UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

THE STATE OF LOUISIANA, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 2:21-cv-01074-JDC-KK

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

More than three months after they filed this case, five months after the Interim Estimates were published, and six months after the President issued the Executive Order that they challenge, Plaintiffs now seek "an extraordinary remedy"—one "never awarded as of right," but instead only in circumstances of clear and immediate need. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In particular, they seek a preliminary injunction, Pls.' Mot., ECF No. 53, at 1, to prohibit federal agencies "from adopting, employing, treating as binding, or relying upon" the Working Group's estimates of the social cost of greenhouse gases, and to require uniform adherence to Plaintiffs' interpretation of non-binding guidance from the Office of Management and Budget, *id.* at 2.

The Court need not decide Plaintiffs' motion. Instead, Defendants' earlier-filed and already-fully-briefed motion to dismiss should be dispositive of the entire case. Indeed, just yesterday, a federal court granted in full the government's motion to dismiss a nearly identical lawsuit. *See Missouri v. Biden*, No. 4:21-cv-287-AGF, 2021 WL 3885590 (E.D. Mo. Aug. 31, 2021). As the court in *Missouri* explained in a thorough opinion rejecting the same standing and ripeness arguments that Plaintiffs advance here, "[t]here is simply no way to predict how the Interim Estimates will affect an agency's analysis, if at all, without resorting to sheer speculation." *Id.* at *9. In addition, Plaintiffs' claims are not ripe (among other reasons) because "[t]he Court cannot meaningfully engage with Plaintiffs' arguments *en masse*, divorced from the context of particular agencies operating under specific statutory delegations of authority." *Id.* at *13 (quoting Defs.' *Missouri* Mot. to Dismiss, ECF No. 28, at 37). Thus, as in *Missouri*, this Court should dismiss this entire case for lack of jurisdiction, and then deny Plaintiffs' motion for a preliminary injunction as moot.

Even if the Court separately considers Plaintiffs' motion, it should be denied. *First*, notwithstanding the rhetoric of their filings, Plaintiffs have not identified any harm that is even cognizable under Article III of the U.S. Constitution, much less sufficient to justify the extraordinary remedy of a preliminary injunction. In place of the immediate, substantial, and irreparable harms that they must present to warrant preliminary relief, Plaintiffs speculate about future, hypothetical agency actions, gesture at routine agency rulemakings (in which they can fully participate), and assert the sort

of procedural harms that (even were they cognizable) are properly redressed through ordinary litigation culminating in final judgment. Plaintiffs' lengthy delay in seeking preliminary relief—explainable only by the absence of any real, immediate, and substantial harm from the actions that Plaintiffs actually challenge—reinforces the stark contrast between the high bar Plaintiffs must meet and the unsupported speculation on which their motion rests. Ultimately, then, Plaintiffs' claims are "riddled with contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam). Whether framed as a standing or a ripeness problem, that central failing of Plaintiffs' pleadings deprives this Court of jurisdiction to award *any* relief at all. And, at a minimum, Plaintiffs have plainly failed to tender any evidence of irreparable harm that could support the issuance of any immediate injunction.

Second, Plaintiffs are not likely to succeed on the merits of their claims. For the reasons explained in Defendants' motion to dismiss, Plaintiffs have not met the constitutional minimum of standing, have asserted only unripe claims, and cannot identify any available cause of action. And even if Plaintiffs could find a way into federal court, their claims would still fail. The Interim Estimates were adopted following a careful, thoroughly explained assessment of various approaches to estimating the social costs of greenhouse gas emissions, and they are the product of Nobel-Prize-winning scientific models and methods that, despite their acknowledged limitations, offer the best available science to estimate these important costs. The decision to adopt them was an exercise of technical and scientific judgment entitled to this Court's greatest deference—neither arbitrary nor capricious, nor anything close. And because of their fundamentally interlocutory nature—the decision to use the Interim Estimates will be revisited again and again in particular factual and statutory contexts to ensure consistency with the law—the failure to invite additional public comments on the Interim Estimates in early 2021 does not warrant an injunction.

Finally, an injunction is not in the public interest. It is the President's duty, in the first instance, to faithfully execute the laws while weighing competing interests, to ensure democratic accountability over federal agencies. The Court should reject Plaintiffs' invitation to micromanage the President's policy discretion and his subordinates' scientific expertise, especially in these preliminary proceedings.

BACKGROUND

I. Factual Background

A. Requiring cost-benefit analysis is a longstanding presidential practice.

Because rulemaking requires federal agencies to exercise their discretion in making policy judgments, every President since President Nixon has imposed some requirement for federal agencies to assess the predictable consequences of proposed rules. *See* Curtis W. Copeland, Cong. Research Serv., RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, at 5-6 (June 9, 2009). In 1978, President Carter issued E.O. 12044, which established a requirement to provide a regulatory analysis for a subset of impactful rules. *See* Exec. Order No. 12044, *Improving Government Regulations*, 43 Fed. Reg. 12661 (Mar. 23, 1978). Then, in 1981, President Reagan took a decisive step to combine comprehensive regulatory-analysis principles with centralized regulatory review when he issued Executive Order 12291. *See* Exec. Order No. 12291, *Federal Regulation*, 46 Fed. Reg. 13193 (Feb. 17, 1981). Among other things, E.O. 12291 set general policies for agencies to follow in issuing new regulations, including an instruction that "to the extent permitted by law, . . . [r]egulatory action shall not be undertaken unless the potential benefits to society . . . outweigh the potential costs." *Id.* § 2(b). And, for the first time, it established a centralized review process, requiring agencies to prepare an analysis of major proposed regulations—including the costs and benefits of the proposed rule, and reasonable alternatives—and to submit that analysis to the White House's Office of Management and Budget (OMB). *See id.* § 3. Every President since has embraced the core premise of E.O. 12291: that an empirical, monetized assessment of the expected social and economic consequences of federal regulation—in other words, a cost-benefit analysis—should inform policymakers and the public about the predicted effects of significant agency decisions.

Executive Order 12866, issued by President Clinton, established the modern framework. *See* Ex. 2, Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Sept. 30, 1993). Like its Reagan-era predecessor, E.O. 12866 directs agencies to follow certain principles "unless a statute requires another regulatory approach." *Id.* § 1(a). And it establishes a detailed regulatory-review process to be coordinated by OMB and its Office of Information and Regulatory Affairs (OIRA) in

which all agencies, save "independent regulatory agencies," must participate. *Id.* § 3(b). For significant regulatory actions, E.O. 12866 requires an assessment of the anticipated costs and benefits of the agency's proposal. *See id.* §§ 6(a)(3)(B)-(C). Agencies are also directed to provide OIRA with a written explanation of why it opted for the proposed action and how it best meets the need for the action. *See id.* §§ 6(a)(3)(B)(i)-(ii), (C)(iii). OIRA then reviews the agency's action. *See id.* § 6(b)(2). If an agency proposes or finalizes a rule, one product of this process, often called a Regulatory Impact Analysis (RIA), is published alongside it. *See id.* § 6(a)(3)(E).

OMB guidance, in particular OMB Circular A-4, sets out non-binding recommendations to assist agencies in developing RIAs that comply with E.O. 12866. *See* Ex. 6, OMB, *Circular A-4* (2003) https://perma.cc/CVU2-QUCE. Among other things, Circular A-4 emphasizes that agencies "should monetize quantitative estimates whenever possible." *Id.* at 27. Furthermore, as Circular A-4 explains, a good cost-benefit analysis will monetize more than just direct effects: Agencies should include "any important ancillary benefits and countervailing risks." *Id.* at 26. And because the costs and benefits of regulations often accrue well into the future, the guidance describes how agencies should consider those future effects—namely, by choosing appropriate discount rates (including those that account for "intergenerational effects")[1] and selecting an end point "far enough in the future to encompass all the significant benefits and costs likely to result from the rule." *Id.* at 31-32.

Importantly, RIAs do not bind an agency's exercise of its statutory discretion. *See* E.O. 12866, prmbl. And because RIAs, standing alone, place no judicially enforceable limits on an agency's ability to choose among regulatory alternatives, the cost-benefit analysis in an agency's RIA is generally not subject to judicial review. *See, e.g.*, *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 670 (6th Cir. 2013) ("Executive Order 12,866 does not . . . provide a basis for rejecting final agency action."). Only in specific circumstances—such as when Congress specifies that agencies must consider costs and benefits, or when an agency chooses to adopt or justify a rule based on the cost-

[1] A discount rate is an interest rate used to convert future monetary sums into present-value equivalents. *See* OMB, *Circular A-4*, at 31-32. The higher the discount rate, the less value a future sum will have in present-day terms.

benefit analysis in its RIA—will an agency's cost-benefit analysis be subject to arbitrary-and-capricious review under the APA. *See, e.g.*, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 452 (5th Cir. 2021) (citing *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012)).

