substantial portion of the state's coastal property," and that rising sea levels caused by climate change had begun to diminish that property. *Id.* at 522-23 & n.19; *see also* Pls.' Opp'n. 2-3. So the holding in *Massachusetts v. EPA* was not based on a *parens patriae* theory.

Plaintiffs cite no authority for the proposition that footnote 17 of *Massachusetts v. EPA* carried out a silent revolution in *parens patriae* standing, and several courts have explicitly rejected that view. As the D.C. Circuit put it, "the Supreme Court had no need to carve out an exception" to the usual rules on *parens patriae* standing in "*Massachusetts v. EPA* because Massachusetts did not sue in its *parens patriae* capacity." *Gov't of Manitoba*, 923 F.3d at 182. And "Missouri's reading of footnote seventeen, if adopted, would establish an exception that makes little sense in light of the vertical federalism

interest" at stake. *Id.* at 183; *see also Iowa ex rel. Miller*, 771 F.2d at 355 ("Although we recognize the considerable importance that the State of Iowa and its citizens place on the continued vitality of agriculture in the state's economy, we cannot allow the State to proceed as *parens patriae* in this case. To do so would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system."). In sum, "a State may not use that doctrine to sue the United States." *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (distinguishing *Massachusetts v. EPA*).[7]

b. Plaintiffs double down on the idea that they have standing solely because they "have suffered a procedural injury." Pls.' Opp'n 8. Plaintiffs seem to believe that because they allege that Defendants violated the law (here, the APA's notice-and-comment requirements), they have standing. But if that were enough, standing requirements would be meaningless. To the contrary, plaintiffs "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Spokeo*, 136 S. Ct. at 1550; *see Summers*, 555 U.S. at 496-97 (same); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 929-31 (8th Cir. 2016) (same). Indeed, the foundational case on Article III standing in the modern era—*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-73 (1992)—reversed the Eighth Circuit's reliance on a similar theory, which the Supreme Court pejoratively described as "remarkable," *id.* at 572.

On this point, Plaintiffs try to distinguish *Summers*—just one of the cases cited by Defendants for this principle—as arising under different facts, *see* Pls.' Opp'n 9, but it is the relevant *legal* principle that is fatal to their argument. And Plaintiffs do not even attempt to distinguish any of the other

[7] Similarly unavailing is Plaintiffs' repeated (yet largely unexplained) reliance on the idea that "states are 'entitled to special solicitude'" in the standing analysis. Pls.' Opp'n 10-11 (quoting *Massachusetts v. EPA*, 549 U.S. at 520). Although the precise meaning of "special solicitude" is elusive, it makes little sense to think it could override the *Mellon* bar on states' *parens patriae* standing to sue the federal government—a rule that only applies to states in the first place. And the most recent Supreme Court decision about state standing—*California v. Texas*, 141 S. Ct. 2104 (2021)—does not cite *Massachusetts v. EPA* at all, nor even acknowledge (let alone rely on) the "special solicitude" language on which Plaintiffs here so heavily rely. Plaintiffs also argue that the concept of "'special solicitude,' is especially crucial where, as here, unilateral Executive action vitiates the States' key protection in the federal constitutional structure—representation in Congress." Pls' Opp'n 12-13. That argument sounds in the merits rather than standing but, in any case, the Executive Order has no effect on anyone's representation in Congress.

authority (discussed above) on this point from the Supreme Court or the Eighth Circuit—all of which is equally binding here. Nor do Plaintiffs cite any authority that affirmatively supports their position.[8]

c. Plaintiffs try a new standing argument: that "the Interim Values threaten specific tax revenues generated from royalties on fossil fuels." Pls.' Opp'n 11. This speculative theory cannot be found in the complaint (which is presumably why it is supported exclusively with citations to internet hyperlinks, rather than actual allegations). *See id.* The Court can therefore disregard it: "the complaint may not be amended by the briefs in opposition to a motion to dismiss," so this argument is "not properly before the district court." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1022 (8th Cir. 2012).

In any case, "loss of general tax revenues as an indirect result of federal policy is not a cognizable injury in fact." *El Paso Cty. v. Trump*, 982 F.3d 332, 339 (5th Cir. 2020); *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) (same); *Iowa ex rel. Miller*, 771 F.2d at 353 (same). *Iowa ex rel. Miller* is instructive. There, "the State allege[d] that" as a result of agency action, "agriculture production will suffer, which will dislocate agriculturally-based industries, forcing unemployment up and state tax revenues down." 771 F.2d at 353. But because that alleged loss in tax revenue was "largely an *incidental* result of the challenged action," *id.* (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976)) (emphasis added), Iowa lacked standing. So too here.[9]

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[8] It matters little, but Plaintiffs also misinterpret *Summers*. *See* Pls.' Opp'n 9 ("*Summers* merely stands for the unremarkable proposition that a plaintiff lacks an injury to challenge procedural regulations after settling the substantive claim causing the injury."). There, plaintiffs challenged Forest Service procedural regulations *and* an application of those regulations to the "Burnt Ridge Project." 555 U.S. at 490-91. But by the time the case came to the Supreme Court, the parties had settled their dispute over the Burnt Ridge Project, leaving only a challenge to the regulations, in the abstract. *Id.* at 491-92, 494. Once the only harm remaining was procedural injury—rather than harm arising from *application* of the regulations to a specific project—the plaintiffs lacked standing. As the Supreme Court put it, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.* at 496.