B. Federal agencies assess the costs and benefits of changes in greenhouse gas emissions when conducting cost-benefit analyses.

1. Past Federal Estimates of the Social Cost of Greenhouse Gases

There is a broad scientific consensus that human-source emissions of greenhouse gases (GHGs) are primary contributors to climate change. *See* Katharine Hayhoe et al., *Our Changing Climate in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, at 73 (2018); *see also* EPA, *Endangerment & Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496 (Dec. 15, 2009) (finding that motor-vehicle emissions of greenhouse gases "endanger both the public health and the public welfare of current and future generations"). To quantify how future emissions are expected to impact society, experts developed methods beginning in the early 1990s for estimating the net impacts—the good and the bad—of additional emissions of certain GHGs, including carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O). The resulting estimates—monetary values of the net damages anticipated to result from one additional ton of emissions of a particular gas in a given year—are described in scientific literature as the "social costs" of a greenhouse gas. Since 2007, following the Ninth Circuit's decision in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), federal agencies have employed estimates of the social cost of greenhouse gases (SC-GHG) to value projected reductions or increases in greenhouse gas emissions when preparing cost-benefit analyses.

Center for Biological Diversity involved a fuel economy rule issued by the National Highway Traffic Safety Administration (NHTSA). *See id.* at 1180-81. The rule was issued pursuant to the Energy Policy and Conservation Act of 1975 (EPCA), which directs the Secretary of Transportation to set fuel economy standards at "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a). The EPCA further specifies that the Secretary's decision must be based upon certain statutory considerations, including

"economic practicability." *Id.* § 32902(f). To fulfill this requirement, when NHTSA chose among possible standards, the agency relied on the cost-benefit analysis in its RIA. *See* NHTSA, *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*, 71 Fed. Reg. 17566, 17592 (Apr. 6, 2006).

NHTSA's cost-benefit analysis did not include any monetized estimates of the damages associated with GHG emissions. In the agency's view, at that time, the "extremely wide variation in published estimates of damage costs from greenhouse gas emissions" meant that "the value of reducing emissions of CO_2 and other greenhouse gases" was "too uncertain to support their explicit valuation and inclusion among the savings in environmental externalities." *Id.* at 17638. Various plaintiffs sued to challenge NHTSA's analysis, arguing that it was arbitrary and capricious for the agency to rely on a cost-benefit analysis that, effectively, assigned a monetary value of zero to the benefit of reducing global CO_2 emissions. *See Ctr. for Biological Diversity*, 538 F.3d at 1181.

The Ninth Circuit agreed. While acknowledging that "the record show[ed] that there [was] a range of values" that could be used, the court rejected NHTSA's concern about the uncertainty of the value of CO_2 emissions reductions. *Id.* at 1200. As the court saw it, no matter how difficult it was to choose an exact number, "the value of carbon emissions reduction [was] certainly not zero." *Id.* Given the availability of reasonable, non-zero estimates of the value of CO_2 reductions, the court found "no evidence to support NHTSA's conclusion that the appropriate course was not to monetize or quantify the value of carbon emissions reduction at all." *Id.* at 1201.

After *Center for Biological Diversity*, at the end of the George W. Bush Administration, agencies began using varying estimates of the social cost of carbon (SC-CO_2), based on the published literature, to monetize projected changes in CO_2 emissions as part of their cost-benefit analyses.[2] In 2009, seeking to harmonize these estimates across the Executive Branch, OMB convened an interagency process "to develop a transparent and defensible method, specifically designed for the rulemaking

[2] *See, e.g.*, *Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products*, 73 Fed. Reg. 62034, 62110 (Oct. 17, 2008) (Dep't of Energy); *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44354, 44446 (July 30, 2008) (EPA); *see also* GAO, *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates*, at 22-23 (July 2014) (listing "[i]ndividually developed agency estimates").

process, to quantify avoided climate change damages from reduced CO_2 emissions." Working Group, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866* ("February 2010 TSD") at 5 (Feb. 2010).

The Working Group began by analyzing the existing peer-reviewed scientific literature, from which it derived interim global SC-CO_2 estimates to recommend for use in agency RIAs. *See* Ex. 4, Working Group, *Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866* ("Response to Comments") at 3-4 (July 2015). When agencies used those 2009 interim estimates in rulemaking, they requested comment on "all of the scientific, economic, and ethical issues" implicated by the interim SC-CO_2 estimates in anticipation of "establishing improved estimates for use in future rulemakings." *See, e.g.*, EPA & NHTSA, *Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards*, 74 Fed. Reg. 49454, 49612 (Sept. 28, 2009).

In 2010, the Working Group published revised SC-CO_2 estimates. *See* February 2010 TSD at 28. In doing so, it relied on three climate-impact models—the DICE model (Dynamic Integrated Climate Economy), the PAGE model (Policy Analysis of the Greenhouse Effect), and the FUND model (Climate Framework for Uncertainty, Negotiation, and Distribution). *See id.* at 5. Collectively, these represented the three most widely cited peer-reviewed models capable of translating future GHG emissions into climate impacts, and climate impacts into monetized damages. *Id.*

While acknowledging differences among these models, the Working Group applied certain standard inputs. It adjusted the models' end year, setting each to run through 2300 in order to capture a significant proportion of future damages. *See id.* at 12-17. The Working Group also chose five socioeconomic and emissions "scenarios" and three discount rates—2.5%, 3%, and 5%—to apply in running the three models.[3] *See id.* at 15-23. It then conducted simulations, running each combination 10,000 times to sample across the range of climate impact projections, for a total of 450,000

[3] While it noted Circular A-4's "default position" recommending a 7% discount rate in most regulatory analyses, the Working Group explained that it would be inappropriate to use such a high discount rate in this context, when accounting for the extended intergenerational effects of SC-CO_2 emissions. *See* February 2010 TSD at 17-23; *see also* OMB Circular A-4 at 35-36 (discussing "intergenerational discounting").

observations per year. *See id.* at 28. For each discount rate, the Working Group averaged the resulting global SC-CO_2 estimates across all models and scenarios. *See id.* The resulting estimates for 2010 (reported in 2007 dollars) were $4.70 at the 5% discount rate, $21.40 at the 3% discount rate, and $35.10 at the 2.5% discount rate. *See id.* Additionally, to represent the damages associated with "low-probability, high-impact" climate damages, the Working Group reported a fourth value, $64.90, which was the 95th percentile SC-CO_2 estimate across all of the three models using the 3% discount rate. *Id.*

The Working Group continued to update its estimates and methodology. Following the release of the 2010 SC-CO_2 estimates, many agencies that employed the estimates in rulemaking received comments urging consideration of recent, peer-reviewed updates to the DICE, PAGE, and FUND models. *See, e.g.*, EPA, *Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews*, 76 Fed. Reg. 52738 (Aug. 23, 2011). The Working Group responded in 2013 by producing revised SC-CO_2 estimates. *See Working Group, Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866* (Nov. 2013).

As a supplement to the public comment processes associated with each proposed rulemaking that employed SC-CO_2 estimates, the Working Group (through OMB) also sought public comment on the methodology underlying its 2013 SC-CO_2 estimates. *See* OMB, *Notice of Availability*, 78 Fed. Reg. 70586 (Nov. 26, 2013). Among other things, the Working Group sought comments on its selection of the three models, its method for synthesizing the resulting estimates, the model inputs it used to produce the estimates (such as the discount rates and climate sensitivity parameters), and the general strengths and limitations of its overall methodology. *See id.* After receiving tens of thousands of comments, the Working Group issued a lengthy July 2015 response. *See* Response to Comments at 4. While its responses broadly defended its earlier methodological choices, the Working Group also committed to seeking further input from the National Academies of Sciences, Engineering, and Medicine regarding the technical merits of its approach and proposals to add additional rigor to the analysis. *See id.* at 5. The Seventh Circuit later upheld an agency's reliance on the Working Group's 2013 estimates, notwithstanding litigants' methodological objections. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678 (7th Cir. 2016).

Eventually, the Working Group broadened its focus beyond CO_2 emissions, and also issued estimates of the social cost of methane (SC-CH_4) and nitrous oxide (SC-N_2O). Experts had developed and published estimates of SC-CH_4 and SC-N_2O, using the same methodology that the Working Group had used for the SC-CO_2. *See* Alex Marten et al., *Incremental CH_4 and N_2O Mitigation Benefits Consistent with the U.S. Government's SC-CO_2 Estimates*, 15(2) Climate Policy 272 (2015); *see also* Working Group, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under E.O. 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* ("2016 CH_4 and N_2O Estimates"), at 2-3 (Aug. 2016) (describing methodological approach consistent with that used to derive SC-CO_2 estimates). EPA commissioned an external peer review of the application of these estimates to regulatory analysis, and agencies began to employ these estimates in RIAs and seek public comment. *See* 2016 CH_4 and N_2O Estimates, at 3; *see also* EPA, *Whitepaper on Valuing Methane Emissions Changes in Regulatory Benefit-Cost Analysis, Peer Review Charge Questions, and Responses: EPA Summary and Response*, at 28-29 (Oct. 1, 2015). After further consideration of the peer-reviewed literature and the public comments received in agency rulemakings, the Working Group published the first federal SC-CH_4 and SC-N_2O estimates in August 2016. *See* 2016 CH_4 and N_2O Estimates, at 2-3. Following the National Academies' advice, the Working Group also enhanced the discussion of uncertainty around its 2013 SC-CO_2 estimates, and deferred further updates until the National Academies could release their final report and recommendations. *See* Working Group, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866*, at 2 (Aug. 2016). In January 2017, the National Academies report was issued, which broadly endorsed the use of SC-GHG estimates. *See* National Academies of Sciences, Engineering, and Medicine, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017).

Shortly after his inauguration in 2017, President Trump issued Executive Order 13783, which disbanded the Working Group and withdrew its prior analyses as "no longer representative of governmental policy." Exec. Order No. 13783 § 5(b), *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16093 (Mar. 28, 2017). President Trump further ordered that "when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the

consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4." *Id.* § 5(c).

Although the Trump Administration's policy approach to climate issues differed in many ways from that of the preceding administration, it continued to use standardized estimates of the social costs of greenhouse gases. Pursuant to E.O. 13783, EPA developed interim SC-CO_2 estimates by making two (and only two) changes to the 2016 estimates: First, it began reporting estimates that attempted to capture only the domestic impacts of climate change, and second, it applied 3% and 7% discount rates. *See* EPA, *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*, at 44 (2017). These interim domestic estimates were intended to be used by EPA and other agencies until more rigorous estimates could be developed, and they were presented alongside global, lower-discount-rate estimates for purposes of sensitivity analysis. *See id.* at 43. Accordingly, although the Working Group had been disbanded, and although the primary estimates of the social costs of greenhouse gas estimates were now lower (because of higher discount rates and an exclusive focus on U.S.-domestic damages), agencies continued to estimate the social costs of greenhouse gases in their cost-benefit analyses, as ordered by the President, just as they had done in prior administrations. *See, e.g.*, Bureau of Land Mgmt., *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements*, 83 Fed. Reg. 49184, 49190 (Sept. 28, 2018) (using "interim values" for the SC-CH_4, "adjusted" to comply with E.O. 13783).

2. Executive Order 13990 and the Working Group's 2021 Interim Estimates

On January 20, 2021, President Biden issued the latest in this history of Executive pronouncements on employing the social cost of greenhouse gases: Executive Order 13990. Ex. 1, Exec. Order No. 13990, *Protecting Public Health & the Environment & Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 20, 2021). Just as President Trump had done in E.O. 13783, President Biden laid out his expectations for agencies estimating the social costs of greenhouse gases:

> It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes

> the breadth of climate impacts, and supports the international leadership of the United States on climate issues. The "social cost of carbon" (SCC), "social cost of nitrous oxide" (SCN), and "social cost of methane" (SCM) are estimates of the monetized damages associated with incremental increases in greenhouse gas emissions. They are intended to include changes in net agricultural productivity, human health, property damage from increased flood risk, and the value of ecosystem services. An accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions.

E.O. 13990 § 5(a). President Biden also reestablished the Working Group, and directed that it "shall, as appropriate and consistent with applicable law[,] publish an interim SCC, SCN, and SCM within 30 days." *Id.* § 5(b)(ii)(A). E.O. 13990 further stated that "agencies shall use" those interim estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published." *Id.* The Executive Order also set a September 1, 2021 deadline to "provide recommendations to the President" regarding the use of SC-GHG estimates in contexts other than rulemaking, and a January 2022 deadline to publish a more comprehensive update to the cost estimates. *See id.* § 5(b)(ii)(B), (C).

As directed by the President, on February 26, 2021, the Working Group issued its interim SC-CO_2, SC-CH_4, and SC-N_2O estimates ("the Interim Estimates"), which are identical to the Working Group's 2016 estimates, other than adjustments for inflation. *See* Ex. 3, Working Group, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under E.O. 13990* ("February 2021 TSD"), at 1 (Feb. 2021). As the Working Group explained, it reviewed the interim SC-GHG estimates that EPA had developed in 2017 for use under E.O. 13783 and found them wanting in several respects. *See id.* at 3. For one, they failed to acknowledge that "a global perspective is essential for SC-GHG estimates because climate impacts occurring outside U.S. borders can directly and indirectly affect the welfare of U.S. citizens." *Id.* Another failing was their use of high discount rates that "inappropriately underestimate[d] the impacts of climate change" and failed to account for "intergenerational ethical considerations." *Id.* The Working Group also acknowledged

significant advances in the relevant scientific literature and explained that recent studies suggest that the new Interim Estimates "likely underestimate the damages from GHG emissions." *Id.* at 31.

On May 7, 2021, pursuant to E.O. 13990's directive that the Working Group "solicit public comment[,] engage with the public and stakeholders[, and] seek the advice of ethics experts" in conducting its work, E.O. 13990 § 5(b)(iii) (cleaned up), OMB published a notice in the Federal Register, inviting comments "on the [February 2021 TSD] as well as on how best to incorporate the latest peer-reviewed science and economics literature in order to develop an updated set of SC-GHG estimates." OMB, *Notice of Availability and Request for Comment* on "*Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under E.O. 13990*", 86 Fed. Reg. 24669, 24669 (May 7, 2021). That comment period closed on June 21, 2021. *Id.*

On June 3, 2021, OIRA published a "Frequently Asked Questions" document to assist agencies in meeting their obligations under E.O. 13990. Ex. 5, OIRA, *Social Cost of Greenhouse Gas Emissions: Frequently Asked Questions (FAQs)* ("OIRA Guidance"), (June 3, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Social-Cost-of-Greenhouse-Gas-Emissions.pdf. As that guidance makes clear, the Interim Estimates will be used when agencies prepare cost-benefit analyses "for purposes of compliance with E.O. 12866." *Id.* at 1. The OIRA Guidance also confirms that where "an applicable statute expressly specifies and requires or excludes an analytic approach," *e.g.*, cost-benefit analysis, that statute "must control" the agency's approach "in taking an agency action," even in the context of the Executive Order. *Id.* at 2. In other words, where Congress has addressed the issue, "those statutory requirements must dictate whether and how the agency monetizes changes in greenhouse gas emissions in the context of the agency action." *Id.*

II. Litigation Background

Ten states filed this action on April 22, 2021, claiming that Section 5 of E.O. 13990 and the Interim Estimates violate the APA and are otherwise *ultra vires*. ECF No. 1. Defendants moved to dismiss on June 28; that motion was fully briefed as of August 23. *See* ECF Nos. 31, 48, 67. On July 30, over a month after Defendants' motion to dismiss—and more than six months after the President

issued the Executive Order challenged here—Plaintiffs moved for a preliminary injunction. Defendants now oppose that motion.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. "The Fifth Circuit frequently cautions that . . . 'the decision to grant a preliminary injunction is to be treated as the exception rather than the rule.'" *Matrix Partners VIII, LLP v. Nat. Res. Recovery, Inc.*, No. 1:08-cv-547, 2009 WL 175132, at *6 (E.D. Tex. Jan. 23, 2009) (alteration omitted) (quoting *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 180 (5th Cir. 1996)). The party seeking a preliminary injunction thus bears the burden to show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (quoting *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013). Due to its "extraordinary" nature, no preliminary-injunction motion should be "granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* at 809 (citation and internal punctuation omitted). In practice, however, the third and fourth factors tend to "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009), into consideration of the public interest.

ARGUMENT

For reasons explained in greater detail in the motion-to-dismiss briefing, Plaintiffs have not carried their burden to show subject-matter jurisdiction. But even if they had, Plaintiffs still are not entitled to a preliminary injunction: (I) they face no irreparable harm that must be remedied now; (II) they are unlikely to succeed on the merits; and (III) a preliminary injunction would be contrary to the public interest. The Court should deny Plaintiffs' motion and dismiss this case.

I. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Defendants have explained why Plaintiffs have not alleged (much less shown) any "certainly impending" future injury, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis omitted),

from a "concrete application" of the Executive Order and the Interim Estimates in a "particular" agency action. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-95 (2009); *see* Defs.' Mot. to Dismiss, ECF No. 31, at 15-21 ("MTD"); Defs.' Reply Mem. in Supp. of Mot. to Dismiss, ECF No. 67, at 3-8 ("MTD Reply"); *see also infra* at 24-25. For all those reasons, incorporated here by reference, this entire case should be dismissed for lack of Article III standing, before any consideration of preliminary relief.

Even if Plaintiffs alleged a basis for standing sufficient to survive threshold dismissal, however, the bar is far higher for the "extraordinary remedy" of a preliminary injunction. *Winter*, 555 U.S. at 24. "In the preliminary-injunction context, plaintiffs must make a 'clear showing' of standing" to obtain relief. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021); *see Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 n.1 (5th Cir. 2020) (contrasting the ordinary showing of standing required "to overcome a motion to dismiss" with the "'clear showing' of standing required to maintain a preliminary injunction"). Plaintiffs cannot merely *allege* Article III injury; they must affirmatively *show* it. And Plaintiffs must also show that such an injury is *irreparable*—that is, that they need immediate relief *now*, lest they be unable to ever obtain meaningful judicial relief in the future. *See, e.g.*, *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 483 F.2d 1, 5 (5th Cir. 1973).

Plaintiffs do not satisfy those burdens. Some of the harms they claim to fear would not likely be remedied at all by the relief they seek (another standing problem, *see* MTD 23-26; MTD Reply 9-11), but even those hypothetical harms that *could* be remedied by court order all stem from routine disagreements with how agencies might exercise future discretion under their organic statutes and the APA. Those sorts of harms—all of which stem from currently unknown but hypothetically possible future agency actions—can be reviewed "in the ordinary course of litigation." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). Accordingly, even if Plaintiffs faced some "actual or imminent" injury, their motion should still be denied for the lack of any *irreparable* harm.

If there could be any doubt on this issue, it is dispelled by Plaintiffs' unexplained six-month delay from the issuance of the Executive Order that they challenge (on January 20, 2021) to the filing of their motion for a preliminary injunction (on July 27, 2021). "[A] party requesting a preliminary injunction must generally show reasonable diligence" in order to substantiate their asserted need for

emergency relief. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Because courts in the Fifth Circuit "generally consider anywhere from a three-month delay to a six-month delay enough to" undermine a showing of irreparable harm, *Leaf Trading Cards, LLC v. The Upper Deck Co.*, No. 3:17-cv-3200, 2019 WL 7882552, at *2 (N.D. Tex. Sept. 18, 2019), Plaintiffs' motion can be denied on that basis alone.

A. Plaintiffs' alleged harms can be remedied (if at all) after final judgment.

As explained in Defendants' motion-to-dismiss briefing, MTD 14-30; MTD Reply 2-15, and summarized again below, *infra* at 24-25, Plaintiffs have not carried their burden to show Article III standing. *See Missouri*, 2021 WL 3885590, at *7 (dismissing nearly identical claims because states "failed to establish any of the[] three elements" of standing). But even if Plaintiffs could show an actual or imminent Article III injury, that is not enough to show *irreparable* injury. *See id.* Routine Article III harms do not support the extraordinary remedy of preliminary relief—it is "only those injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits" that "can properly justify a preliminary injunction." *Canal Auth. of the State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). In particular, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, [weighs] heavily against a claim of irreparable harm." *Melancon*, 703 F.3d at 279 (citation omitted)); *see, e.g.*, *Tex. First Nat'l Bank v. Wu*, 347 F. Supp. 2d 389, 399 (S.D. Tex. 2004) ("Irreparable harm is . . . harm that cannot be redressed by either an equitable or legal remedy following trial."). In addition, to justify a preliminary injunction, "speculative injury is not sufficient." *Daniels Health Scis., LLC v. Vascular Health Scis.*, LLC, 710 F.3d 579, 585 (5th Cir. 2013) (citation omitted). Instead, "[a] presently existing actual threat must be shown." *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (emphasis & citation omitted).

1. In trying to carry their burden on irreparable harm, Plaintiffs rely largely on speculation about future, hypothetical agency actions. For example, they hypothesize that "increased stringency" in future "[r]egulatory standards affecting air quality, energy efficiency, [and] power plant regulation" "will directly harm the economies and revenues of Plaintiff States." Pls.' Br. 41. But such speculative assertions do not suffice for standing, let alone irreparable harm as required for a preliminary injunction. *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). At most, the

Interim Estimates could be "one of innumerable other factors in the cost-benefit analysis conducted by a wide range of agencies in an even wider range of regulatory contexts." *Missouri*, 2021 WL 3885590, at *9. Thus, when implementing the Executive Order on an agency-by-agency, rule-by-rule basis, "policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise . . . policy and myriad other circumstances." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989). But those decisions and the factors that may inform them are not knowable now, and injunctive relief may not issue based only on "a possibility of irreparable harm." *Winter*, 555 U.S. at 22. Instead, the threat of irreparable harm must be "real," "substantial," and "immediate." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). None of Plaintiffs' assertions—often made without any citation or support—come close to the "presently existing actual threat" of "irreparable harm" required by the Fifth Circuit. *Emerson*, 270 F.3d at 262 (emphasis & citation omitted). As another court put it just yesterday, "[t]here is simply no way to predict how the Interim Estimates will affect an agency's analysis, if at all, without resorting to sheer speculation." *Missouri*, 2021 WL 3885590, at *9.

2. Even if any of Plaintiffs' hypothesized injuries were "certainly impending," *Clapper*, 568 U.S. at 409, they still would not be *irreparable*, because "relief will be available at a later date, in the ordinary course of litigation." *Melancon*, 703 F.3d at 279; *accord* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2948.1 (3d ed.) ("[A] preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of . . . other relief.").

Plaintiffs have several options. For starters, relief would be equally available upon final judgment. Plaintiffs offer *zero* explanation of whether (or why) the relief that they seek—against an action taken *over seven months ago*—is so urgent that it "cannot be redressed by either an equitable or legal remedy following trial." *Wu*, 347 F. Supp. 2d at 399. Because Plaintiffs bear the burden, *Jordan*, 823 F.3d at 809, their failure to establish any time-sensitivity is sufficient to deny their motion.

Even setting aside the availability of post-judgment relief in *this* case, Plaintiffs' alleged injuries are easily capable of being remedied "at a later date, in the ordinary course of litigation," *Melancon*, 703 F.3d at 279, given the undisputed availability of future APA litigation to challenge future agency actions that cause Plaintiffs Article III harm. And those future lawsuits could include Plaintiffs'

arguments about the legality of the Executive Order and the Interim Estimates, if some agency actually relies on them to justify a specific action. *See, e.g.*, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998) ("The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i.e.*, if the Plan plays a causal role with respect to the future, then-imminent, harm from logging."); *Missouri*, 2021 WL 3885590, at *11 ("Plaintiffs will have ample opportunity to bring legal challenges to particular regulations if those regulations pose imminent, concrete, and particularized injury.").

The D.C. Circuit's decision in *Building & Construction Trades Department v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) is particularly instructive. There, in vacating an injunction against an executive order, the D.C. Circuit explained that "[t]he mere possibility that some agency might make a legally suspect decision" in the future, in reliance on the challenged executive order, "does not justify an injunction against enforcement of" the executive order itself. *Id.* at 33. Instead, "[i]n the event that an agency *does* contravene the law in a particular instance, an aggrieved party may seek redress through any of the procedures ordinarily available to it," including "an action in the district court challenging that specific decision." *Id.* (emphasis added). So too here. *See also, e.g.*, *Wu*, 347 F. Supp. 2d at 399 (injunction denied because "any potential injury" was "not irreparable," as party was "not without a legal remedy," in part because of the possibility they would prevail in future litigation in federal or state court); *cf. Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 21 (2d Cir. 1971) ("[E]quitable relief is not warranted for the further reason that if a statement should be obtained from an inmate in violation of his constitutional rights, he has an adequate remedy at law by way of a motion to suppress in the proceeding in which the State seeks to use it.").

3. Plaintiffs continue to rely heavily on allegations of procedural harm. As Defendants have explained in prior briefing, *see* MTD 30; MTD Reply 11-12, simply being "denied the ability to file comments" is not sufficient to establish Article III standing, *Summers*, 555 U.S. at 496; *Missouri*, 2021 WL 3885590, at *9, and thus it likewise necessarily fails to support preliminary injunctive relief, *see Lyons*, 461 U.S. at 111; *accord Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 929 (11th Cir. 2020);

Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 391-92 (6th Cir. 2020). And Plaintiffs do not even assert that any procedural harm in this case is truly irreparable, nor explain why relief now, as opposed to at final judgment, is necessary. Nor could they: procedural injury "cannot stand alone as the basis for a finding of irreparable harm." *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998); *accord Sierra Club v. U.S. Army Corps of Eng'rs*, 482 F. Supp. 3d 543, 555 (W.D. Tex. 2020) (plaintiff "concede[d] that a procedural violation of NEPA, by itself, is not sufficient to establish irreparable injury"); *Blanco v. Burton*, No. 06-cv-3813, 2006 WL 2366046, at *15 (E.D. La. Aug. 14, 2006) ("Though the Court believes that Plaintiffs have established at least a *prima facie* showing of statutory violations on the part of the Defendants, such statutory violations do not, in and of themselves, constitute irreparable harm for purposes of injunctive relief on a preliminary basis.") (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987) (rejecting the idea "that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action")).