[9] Plaintiffs use conclusory buzzwords like "*specific* tax revenues" and "*direct* financial stake" to try and squeeze within precedents like *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), and *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1981). Pls.' Opp'n 11 (emphases added). But there is nothing "direct" or "specific" about the hypothesized loss of revenue here, where Plaintiffs assert vaguely that they "receive royalty and other payments based on fossil fuel productions that are threatened by increasing energy costs to reduce demand," without reference to any specific agency action that actually causes a concrete loss. *Id.* And even setting aside the plausibility of that causal

d. Defendants previously addressed Plaintiffs' allegations that "every aspect of Americans' lives" will supposedly get more expensive, "from their cars, to their refrigerators and homes, to their grocery and electric bills." Am. Compl. ¶ 5. Plaintiffs alleged that they—like everyone—are "regular purchasers of regulated products," which allegedly "will now become more expensive due to increased regulations." *Id.* ¶ 179. But even "taking Plaintiffs' allegations at face value, unless and until the Executive Order is applied in a future agency action that directly affects these Plaintiffs in some *particularized* way, Plaintiffs' interest in the Executive Order's legality is the same as anyone else's: an 'undifferentiated, generalized grievance about the conduct of government.'" Defs.' Br. 27 (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). Plaintiffs failed to respond, conceding the point. *See, e.g.*, *Huskey v. Colgate-Palmolive Co.*, 486 F. Supp. 3d 1339, 1349 (E.D. Mo. 2020) (collecting cases).

e. Plaintiff Missouri continues to rely on its own "'no stricter than' statute," which Plaintiffs believe "effectively requires Missouri, as a matter of law for most clean-air programs, to enforce . . . the clean-air standards adopted by EPA, including those standards that incorporate and rely upon the Interim Values." Am. Compl. ¶ 178. Defendants already explained (Defs.' Br. 28-29) that any injury caused by *Missouri* law is self-inflicted, and Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 416. Plaintiffs quibble over what, exactly, it means for an injury to be self-inflicted, *see* Pls.' Opp'n 13, but they fail to respond to Defendants' primary argument: that "if EPA one day *does* adopt new clean-air standards that rely on the Interim Estimates, *and* they cause concrete harm to Plaintiffs, Plaintiffs can challenge them then." Defs.' Br. 28. In fact, Plaintiffs seemingly embrace that premise, arguing that "Missouri is injured *when the EPA changes standards* based on the alleged social benefits accruing to more expensive 'green' technologies." Pls.' Opp'n 13 (emphasis added). Precisely. If EPA ever issues new clean-air standards that rely on the Interim Estimates, and if those standards cause Missouri concrete injury, then Missouri can sue the EPA—that is, via a petition for review filed directly in the Court of Appeals. *See* 41 U.S.C. § 7607(b)(1). But

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chain, it is hardly "direct" or "specific"—and significantly less so than the argument that the Eighth Circuit rejected in *Iowa ex rel. Miller v. Block*.

that is no help to Plaintiffs in *this* lawsuit, which challenges (in district court) the Executive Order and the Interim Estimates, rather than any EPA action.[10]

B. Plaintiffs' claims are not ripe.

For similar reasons, this case is not ripe: Plaintiffs must wait "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the [Executive Order] to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

1. On the question of "the hardship to the parties of withholding court consideration," *Duffner v. City of St. Peters*, 930 F.3d 973, 977 (8th Cir. 2019) (quotation omitted), Plaintiffs barely respond to Defendants' primary argument: because they can sue later—*i.e.*, when faced with a concrete *application* of the Executive Order, in a specific agency action that causes them harm—they cannot sue now. *See* Defs.' Br. 30-37. In response, Plaintiffs assert without basis that "Defendants seek to place Plaintiffs in a Catch-22—now, they say that it is too early to challenge the Working Group's actions, but when another agency relies on them, they will say it is too late." Pls.' Opp'n 3. To the contrary, Defendants have expressly disavowed that approach. Although future (hypothetical) cases may raise case-specific issues, as a general matter, Plaintiffs *can* "challenge future agency regulations when they are actually issued, as long as those regulations cause them some concrete, particularized, and actual or imminent harm. And in those lawsuits, Plaintiffs can argue that the Executive Order or the Interim Estimates led the agency into legal error." Defs.' Br. 2; *see also id.* 31-32 (describing challenges to prior social-cost estimates). So there is no Catch-22—just the traditional "case-by-case approach" required by Article III. *Nat'l Wildlife Fed'n*, 497 U.S. at 894.[11]

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[10] Plaintiffs claim (also for the first time) to have suffered "a concrete and particularized injury" based on their "inability to compete on an even playing field." Pls.' Opp'n 2 (quoting *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019)). But that doctrine has no applicability here, because Plaintiffs do not allege that they face any discriminatory disadvantage relative to others.