4. For the most part, Plaintiffs focus their arguments on Article III injury, rather than irreparable harm. For example, they continue to argue that "Plaintiff States have *parens patriae* standing to vindicate the economic injuries the SC-GHG estimates will impose on their citizens." Pls.' Br. 47. As Defendants have explained, *see* MTD 26-27; MTD Reply 12-13, that is wrong: "as 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) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982)). But, regardless, for a preliminary injunction, Article III standing is not enough. Any *parens patriae* injury can be remedied at final judgment, and Plaintiffs offer no argument to the contrary.

5. Plaintiffs argue that the Interim Estimates "will harm Plaintiff States' ability to purchase affordable energy," Pls.' Br. 45, and suggest that that provides Article III standing—though again without any mention of irreparable harm. But Plaintiffs cite nothing that would justify their confidence that they can successfully predict future swings in energy prices, let alone pin some predicted future increase on the Executive Order. And even ignoring the speculation, traceability, and redressability issues, this theory would apply to every energy consumer on earth. So "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.'" MTD 27-28 (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). This theory thus cannot support standing, and even more clearly cannot be the basis for irreparable harm that must be remedied by a preliminary injunction.

6. Plaintiffs fear that they "will lose significant tax revenues" as a result of future agency actions implementing the Interim Estimates, and that they therefore have Article III standing. Pls.' Br. 46. But the "loss of general tax revenues as an indirect result of federal policy is not a cognizable injury in fact." *El Paso Cnty. v. Trump*, 982 F.3d 332, 339 (5th Cir. 2020), *cert. denied, El Paso Cnty. v. Biden*, --- S. Ct. ----, 2021 WL 2742797 (U.S. July 2, 2021); *see also Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) (same); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (same). And again, even if this *standing* theory had merit, an Article III injury alone is not enough, and Plaintiffs do not even attempt to tie any alleged revenue loss to any *irreparable* harm.[4]

7. Finally, Plaintiffs assert that the Interim Estimates "will impose additional duties upon Plaintiff States when they implement cooperative federalism programs." Pls.' Br. 43. This theory fails for several reasons, but the most straightforward is that Plaintiffs are factually incorrect. Neither the Executive Order nor the Interim Estimates "impose additional duties upon Plaintiff States" as part of any cooperative-federalism program, and Plaintiffs offer no explanation for their conclusory assertions to the contrary. The Executive Order applies to "all executive departments and agencies" of the *federal* government, E.O. 13990 § 1—it does not obligate the *states* to do anything.[5]

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[4] Plaintiff Louisiana goes one step further, asserting that the Interim Estimates "threaten the coastline of . . . Louisiana by directly reducing the funds necessary to maintain the State's coastal lands." Pls.' Br. 46. But because Fifth Circuit precedent forbids Plaintiffs from relying on allegations of a general diminution in revenue as an indirect result of federal policy to support standing, it does not matter what any state would have used that revenue for—even excusing the speculation, as well as Louisiana's admission that the loss in coastline is attributable "to follow-on effects from environmental catastrophes," rather than any action by the federal government. *Id.* 46 n.9.

[5] In addition, the Executive Order's directive to federal agencies to use the Interim Estimates applies to cost-benefit analyses of "regulations *and other relevant agency actions* until final values are published," but does not define the phrase "other relevant agency actions." E.O. 13990 § 5(b)(ii)(A)

Plaintiffs' only serious effort to provide an example illustrating their cooperative-federalism theory of harm is with respect to the EPA's National Ambient Air Quality Standards (NAAQS), which Plaintiffs assert—again without citation—"are now required to be set based on the IWG's SC-GHG Estimates," which they claim means that "States must employ the Estimates or their state implementation plans (SIP) will be disapproved." Pls.' Br. 44. Even if that were correct, at most, it would provide standing to challenge the denial of a particular state implementation plan, or perhaps even EPA's setting of NAAQS generally. But it turns out *not* to be correct—there are no NAAQS for greenhouse gases, *see Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014) (listing the "six pollutants" for which "EPA has issued NAAQS"), and Plaintiffs offer no explanation of how the Interim Estimates would be used in setting or revising NAAQS for non-greenhouse-gas pollutants.

Plaintiffs contend that "EPA has already published a final rule relying on the Biden SC-GHG Estimates to impose NAAQS good neighbor FIPs on several Plaintiff States including Louisiana and Kentucky." Pls.' Br. 44 (citing *Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 86 Fed. Reg. 23054 (Apr. 30, 2021) ("Revised CSAPR Update"). That assertion is belied by the record. EPA established new nitrogen oxide emission budgets for power plants in twelve states under the "good neighbor" provision of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But the basis for this action had nothing to do with the Interim Estimates. *See* 86 Fed. Reg. at 23086-87 (explaining the multi-factor approach EPA used to address regional ozone). To be sure, to comply with the longstanding, unchallenged, and undisputedly non-enforceable[6] intra-Executive Branch requirements

(emphasis added). Elsewhere, the Executive Order directs the Working Group to provide "*recommendations* to the President, by no later than September 1, 2021, regarding areas of decision making, budgeting, and procurement" to which social-cost estimates "should be applied." *Id.* § 5(b)(ii)(C) (emphasis added). So, even as to the *federal* government, the only obligation currently imposed by the Executive Order is about cost-benefit analysis during rulemaking, and any additional obligations are subject to future actions and clarifications from the Executive Branch (and, in any case, would never bind states directly, absent some separate, future agency action that could be challenged).

[6] Defendants previously explained that "[o]ften, agencies prepare a cost-benefit analysis solely as part of the Regulatory Impact Analysis required by E.O. 12866—*not* because it is required by statute, and *not* because that cost-benefit analysis will be relied upon as justification for the agency rule." MTD 19. Plaintiffs have never disputed that in that scenario—in which "the Interim Estimates will have made no substantive difference to the outcome," *id.*—the agency's cost benefit analysis would

imposed by E.O. 12866, EPA conducted a cost-benefit analysis, and used the Interim Estimates as part of that analysis. *See id.* at 23150-55. But as for the actual *justification* for its action, EPA could not have been clearer: "[i]nformation from the [Working Group] used to estimate climate benefits is not relied upon as part of the record basis for this rulemaking." EPA, *Revised Cross-State Air Pollution Rule Update – Response to Comment* (Apr. 29, 2021) at 546, https://perma.cc/RGW8-G2DT.

Plaintiffs likewise cite no action on State Implementation Plan (SIP) submissions that in any way relied on the Interim Estimates as a basis for disapproval. And the FIPs that Plaintiffs *do* cite (for Louisiana and Kentucky) were based on the same air-quality and emissions-control analysis applied to other states—which likewise did not rely on the Interim Estimates. *See, e.g.*, 86 Fed. Reg. at 23085-86. In sum, Plaintiffs have not identified a single example of EPA relying on the Interim Estimates as a basis for disapproving state plans (or promulgating federal plans) under the Clean Air Act. Nor do they offer any other example of a cooperative-federalism program in which the Interim Estimates have actually been relied upon, or will imminently be relied upon, to cause any concrete harm—irreparable or otherwise. Accordingly, Plaintiffs cannot base their standing (let alone irreparable harm) on alleged changes to cooperative-federalism programs, and their inaccurate factual narrative would not even support a challenge to those *specific* agency actions. Regardless, these examples surely do not present irreparable harm cognizable in *this* case, which raises only a facial challenge to the Executive Order and the Interim Estimates, rather than any EPA action.

None of Plaintiffs' authorities are to the contrary—if anything, they prove Defendants' point. For example, Plaintiffs are right that plaintiffs had *standing*, though not irreparable harm, to file a petition for review in the D.C. Circuit to challenge an EPA action that, under the Clean Air Act, "direct[ed] each state to revise its SIP in accordance with EPA's NOx emissions budget." Pls.' Br. 45 (quoting *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004)). The D.C. Circuit concluded that the "great degree of deference" owed to agency experts, "coupled with EPA's explanation and the evidence" in the record in that particular case, ultimately "require[d] that the petitions be denied" on

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generally not be subject to judicial review. Nor could they. *See, e.g.*, *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013).

the merits. *West Virginia*, 362 F.3d at 871. But regardless of the outcome, that is exactly how such litigation *should* proceed: if some agency actually takes some action that harms Plaintiffs, they can sue, challenging that specific action, in the appropriate forum. *See Missouri*, 2021 WL 3885590, at *13 n.17.

Indeed, ironically, when it comes to NAAQS implementation, the Revised CSAPR Update that Plaintiffs now complain of in their briefs (but do not actually challenge in their complaint) is currently the subject of separate litigation in the D.C. Circuit. *See Midwest Ozone Grp. v. EPA*, No. 21-1146 (D.C. Cir.). But for whatever reason, none of these plaintiffs has challenged that action through the process made available by the Clean Air Act, 42 U.S.C. § 7607(b)(1), which, among other things, requires a filing directly in the court of appeals. So those sorts of allegations cannot provide a basis for standing here—and certainly not *irreparable* harm, given the availability of other remedies.

B. Plaintiffs unreasonably delayed in seeking a preliminary injunction.

"[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944. So "[d]elay in seeking a remedy is an important factor bearing on the need for a preliminary injunction. Absent a good explanation, a substantial period of delay militates against . . . a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *H.D. Vest, Inc. v. H.D. Vest Mgmt. & Servs., LLC*, No. 3:09-cv-00390, 2009 WL 1766095, at *4 (N.D. Tex. June 23, 2009) (internal quotation marks omitted).

Plaintiffs waited *over six months* after issuance of the Executive Order (and five months after the Interim Estimates) to seek a preliminary injunction—even though they were on notice from day one. Comparable delays are routinely dispositive, and the Fifth Circuit has affirmed a district court's denial of temporary relief where the movant "waited three months before petitioning the district court" for that relief. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975). Overall, "courts generally consider anywhere from a three-month delay to a six-month delay enough to militate against issuing injunctive relief." *Leaf Trading Cards*, 2019 WL 7882552, at *2.[7]

[7] Even if the Court measured from the date of the issuance of the Interim Estimates—February 26, 2021—the delay would still be five months, which is longer than the "three months" that troubled the Fifth Circuit in *Boire*, 515 F.2d at 1193, and within the "three-month delay to a six-month

Many courts within the Fifth Circuit and around the country have applied that rule to delays that are comparable to (or shorter than) the unexplained six-month delay here. *See, e.g.*, *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm."); *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (affirming denial of preliminary injunction, calling six months "a long delay in seeking relief" that "indicates that speedy action is not required") (internal quotation marks omitted); *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983) (affirming denial of preliminary-injunction after plaintiffs "wait[ed] two months . . . to make the request," because "[s]uch a delay is inconsistent with a claim of irreparable injury"); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Citibank did not seek the injunction until September 14—more than ten weeks after it learned directly of Citytrust's plans, and more than nine months after it received notice[.]"); *TIGI Linea Corp. v. Pro. Prods. Grp., LLC*, No. 4:19-cv-00840, 2020 WL 3154857, at *7 (E.D. Tex. May 20, 2020) ("Courts have found that the expiration of several months between discovering an act of breach and seeking injunctive relief should factor into the court's analysis and could serve to rebut a claim of irreparable harm."), *report & recommendation adopted*, No. 2020 WL 3130139 (E.D. Tex. June 12, 2020); *Embarcadero Techs., Inc. v. Redgate Software, Inc.*, No. 1:17-cv-444, 2017 WL 5588190, at *3 (W.D. Tex. Nov. 20, 2017) (five- and ten-month delays were "fatal" to a "request for a preliminary injunction"); *Jack's Canoes & Kayaks LLC v. Nat'l Park Serv.*, 933 F. Supp. 2d 58, 81 (D.D.C. 2013) (no irreparable harm where "Plaintiff inexplicably waited an entire month"); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (two- or eight-month delay "militates against a finding of irreparable harm").

To be sure, a delay in seeking preliminary relief may be excused if there is "a reasonable explanation," such as the plaintiff conducting "good faith efforts to investigate[.]" *ADT, LLC v. Cap. Connect, Inc.*, 145 F. Supp. 3d 671, 699 (N.D. Tex. 2015). But that excuse is unavailable here—Plaintiffs

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delay" range discussed in *Leaf Trading Cards*, 2019 WL 7882552, at *2. In any case, the relevant date must be January 20, because the President ordered on that date that the Interim Estimates be published "within 30 days," E.O. 13990 § 5(b)(ii)(A)—putting all interested parties on notice of what was forthcoming and when.

knew (or should have known) of the Executive Order as soon as it was signed on January 20, 2021, President Biden's first day in office. *See, e.g.*, Bo Erickson, CBS NEWS, *Biden signs executive actions on COVID, climate change, immigration and more* (Jan. 21, 2021), https://perma.cc/A7A8-BLB2. And none of Plaintiffs' alleged theories of harm required further investigation due to their subtlety—to the contrary, Plaintiffs assert that the Court has before it what "may be the most significant regulatory encroachment upon individual liberty and State sovereignty in American history." Pls.' Br. 1. Plaintiffs have not provided "a good explanation" for their delay, *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006)—indeed, they have provided no explanation at all.[8] So even if they had put forth "sufficient proof of irreparable damage and ha[d] shown that they have no other viable legal remedy[,] . . . the Plaintiff States cannot prevail on the legal element of irreparable harm due to their delay." *Texas v. United States*, 328 F. Supp. 3d 662, 740 (S.D. Tex. 2018).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

A. The Court lacks subject-matter jurisdiction over all of Plaintiffs' claims.

1. Plaintiffs lack standing.

As Defendants have already explained in greater detail elsewhere, *see supra* at 15-22; MTD 14-30, MTD Reply 2-15, Plaintiffs lack standing to seek relief from this Court—preliminary *or* final—because (1) they have not alleged a concrete, particularized, and actual or imminent injury-in-fact; (2) any injury Plaintiffs might have would be traceable to future, hypothetical agency actions, not to the Executive Order or the Interim Estimates; and (3) any such injury would not be redressable by a victory in this lawsuit. Because they lack standing, Plaintiffs cannot be likely to succeed on the merits.

[8] The final five weeks of Plaintiffs' delay were particularly inexplicable. Plaintiffs' counsel mentioned the possibility of seeking a preliminary injunction for the first time over the phone on June 21—one day after the five-month anniversary of the Executive Order. *See* ECF No. 54-1 (email correspondence attached to Plaintiffs' page-extension motion). But even then, Plaintiffs waited 36 additional days to file, for reasons unknown. And all of this put Plaintiffs a distant second in line behind another group of states challenging E.O. 13990, who both sued earlier and moved for a preliminary injunction earlier (on May 3, about two-and-a-half months before these Plaintiffs). *See Missouri v. Biden*, No. 4:21-cv-00287-AGF (E.D. Mo. 2021), ECF Nos. 1, 17. Indeed, that case has already been litigated all the way to final judgment. *See Missouri*, 2021 WL 3885590.

On injury, just as in *Missouri*, "Plaintiffs ask the Court to assume that at some point in the future, one or more agencies will 'inevitably' issue one or more regulations that rely in some way upon the Interim Estimates; that such agency will 'inevitably' disregard any objections to the methodology by which the Interim Estimates were calculated; and that this yet-to-be-identified regulation will then harm Plaintiffs in a concrete and particularized way. This 'theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.'" *Missouri*, 2021 WL 3885590, at *7 (quoting *Clapper*, 568 U.S. at 410); *see also id.* (explaining why "*Summers v. Earth Island Institute*, 555 U.S. 488 (2009) is instructive").

Similarly, as for causation, "[i]n light of the inherently speculative nature of Plaintiffs' alleged harm, it is unknowable in advance whether that harm caused by possible future regulations would have any causal connection to EO 13990 or the Interim Estimates." *Id.* at *8. In other words, "[t]here is simply no way to predict how the Interim Estimates will affect an agency's analysis, if at all, without resorting to sheer speculation." *Id.* at *9.[9] Finally, as for redressability, "[e]ven if the Court were to declare the Interim Estimates non-binding, agencies would be free to—and may be required to—consider the social costs of greenhouse gas emissions." *Id.* (citing *Center for Biological Diversity*, 538 F.3d at 1200). And under those circumstances, "agencies may arrive at the same or even more costly regulations at the same speed or even more quickly than Plaintiffs currently predict." *Id.*[10]

2. Plaintiffs' claims are not ripe.

If an agency one day relies on the Interim Estimates to justify some action that causes Plaintiffs a concrete injury, they can challenge that specific agency action and its use of the Interim Estimates

[9] "[T]he actions of the third parties here are far from predictable," so Plaintiffs cannot rely on "the predictable effect of Government action" on third parties for standing. *Missouri*, 2021 WL 3885590, at *8 (distinguishing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)).