[11] The only authority Plaintiffs cite for the idea that they could face this "Catch-22" problem in future lawsuits is *DHS v. Regents of the University of California*, 140 S. Ct. 1891, 1910 (2020), *see* Pls.' Opp'n 3—but there the Supreme Court exercised jurisdiction, and *rejected* all of the government's justiciability arguments (none of which were about standing or ripeness). The dictum that Plaintiffs partially quote (shorn from context), was about what the Court called "a unique statutory provision,"

Plaintiffs suggest that they need to litigate now because future comments opposing the Interim Estimates "will be disregarded." Pls.' Opp'n 2. But OIRA guidance about E.O. 13990 conclusively refutes their pessimism: whenever "required by principles of administrative law, the agency must make its benefit-cost analysis (including any use of the 2021 interim estimates and methodological choices made with respect to the 2021 interim estimates, as well the agency's rationale for those choices) available for public notice and comment." OIRA Guidance at 2.[12] And if an agency decides to "take final action in reliance on a benefit-cost analysis that includes estimates of the social cost of greenhouse gas emissions, the agency must respond to any significant comments on those estimates and ensure its analysis (including any use of the 2021 interim estimates) is justified as not arbitrary or capricious." *Id.* No comments will be "disregarded." Pls.' Opp'n 2.[13]

To be sure, in addressing comments, an agency might not agree with Plaintiffs on the *substance* of how to account for the social costs of greenhouse-gas emissions (with or without the Executive Order). But that is no answer to Defendants' ripeness argument. If an agency rejects their comments and takes some action that Plaintiffs consider to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," then Plaintiffs can challenge it. *See* 5 U.S.C. § 706(2)(A). If a court agrees with Plaintiffs, the action will be set aside. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*

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id. at 1910, in the Immigration and Nationality Act—a statute that has nothing to do with this case. In any event, the Supreme Court expressly declined to consider the argument that Plaintiffs (vaguely) reference. *See id. Regents* has no relevance here.

[12] Plaintiffs disparage the OIRA guidance as "untimely" and "attorney-prepared," Pls.' Opp'n 22, but they rightly do not attribute any legal significance to those complaints. Tellingly, as to the *substance* of the guidance, Plaintiffs say little—and what they do say suggests that this lawsuit is unnecessary to protect their rights. *See* Pls.' Opp'n 22 ("[The OIRA guidance] states what Plaintiff States have been saying here: 'statutory requirements must dictate whether and how the agency monetizes changes in greenhouse gas emissions.'") (quoting OIRA Guidance at 2).

[13] Plaintiffs also seem to have overlooked the possibility that the APA *itself* might require deviation from the Interim Estimates (*i.e.*, to avoid a finding that agency action is arbitrary and capricious). To be sure, that is unlikely to happen in the short term, because the current view of the Executive Branch is that the Interim Estimates represent the best available science. *See* OIRA Guidance at 2 (explaining why "the 2021 interim estimates . . . will *often* provide the best available method for monetizing the value of increases or decreases in greenhouse gas emissions resulting from or related to federal agency actions") (emphasis added). But, at least theoretically, the APA itself is one of the "applicable statutes," *id.*, which might require agencies to deviate from the Interim Estimates in a given rulemaking. *See* E.O. 13990 §§ 5(b)(ii), 8(b).

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Neither the Executive Order nor the Interim Estimates alters those basic principles of administrative procedure or APA litigation.

2. Plaintiffs quote a passage from *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998), that itself quotes a forfeited argument the Supreme Court did not address, *see* Pls.' Opp'n 20—but the actual holding confirms that Plaintiffs' claims are not ripe. In *Ohio Forestry*, the Court held that a challenge to the agency's "forest plan" for a particular National Forest was not ripe, because, notwithstanding finalization of the overall plan, "before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court." 523 U.S. at 734. The same is true here: before any new regulatory burdens are actually imposed, some agency must, for example, issue a notice of proposed rulemaking, consider comments, and "(if challenged) justify the proposal in court." *Id.* And Plaintiffs "will have ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Id.*

After Defendants filed their brief, a federal court dismissed on grounds of standing and ripeness a very similar challenge to a 2020 rule issued by the Council on Environmental Quality (CEQ), which "is the federal agency charged with overseeing the implementation of [the National Environmental Policy Act (NEPA)]" across the Executive Branch. *Wild Va. v. CEQ*, --- F. Supp. 3d ----, 2021 WL 2521561, at *2 (W.D. Va. June 21, 2021). Among other things, the CEQ rule "exempts certain categories of activities from the NEPA process entirely." *Id.* Plaintiffs argued that the rule violated the APA. *Id.* at *3. The court dismissed as unripe, explaining that although "the plaintiffs may have valid concerns about how the 2020 Rule will impact projects in their areas," we "simply do not know how each agency will interpret" it. *Id.* at *11. Instead, "[w]hen a *particular* agency renders a decision on a *particular* project following a procedure that, in the plaintiffs' view, does not meet the requirements of NEPA, the plaintiffs will then be able to pursue a legal challenge" to that specific agency action. *Id.* at *8 (emphases added). The same reasoning applies here.