[10] Yesterday's opinion in *Missouri* also rejects Plaintiffs' arguments that *Massachusetts v. EPA* or "special solicitude" for state plaintiffs warrants a different result: "even giving Plaintiffs the benefit of doubt that the solicitude doctrine may afford, Plaintiffs cannot establish redressability or any of the other Article III requirements." *Missouri*, 2021 WL 3885590, at *10 n.13. In doing so, the court specifically distinguished recent Fifth Circuit authority on the concept of "special solicitude." *See id.*

at that time. That is the only appropriate way to bring this sort of challenge: in a concrete context, about a specific agency action, which is causing concrete harms, to a specific plaintiff.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). Plaintiffs bear the burden of demonstrating ripeness. *See, e.g.*, *id.* at 714.

Despite their burden, Plaintiffs' preliminary-injunction brief only mentions ripeness in passing, in one footnote: Plaintiffs argue that because the Interim Estimates "constitute[] final agency action, they are ripe for review." Pls.' Br. 38 n.7. Plaintiffs also assert (without explanation) that "this case is ripe because the questions presented are purely legal." *Id.* (citation omitted).

The Supreme Court has squarely rejected Plaintiffs' only argument. In *National Park Hospitality Association*, an agency issued a regulation about concession contracts in national parks. 538 U.S. at 806. Immediately, "concessioners doing business in the national parks" "brought a facial challenge to the regulation"—before any "concrete dispute about a *particular* concession contract." *Id.* at 804, 807, 812 (emphasis added). The Court acknowledged that "the question presented" was "a purely legal one," *and* that the regulation at issue "constitute[d] 'final agency action' within the meaning of" the APA. *Id.* at 812. Justice Thomas's opinion for the Court nonetheless dismissed on ripeness grounds, holding that litigation 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 regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 808.

Similarly, in *Ohio Forestry*, the Forest Service had created a land-management plan for a specific forest, but several steps remained before any actual injury would result: "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. As a unanimous Supreme Court explained:

> The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i.e.*, if the Plan plays a causal role with respect to the future, then-imminent, harm from logging. Hence we do not find a strong reason why the Sierra Club must bring its challenge now in order to get relief.

Id. Simply replace "Plan" with "Executive Order," and "logging" with "agency reliance on the Interim Estimates," and the consequences for this case are obvious. *See also, e.g.*, *Wild Va. v. Council on Env't Quality*, --- F. Supp. 3d ----, 2021 WL 2521561, at *2 (W.D. Va. June 21, 2021) (dismissing, on grounds of standing and ripeness, challenge to new Executive-Branch-wide NEPA regulations, in favor of future litigation in the context of specific agency actions).

Importantly, Plaintiffs can challenge any future regulation that actually causes them concrete harm, if and when such a regulation is actually issued. That is not just a hypothetical: there have been several cases challenging specific agency actions on the theory that an agency inappropriately accounted for the social costs of greenhouse gases. Several of those cases hold that (at least in some circumstances) an agency *must* consider those costs as part of the agency's cost-benefit analysis.[11] Others hold that an agency has a range of available options.[12] But those varied outcomes, in cases

[11] *See, e.g.*, *Ctr. for Biological Diversity*, 538 F.3d at 1203 ("NHTSA's decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious[.]"); *WildEarth Guardians v. Bernhardt*, No. 17-cv-80, 2021 WL 363955, at *10 (D. Mont. Feb. 3, 2021) (agency "failed to take a 'hard look' at the costs of greenhouse gas emissions"); *California v. Bernhardt*, 472 F. Supp. 3d 573, 611 (N.D. Cal. 2020) (relying on "the consensus that [the 2016 Working Group's] estimates constitute the best available science about monetizing the impacts of greenhouse gas emissions" to hold that agency's failure to consider global "social cost of methane" was arbitrary and capricious); *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014) (agency failed to justify "not using . . . the social cost of carbon").

[12] *See, e.g.*, *Zero Zone*, 832 F.3d at 677 ("Congress intended that [the Department of Energy] have the authority . . . to consider the reduction in SCC."); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (rejecting argument that agency was obligated to consider social cost of carbon).

against various agency defendants, with varying statutory constraints on their delegated authority, confirm that it is both impractical and unnecessary to litigate all of these issues now, in this abstract context, with ten plaintiffs suing twenty-three defendants at once, complaining of a wide variety of potential future statutory violations across "a diverse array of industries." Compl. ¶ 131.

Relying on these authorities to assess virtually identical claims, the district court in *Missouri* concluded that "there is 'considerable legal distance' between the adoption of the Interim Estimates and the moment—if one occurs—when a harmful regulation is issued." 2021 WL 3885590, at *11 (quoting *Ohio Forestry*, 523 U.S. at 730). Thus, it agreed with Defendants that the claims were unripe:

> A court's determination of the legality of an agency's reliance on the Interim Estimates will necessarily be informed by the specific statutory directives that Congress has provided to guide the agency's actions. The Court cannot meaningfully engage with Plaintiffs' arguments *en masse*, divorced from the context of particular agencies operating under specific statutory delegations of authority.

Id. at *13 (quoting Defs.' *Missouri* Mot. to Dismiss, ECF No. 28, at 37). So too here.

3. Plaintiffs lack a cause of action.

a. As Defendants have explained, *see* MTD 37-39, Plaintiffs cannot succeed on the merits of their APA claims because those claims are not brought pursuant to any valid cause of action. One problem is that the APA only authorizes challenges to "[f]inal agency action[]," *i.e.,* an action that "(1) 'mark[s] the consummation of the agency's decisionmaking process,' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Plaintiffs are unlikely to satisfy the first *Bennett* prong because their true grievance is not with any consummated decision of the Working Group, but with hypothetical *future* consummated decisions by *other* actors, in which the Interim Estimates will play just a partial role, if any at all. *See* Pls.' Br. 14-15, 31-36, 41-47.

On the second *Bennett* prong, Plaintiffs argue that the Interim Estimates "bind the entire Executive Branch to a particular numerical measure," and thus "alter the legal regime." Pls.' Br. 37. But *Bennett*'s second prong is evaluated "from the regulated parties' perspective," not "from the agency's perspective." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018), *cert. denied*, 139

S. Ct. 1544 (2019); *see also Sackett v. EPA*, 566 U.S. 120, 126 (2012) (final agency action where plaintiffs "the Sacketts" faced a new "legal obligation"); *Luminant Generation Co. v. U.S. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (agency action not "final" because it "does not itself determine Luminant's rights or obligations"). No matter what E.O. 13990 requires of agencies, it does not impose "direct and appreciable legal consequences" on anyone outside of the Executive Branch. *Bennett*, 520 U.S. at 178.

b. Plaintiffs contend that they may press APA claims against the Working Group because it qualifies as an "agency" under the APA. *See* Pls.' Br. 38. It does not. *See* MTD 39-42; MTD Reply 19-20. Plaintiffs assert that E.O. 13990 vests the Working Group with "significant independent authority to create" the Interim Estimates "that will be binding on executive agencies." Pls.' Br. 38. But Plaintiffs have it backwards: to the extent agencies are bound to use the Interim Estimates, that obligation flows *from the President*, not the Working Group. *See* E.O. 13990 § 5(b)(ii)(A). And while Plaintiffs also suggest that "[n]o further action from the President is needed," Pls.' Br. 38, it was the President, not the Working Group, who set all of this in motion. *See* E.O. 13990 § 5(b)(ii), (iii). Thus, much as in *Meyer v. Bush*, "it is rather hard to imagine that . . . any . . . head of a department or agency who *reports directly* to the President, would acquiesce in" the Interim Estimates if they were "thought not to represent directly and precisely the President's opinion." 981 F.2d 1288, 1295 (D.C. Cir. 1993).

At bottom, the Working Group is similarly situated to many other governmental bodies that amplify the President's capacity to oversee the Executive Branch and advance his priorities. Regardless of its importance, the Working Group is ultimately a mere extension of the President, who may unilaterally revoke its authority at any time. *See Promoting Energy Independence and Economic Growth*, E.O. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (disbanding Working Group); E.O. 13990 (reestablishing it). For this reason, the Working Group is not an "agency" subject to the APA.

c. Plaintiffs also seek to avail themselves of a non-statutory *ultra vires* cause of action. As detailed in Defendants' motion to dismiss, *see* MTD 42-44, such claims are subject to an extraordinarily high bar in the Fifth Circuit: They are only available when (1) "there is a 'plain' violation of an unambiguous and mandatory provision of [a] statute," and (2) no statutory cause of action will ever provide the plaintiff with a "meaningful and adequate opportunity for judicial review of the validity"

of the challenged action. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999); *accord Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.) (*ultra vires* claim is "essentially a Hail Mary pass" that "rarely succeeds").