3. Also on the subject of NEPA, Plaintiffs assert that "the Executive Order purports to bind agencies to use the Interim Values [when] engaging in NEPA processes." Pls.' Opp'n 21; *see also id.*

("[F]ederal agencies are required to use the Interim Values, and as a result, so will state actors."). Plaintiffs are mistaken. To be clear: at present, neither the Executive Order nor the Interim Estimates triggers *any* legally binding NEPA-related obligations for federal agencies—let alone for States. *See* Defs.' Br. 28, 33; *cf. Missouri v. Yellen*, No. 4:21-cv-376-HEA, --- F. Supp. 3d ---, 2021 WL 1889867, at *4-5 (E.D. Mo. May 11, 2021) (dismissing for lack of standing and ripeness in part based on representations that the United States "do[es] not agree with the 'broad interpretation' proposed by Missouri" of the challenged statute). Plaintiffs should welcome that confirmation, rather than refusing to take yes for an answer, contrary to their own apparent interests.

In any event, Plaintiffs' interpretation is baseless. "The Executive Order applies to 'all executive departments and agencies' of the *federal* government, E.O. 13990 § 1"—it does not apply to states. Defs.' Br. 28. And even as to the federal government, "no decisions have yet been made as to whether (and to what extent) the Executive Order applies *at all* outside the context of agency regulations," making any NEPA consequences entirely speculative. *Id.* (citing E.O. 13990 § 5(b)(ii) (the President requesting "recommendations" by September on the applicability of the Interim Estimates outside the context of regulations)). In addition, "NEPA does not require *any* agency to conduct a cost-benefit analysis when preparing an analysis of environmental impacts, and federal agencies frequently do not do so." Defs.' Br. 28 (citing 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1502.22 (2020)). That resolves the matter because, "at present, Section 5 of the Executive Order only governs when an agency monetizes the cost of greenhouse-gas emissions in a cost-benefit analysis." *Id.* (citing E.O. 13990 §§ 5(a), (b)(ii)(A); Feb. 2021 TSD at 9). Plaintiffs do not respond to these arguments.[14]

[14] Defendants also cited recent guidance from the Department of the Interior, which states "that the Working Group's social-cost estimates 'can be a useful measure' in some NEPA-related contexts," but does "not yet *mandat[e]* their use by the agency in any context other than rulemaking." Defs.' Br. 33 n.17 (quoting Dep't of the Interior, Sec'y of the Interior Order No. 3399 (April 16, 2021), *available at* https://perma.cc/6ADG-ZWAN). That order also explicitly notes that additional guidance is forthcoming on this subject, further undermining Plaintiffs' assumption that there is some fixed and current legal obligation. *See id.* ("The Climate Task Force will work in coordination with [the Working Group] as additional guidance is developed regarding the application of SC-GHG to decision making, budgeting, and procurement by the Federal Government."). Somehow, Plaintiffs interpret even this order as proof that E.O. 13990 "reach[es] 'agency actions' that are more than just rulemakings now, before any further action by the Working Group or subordinate officers." Pls.' Opp'n 21. But they

Even if there *were* some binding NEPA-related obligation hidden in the Executive Order or the Interim Estimates, that would be no help to Plaintiffs here. At most, any such obligation would be relevant to a "future lawsuit challenging the use of the Interim Estimates in a specific agency action that triggers NEPA-related requirements"—rather than to *this* lawsuit which challenges only the Executive Order and the Interim Estimates on their face and in their entirety. Defs.' Br. 28 (citing *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[S]tanding is not dispensed in gross."). That is precisely why the district court in *Wild Virginia* dismissed, on grounds of standing and ripeness, a challenge to CEQ's new Executive-Branch-wide NEPA regulations, in favor of future litigation in the context of specific agency actions. *See* 2021 WL 2521561, at *8.

In sum, Plaintiffs' unsupported assumptions about NEPA cannot solve their ripeness problem—if anything, they exacerbate it, confirming that their claims "involve[] contingent future events that may not occur as anticipated, or indeed may not occur at all." *Mo. Roundtable for Life v. Carnahan*, 676 F.3d 665, 674 (8th Cir. 2012) (quotation omitted).[15]

4. Defendants previously explained why Plaintiffs' ongoing participation in a pending proceeding before Defendant Federal Energy Regulatory Commission provides an illustrative case study of the many ways in which Plaintiffs' approach to this litigation was problematic, and why Plaintiffs' claims were therefore not ripe. *See* Defs.' Br. 34-37. Plaintiffs offer no response.

II. PLAINTIFFS LACK A CAUSE OF ACTION.

Although the legal rubric underlying Plaintiffs' claims has shifted during briefing, however they are framed, all of Plaintiffs' claims should be dismissed for the lack of any cause of action.

A. Plaintiffs do not challenge any final agency action.

Defendants' primary argument regarding the APA's final-agency-action requirement is that "neither the Executive Order nor the Interim Estimates requires *Plaintiffs* to do anything," Defs.' Br.

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cannot square their reading with the fact that the Executive Order itself explicitly contemplates future deliberations on this very subject. *See* E.O. 13990 § 5(b)(ii).

[15] For similar reasons, the speculative possibility of future NEPA-related consequences cannot support Article III standing. The same goes for Plaintiffs' (even more conclusory) assumptions about the effects of the Executive Order on various (largely unidentified) cooperative-federalism programs.

38—even if, at least in some contexts, the Executive Order is binding on agencies. That is a problem for Plaintiffs, who do not dispute that "the second *Bennett* prong examines finality 'from the regulated parties' perspective,' *not* 'from the agency's perspective.'" *Id.* (quoting *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018)); *see also Sisseton-Wahpeton Oyate of the Lake Traverse Rsrv. v. U.S. Corps of Eng'rs*, 888 F.3d 906, 915 (8th Cir. 2018) (to satisfy the second prong of *Bennett v. Spear*, the challenged action "must inflict some legal injury upon the party seeking judicial review").

In response, Plaintiffs argue that the relevant "legal regime has changed," that it "will continue to change, and that '[n]o one will escape the burden of these regulatory costs'"—and that that is enough "at this stage" because showing final agency action "is not a heavy lift." Pls.' Opp'n 26 (quoting Am. Compl. ¶ 187). But it is not clear how Plaintiffs' speculation that the regulatory landscape "will continue to change," *id.*, could be *helpful* to their arguments that they are challenging a discrete and "final" action that represents the "consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Likewise, Plaintiffs' references to the future burden of regulatory costs imposed by not-yet-issued agency regulations cannot help them here, absent some allegation that the Executive Order *itself* imposes some new burden on regulated parties.[16]

Separately, Defendants previously explained that "whatever can be said about the President or the Working Group, all of the other Defendants should plainly be dismissed for the lack of any 'final agency action,' 5 U.S.C. § 704—indeed, any 'agency action' at all, *id.* § 551(13)." Defs.' Br. 39. Plaintiffs barely respond, stating only that those Defendants "are directly involved with the Working Group . . . and are necessary to afford relief to Plaintiff States." Pls.' Opp'n 19. But that Plaintiffs believe it necessary to name 17 different Defendants in order to award some relief is itself confirmation of the fundamental problems with their claims. Plaintiffs do not explain *why* they believe any or all of those Defendants are "necessary to afford relief," *id.*—though presumably it is because they are some of the many federal agencies and officials who might act, in the future, in a way that might *actually*

[16] Plaintiffs also do not dispute that Defendants' final-agency-action argument "appl[ies] equally to Plaintiffs' constitutional claim." Defs.' Br. 38-39 n.23.

cause Plaintiffs some actual or imminent injury. In any case, that is no response to Defendants' point: that the only actions at issue in *this* lawsuit are those of the President and the Working Group.

B. The Working Group is not an agency subject to the APA.

To state an APA claim, Plaintiffs must also show that the Working Group is an "agency" within the meaning of 5 U.S.C. § 701(b)(1). *See* Defs.' Br. 39-42. It is not. Contrary to Plaintiffs' contentions, *see* Pls.' Opp'n 4, 26-28, the Working Group *is* similar to President Reagan's Task Force on Regulatory Relief, which the D.C. Circuit found was not an agency in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993). Like that Task Force, the Working Group consists of high-ranking Executive Branch officials. *See* E.O. 13990 § 5(b)(i); *Meyer*, 981 F.2d at 1289. And the Working Group was established without permanent staff, leaving it to "borrow[]" members' personnel "as needed." *Meyer* 981 F.2d at 1296; *see also* E.O. 13990 § 5(b)(i).[17] Moreover, both entities were assigned important policymaking roles. *See* Exec. Order No. 12291 § 6(a)(2), 46 Fed. Reg. 13193, 13196 (Feb. 17, 1981) (Task Force would direct OMB as it "[p]repare[d] and promulgate[d] uniform standards for" identifying rules to review and developing regulatory analysis); E.O. 13990 § 5(b)(ii)(A)-(B).[18]

Of course, there are differences. The Working Group's scope of work, focused on greenhouse gas emissions, is *narrower* than that of the Task Force, which supervised government-wide regulatory reviews. *See* E.O. 13990 § 5(b)(ii); *Meyer*, 981 F.2d at 1289-90. And unlike the Task Force, the Working Group counts presidential staff among its members. *See* E.O. 13990 § 5(b)(i); *Meyer*, 981 F.2d at 1289. But on the whole, such differences suggest the Working Group wields even less authority, and less independently, than the Task Force. *Cf. Meyer*, 981 F.2d at 1297 (group "composed partially of senior White House staff and cabinet officers" is less likely an agency than one of only cabinet officers).

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[17] Plaintiffs suggest that Defendants' argument turns substantially on this point. *See* Pls.' Opp'n 26. But Defendants reference the Working Group's lack of dedicated staff as just one of a number of indications that the Working Group exercises no substantial independent authority. *See* Defs.' Br. 41. In any case, Plaintiffs acknowledge that the Working Group does depend on members' staff. *See* Pls.' Opp'n 27 (noting the request for comment on the February 2021 TSD was signed by OIRA staff).

[18] Though Plaintiffs contend that E.O. 13990 is novel in imposing substantive rather than procedural requirements, *see* Pls.' Opp'n 1, 4, *Meyer* demonstrates that there is nothing new or strange about imposing substantively "uniform standards" in the regulatory-review process.

As "[t]he key distinction" between the two, Plaintiffs assert that the Working Group is "vested with authority to set the Interim [Estimates] as it pleases and bind agencies directly," Pls.' Opp'n 27, while the Task Force "found it necessary to advise the President to put" instructions to the Executive Branch "in another Executive Order," *id.* (quoting *Meyer*, 981 F.2d at 1294). But Plaintiffs have it backwards: to the extent E.O. 13990 binds agencies, those obligations flow from *the President*, not the Working Group. *See* E.O. 13990 § 5(b)(ii)(A). And even if developing the Interim Estimates was an exercise of substantial authority, that alone cannot render the Working Group its own "agency," given that the President could revoke any or all of its authority at any time. *Compare* Exec. Order No. 13783 (Mar. 28, 2017) (disbanding Working Group), *with* E.O. 13990 (reestablishing Working Group).

Finally, Plaintiffs imply that it is somehow improper to consider whether the Working Group is an agency because they have not yet obtained discovery as to its "inner workings." Pls.' Opp'n 28. To the extent that Plaintiffs effectively seek reconsideration of the Court's recent case-management order, *see* ECF No. 34, their opposition to a motion to dismiss is not the appropriate mechanism. Regardless, where a complaint does not plausibly establish the elements of the plaintiff's claim, "he is not entitled to discovery, cabined or otherwise," *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009), and the absence of discovery is no obstacle to dismissal, *see Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 74 (D.D.C. 2019). Here, Plaintiffs have not plausibly alleged either that any agency has taken "final" action or that any final action was taken by an "agency." Thus, the Court should dismiss all of Plaintiffs' APA claims for lack of any cause of action.

C. Plaintiffs cannot invoke an equitable, non-statutory *ultra vires* cause of action.

To try and get around the lack of an APA cause of action, Plaintiffs recast their separation-of-powers and statutory-violation claims, asserting for the first time that both Counts I and II are "non-statutory" "*ultra vires*" claims. *See* Pls.' Opp'n 24-25. Even accepting the theoretical availability of such a cause of action (and excusing Plaintiffs' amendment-by-argument), they cannot invoke it here.

To be sure, in rare circumstances, the Supreme Court has recognized an *ultra vires* cause of action where, because Congress has not provided a cause of action, an "individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is

unauthorized by any law, and is in violation of the rights of the individual." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902). Thus, in *Leedom v. Kyne*, 358 U.S. 184 (1958), plaintiffs could challenge the certification of a bargaining unit that was "[p]lainly" an "attempted exercise of power that had been specifically withheld" and "deprived . . . employees of a 'right' assured to them by Congress." *Id.* at 189. "Central" to *Kyne* was that declining to recognize a non-statutory cause of action would leave no "meaningful and adequate means" to vindicate statutory rights. *Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991).[19]

This case bears no resemblance to those in which the Supreme Court has recognized a non-statutory *ultra vires* cause of action. Congress has not left Plaintiffs "to the absolutely uncontrolled and arbitrary action" of the government, *McAnnulty*, 187 U.S. at 110, nor would failing to consider Plaintiffs' claims now forever preclude "meaningful and adequate" review, *MCorp Fin., Inc.*, 502 U.S. at 43.[20] Instead, as explained above, Plaintiffs can obtain meaningful and adequate APA review when an agency relies on the Interim Estimates to justify an action that causes them some concrete harm. *Cf. Thermal Sci., Inc. v. Nuclear Regul. Comm'n*, 184 F.3d 803, 806-07 (8th Cir. 1999) (dismissing challenge to agency authority where agency had yet to determine its authority). Thus, even accepting Plaintiffs' reframing, the Court should dismiss Counts I and II for the lack of any valid cause of action.

III. PLAINTIFFS' CLAIMS ARE MERITLESS.

This Court need not reach the merits, but if it does, Plaintiffs' separation-of-powers (Count I), statutory-violation (Count II), and notice-and-comment (Count III) claims should all be dismissed.

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[19] These limitations on *ultra vires* review are a specific application of the broader principle (*see* Defs.' Br. 42-43) that courts do not imply non-statutory causes of action as a matter of course, but only in unusual cases where it would be inequitable not to. *See Key Med. Supply, Inc. v. Burwell*, 764 F.3d 955, 965-66 (8th Cir. 2014) (plaintiff lacked "a protected property or liberty interest," so there was no "*substantial* constitutional challenge capable of overcoming" the lack of a cause of action). If a plaintiff can bring some other cause of action, then an *ultra vires* claim will be unavailable. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

[20] Even the primary case that Plaintiffs rely on suggests that such claims are improper in a case like this. *See Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 48 (D.D.C. 2020) ("The Court doubts that Plaintiffs can bring an equitable claim when a statutory cause of action is available to it.").

A. The equitable, non-statutory *ultra vires* claims in Counts I and II lack merit.

In their amended complaint, Plaintiffs sought relief from a "violation of the separation of powers" in Count I, Am. Compl. 38, and from a "violation of agency statutes" in Count II, *id.* at 39. So Defendants assumed that Count I was an equitable constitutional claim, but that Plaintiffs had sought relief under the APA for the statutory violations alleged in Count II. Defs.' Br. 42-48. Now, Plaintiffs claim that *both* counts are "non-statutory" (*i.e.*, equitable) *ultra vires* claims. *See* Pls.' Opp'n 24-25. This framing renders them indistinguishable from each other on the merits, because "unconstitutional and *ultra vires* conduct" are "separate categories." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). In other words, if Count I challenges *ultra vires* conduct by the President, it appears that Plaintiffs do *not* challenge the President's *constitutional* authority. *See Eagle Tr. Fund v. USPS*, 811 F. App'x 669, 670 (D.C. Cir. 2020) ("[A] constitutional claim is separate from an ultra vires claim."). At best, then, Plaintiffs' two *ultra vires* claims concern alleged statutory violations by different Defendants (Count I the President, Count II the Working Group). So both claims fail for the same reason: Plaintiffs identify no relevant, unambiguous statutory limit applicable to either Defendant's actions.

1. Even assuming that an equitable, non-statutory *ultra vires* cause of action is available in this case, *contra* Section II.C and notwithstanding the eventual availability of APA review, Plaintiffs' claims fail. That is because Plaintiffs do not identify the kind of "plain violation of an unambiguous and mandatory" statutory provision, *Neb. State Legis. Bd., United Transp. Union v. Slater*, 245 F.3d 656, 659 (8th Cir. 2001) (quotation omitted), that satisfies the "very stringent standard" for *ultra vires* claims, *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009).

Pursuant to *Kyne*, it may be possible in some cases to "review an agency's action outside the review provisions afforded by [a] statute" provided that "the agency's action is in excess of delegated powers and contrary to a specific prohibition that is clear and mandatory." *Nucor Steel-Ark. v. EPA*, 2016 WL 4055695, at *2 (E.D. Ark. Apr. 13, 2016); *accord Thermal Sci., Inc. v. Nuclear Regul. Comm'n*, 29 F. Supp. 2d 1068, 1075 (E.D. Mo. 1998), *aff'd*, 184 F.3d 803 (8th Cir. 1999) (recognizing availability of *ultra vires* review where an agency "attempt[s] to exercise power specifically withheld by statute"). But the standard for pleading such a claim is high—much higher than that for the analogous APA claim

from which Plaintiffs now have seemingly retreated. *See Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) (noting "if [the plaintiff's] claims would fail review under the APA . . . , they could not succeed under any other vehicle"). In fact, the alleged violation must be beyond question, as the Eighth Circuit "has expressed a clear disinclination to accept plaintiffs' characterization of agency actions as *ultra vires* where is it possible to characterize a dispute merely as one of statutory interpretation concerning the scope of agency authority." *Key Med. Supply, Inc.*, 764 F.3d at 962; *see also Slater*, 245 F.3d at 660 ("a mere allegation of *ultra vires* action" does not warrant review). In short, *ultra vires* claims are "essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nyunt*, 589 F.3d at 449.

These claims are no exception. For one, Plaintiffs do not even acknowledge—much less satisfy—the relevant factors. *See Key Med. Supply, Inc.*, 764 F.3d at 963 (*Kyne* and its progeny "collectively illustrate the need to examine (1) the clarity and specificity of the bar on review; (2) the breadth of the Agency's statutory authorization; (3) the scope of any express statutory limits on the Agency's authority; and (4) the relationship between the action taken and these other three factors"). A more fundamental problem, though, is that Plaintiffs—while intoning that Defendants have "usurped legislative authority and exceeded any power granted to them by statute or Article II," Pls.' Opp'n 24—never identify any "*specific* limits on authority," *Key Med. Supply, Inc.*, 764 F.3d at 964, or explain how Congress has "specifically withheld" such authority, *Slater*, 245 F.3d at 659. Instead, they seek to shift the burden of pleading their claims to the government, faulting the government for not identifying "any statutory authority" that instructs the President and the Working Group to act as they have. Pls.' Opp'n 24-25. But that turns established *ultra vires* pleading standards on their head.

2. Substantively, Plaintiffs' arguments addressed to Count I are unavailing. They malign the OIRA Guidance that explicitly directs agencies to heed any applicable statutory constraints on their authority. *See* Pls.' Opp'n 23-24. But there is nothing improper about instructing agencies on the proper implementation of an executive order, even if that order is the subject of ongoing litigation. *See Public Citizen*, 297 F. Supp. 3d at 14 (describing analogous OMB guidance as offering "important clarifications and refinements"). And though Plaintiffs imply that some limits were imposed by language on the cover of past TSDs, *see* Pls.' Opp'n 23, even accepting Plaintiffs' characterization,

those are not unambiguous *statutory* limits on the President's authority. Similarly, despite Plaintiffs' insistence on a selective reading, *see id*, E.O. 13990's instruction to *all* Executive Branch officials that it "shall be implemented in a manner consistent with applicable law," *id.* § 8(b), vitiates any contention that the President has issued a directive that contravenes any statutory prohibition (specific or otherwise).[21] And when Plaintiffs invoke the "presumption against extra-territoriality," Pls.' Opp'n 23—conflating extra-territorial *applications* of federal law with domestic *assessments* of extra-territorial effects—they only confirm that their claims raise, *at best*, a dispute about statutory interpretation, which is never sufficient on *ultra vires* review. *See Key Med. Supply, Inc.*, 764 F.3d at 962.[22]

3. Similarly, Plaintiffs have no meaningful answer to Defendants' argument, *see* Defs.' Br. 43-44, that they identify no statutory violation to support Count II. Per E.O. 13990, the Working Group cannot prevent an agency from carrying out its legal duty, *see id.* § 5(b)(ii), and no agency may presume that it can, *id.* § 8(b). And the OIRA guidance (at 2) puts the matter beyond any doubt. Whatever can be said for Plaintiffs' other allegations, *see* Pls.' Opp'n 25 (citing Am. Compl. ¶¶ 163-64), they do not show any "clear departure from [a] statutory mandate," *Slater*, 245 F.3d at 660, nor transgression of some "clearly marked boundar[y]," *West v. Bergland*, 611 F.2d 710, 717 (8th Cir. 1979). Instead, they are "mere allegation[s]" of *ultra vires* action insufficient to state a claim. *Slater*, 245 F.3d

[21] Citing *Hias, Inc. v. Trump*, 985 F.3d 309 (4th Cir. 2021), Plaintiffs assert that this language has no practical effect in this case because it "would nullify the clear and specific substantive provisions of the Order." Pls.' Opp'n 17. But *Hias* involved a very different savings clause, which the Fourth Circuit found was "purely theoretical" in practice. 985 F.3d at 325. Here, agencies will be able to discern when using the Interim Estimates would be inconsistent with a statutory command, so the Court "cannot ignore [the] repeated and unambiguous qualifiers imposing lawfulness . . . constraints" on the Executive Order's implementation. *Common Cause v. Trump*, 506 F. Supp. 3d 39, 47 (D.D.C. 2020) (Katsas, J.) (citing *Bldg. & Const. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002)).

[22] To the extent that Plaintiffs continue to press any distinct *constitutional* arguments, they are still meritless. *See* Defs.' Br. 44-48. Article II grants the President "general administrative control of those executing the laws," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010), and his subordinates "are duty-bound to give effect" to his directions "to the extent allowed by the law," *Allbaugh*, 295 F.3d at 32. As for *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *see* Pls.' Opp'n 24, as the D.C. Circuit put it, "had President Truman merely instructed the Secretary of Commerce to secure the Government's access to steel [t]o the extent permitted by law," his order, like President Biden's here, would have raised no constitutional problem. *Allbaugh*, 295 F.3d at 33.

at 660. Accordingly, whether considered under the APA (*see* Defs.' Br 43-48) or as non-statutory *ultra vires* claims, Counts I and II should be dismissed for failure to state a claim.

B. Plaintiffs have conceded their notice-and-comment claim.

Count III, which alleges that the Working Group violated the APA by failing to conduct formal notice-and-comment, fails for all the reasons in Defendants' prior brief. *See* Defs.' Br. 48-50. In response, Plaintiffs claim that, for purposes of Count III, "the parties only dispute whether the Interim Values are final agency action and whether the Working Group is an agency." Pls.' Opp'n 25. That is demonstrably wrong. Under the bolded heading "Plaintiffs' notice-and-comment claims are meritless," Defendants asserted two additional defenses: first, that "there was no notice-and-comment obligation here" because the Interim Estimates are not a legislative rule, and second, that even if they were, "any error was harmless" because Plaintiffs have had opportunities to comment on the Working Group's methodology and these estimates (prior only to inflation adjustments), and will have more in the future. Defs.' Br. 48. Plaintiffs do not respond to these arguments.[23] And because "a plaintiff's failure to address a defendant's arguments on a motion to dismiss operates as an abandonment of those claims," *Huskey*, 486 F. Supp. 3d at 1349 (quotation omitted); *accord Demien Const. Co. v. O'Fallon Fire Prot. Dist.*, 812 F.3d 654, 657 (8th Cir. 2016), the Court must dismiss Count III.

C. Plaintiffs have not stated any claim against Defendants other than the President or the Working Group.

Among its other defects, the amended complaint fails to allege any wrongdoing by any Defendant other than the President or the Working Group. *See* Defs.' Br. 50. Plaintiffs do not identify any such allegations in their latest brief, so those Defendants can now be dismissed on that basis.

CONCLUSION

For these reasons, all of Plaintiffs' claims should be dismissed.

[23] Plaintiffs do make passing reference to harmless error. *See* Pls.' Opp'n 18 (stating that for reasons relating to standing, "Defendants' harmless error arguments fail"). But that conclusory statement is insufficient to avoid forfeiture. And it is no response at all to Defendants' other merits argument: that the Interim Estimates are, at most, a "general statement of policy." Defs.' Br. 48-49.

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Respectfully submitted,

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