Plaintiffs do not even grapple with, much less satisfy, the Fifth Circuit standard. For one thing, Plaintiffs have not alleged any direct violation of a clear statutory prohibition. And even if some statutory prohibition did apply, the Executive Order requires agencies to comply with any applicable statute. *See* E.O. 13990 §§ 5(b)(ii), 8; *see also* OIRA Guidance, at 2. Thus, Plaintiffs' allegations do not establish any "plain violation of an unambiguous and mandatory provision of [a] statute" that is a prerequisite to *ultra vires* review. *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002).

Plaintiffs' attempt to invoke an *ultra vires* cause of action faces another, equally fatal, problem: the eventual availability of APA review. If an agency relies upon the Executive Order to justify some action that concretely harms Plaintiffs, the APA will provide an opportunity for "meaningful and adequate" review. *Am. Airlines*, 176 F.3d at 293; *see also Ohio Forestry*, 523 U.S. at 734. Moreover, though Plaintiffs assert that the text of E.O. 13990 and their "experience of the Obama Administration" suggest that agencies will refuse to "rethink the fundamentals" of the Working Group's work, Pls.' Br. 28 n.3, that is precisely the sort of thing that can be challenged (and remedied) in litigation over a specific agency action. *See, e.g., Zero Zone*, 832 F.3d at 678 (discussed in *Missouri*, 2021 WL 3885590, at *11-12). Plaintiffs are thus unlikely to succeed on their *ultra vires* claim.

B. Plaintiffs' claims lack merit.

1. The Interim Estimates are not arbitrary and capricious.

Like Plaintiffs' other claims, their arbitrary-and-capricious claim lacks merit: the Interim Estimates comport with the APA's requirements, and there is no basis for this Court to accept Plaintiffs' invitation to "substitute its own policy judgment for that of the" the Working Group. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).[13]

[13] Plaintiffs' brief augments their arbitrary-and-capricious claim with a new theory of liability. *Compare* Compl. ¶¶ 101-112 (alleging that the Interim Estimates are arbitrary and capricious for nine reasons), *with* Pls.' Br. 27-28 (adding, as a tenth reason, that CEQ's NEPA regulations are "another

Arbitrary and capricious review is governed by "a narrow and highly deferential standard." *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). Agency action "is 'arbitrary and capricious' only where the agency has considered impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise." *BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 824 (5th Cir. 2003). A court may not "substitute [its] judgment for that of the agency." *Clean Water Action v. U.S. EPA*, 936 F.3d 308, 316 (5th Cir. 2019). Instead, a court "simply ensures that the agency has acted within a zone of reasonableness" and "has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio*, 141 S. Ct. at 1158. Such review is at its "'most deferential'" where, as here, an agency's decision is "based upon its evaluation of complex scientific data within its technical expertise." *BCCA Appeal Grp*, 355 F.3d at 824; *see also Texas v. U.S. EPA*, 983 F.3d 826, 841 (5th Cir. 2020) (same). The Court must be "mindful of the many problems inherent in [considering costs]," avoid undertaking its own "economic study," and "uphold a reasonable effort made by the Agency." *Huawei*, 2 F.4th at 452 (citation omitted).

a. The Working Group's decision to adopt the Interim Estimates was well-reasoned and well-supported by the record.

In adopting the Interim Estimates, the Working Group was responding to a difficult but important problem: the need for agencies to estimate and report the wide-ranging, compounding impacts of greenhouse gas emissions that will mix into the Earth's global atmosphere and linger there for decades. While this task is subject to some unavoidable uncertainty—as the Working Group expressly acknowledged—the Interim Estimates are the product of the best available scientific and economic analysis that is usable in regulatory impact analysis. They are indistinguishable from estimates that have been endorsed by federal courts for years. They are based on a carefully selected

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important aspect of the problem ignored" by the Working Group). "Assertions that do not appear in the complaint cannot form the basis for a preliminary injunction," *Barnett v. Hill*, No. 1:19-cv-00008-JMB, 2019 WL 2343439, at *2 (E.D. Mo. June 3, 2019), so the Court need not address Plaintiffs' late-breaking theory. But in any case, for reasons explained *infra* at 43, that theory also fails on its merits.

combination of the most widely cited integrated assessment models used in the peer-reviewed economic and scientific literature. They were developed using a methodology whose strengths and weaknesses have been extensively considered and defined over the course of numerous rulemaking processes. Given all of this, the Working Group's decision to adopt the Interim Estimates was at least rational, in light of the scientific and economic evidence before it. That is all the APA requires.

1. To support their contrary view, Plaintiffs raise a litany of disconnected complaints about the Working Group's methodology and models. In Plaintiffs' view, these are "fundamentally flawed." Pls.' Br. 19. In truth, though, Plaintiffs never really engage with the Working Group's explanation of these matters. Instead, Plaintiffs submit their own preferred sources and rely on declarations and post-decision materials, instead of evaluating the record that was before the Working Group. *See* Pls.' Br. 26. But "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Most of Plaintiffs' sources (and all of Plaintiffs' declarations) are thus irrelevant to this Court's assessment of the merits of Plaintiffs' arbitrary-and-capricious claims, for which judicial review is limited to those materials that the *agency* considered, directly or indirectly, when making the challenged decision. *See Nat'l Pork Producers Council v. Bergland*, 631 F.2d 1353, 1359 (8th Cir. 1980). Should this case proceed, Defendants will ultimately produce an administrative record, and it is *that* record on which any arbitrary-and-capricious review must be based—not Plaintiffs' self-serving declarations. Defendants thus object to any consideration of Plaintiffs' extra-record evidence.

In any event, the *substance* of Plaintiffs' critiques falls well short of demonstrating arbitrary agency action, and can be rejected on the basis of materials already before the Court, and the detailed and technical explanation that the Working Group has already provided in its February 2021 Technical Support Document (Ex. 3)—without the need for the Court to steep itself in the scientific literature on climate science and economics. The three models that Plaintiffs disparage are *the very same models* that were used during the Trump Administration to produce standardized estimates of the social costs of greenhouse gases pursuant to Executive Order 13783—an era that Plaintiffs praise, and describe in their complaint as characterized by "bipartisan good-regulation practices." Compl. at 26

(capitalization altered). The models' wide usage reflects the fact that they represented the best state of the science at the time that they were developed: in fact, the developer of the DICE model, Dr. William Nordhaus, won the 2018 Nobel Prize in Economics for his work in developing it. *See William D. Nordhaus*, NOBELPRIZE.ORG, https://perma.cc/UK82-AE5X. And a wide range of experts have endorsed the Working Group's methodology. *See, e.g.*, GAO, *Social Cost of Carbon: Identifying a Federal Entity to Address the Nat'l Academies' Recommendations Could Strengthen Regulatory Analysis*, at 61 (June 2020) ("GAO 2020 Report") (describing Canada's adoption of estimates based on the Working Group's modeling for purposes of regulatory analyses); National Academies at 2-3 (endorsing continued use of the Working Group's estimates). And multiple courts of appeals have endorsed agency uses of the Working Group's estimates in the face of the same sort of critiques that Plaintiffs advance here. *See Zero Zone, Inc.*, 832 F.3d at 678-79; *cf. Ctr. for Biological Diversity*, 538 F.3d at 1199-1202 (discussing available methodologies for estimating the value of reducing carbon emissions); *Vecinos Para El Bienestar De La Comunidad Costera v. FERC*, --- F.4th ----, 2021 WL 3354747, at *4 (D.C. Cir. Aug. 3, 2021) (remanding for FERC to explain whether the Working Group's social cost of carbon estimates should be adopted as "generally accepted in the scientific community"). There can be little question, then, that the Interim Estimates, in reflecting well-reasoned, substantiated, and peer-reviewed efforts available while the Working Group crafts updated estimates, "constitute the best available science about monetizing the impacts of greenhouse gas emissions." *California v. Bernhardt*, 472 F. Supp. 3d at 611. Plaintiffs offer little more than conclusory complaints to the contrary, and do not even acknowledge that they ask this Court to open up a split with (at least) the Seventh and Ninth Circuits.

Even accepting the unsupported proposition that reasonable minds could differ over whether the Interim Estimates represent the best available science, Plaintiffs' objections would still fail under the applicable standard of review. Plaintiffs do not dispute (nor could they) that the Working Group "is making predictions, within its area of special expertise, at the frontiers of science." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Id.* Operating with this extraordinary level of deference, the only question for this Court

is "whether the [Working Group's] projections represent arbitrary or capricious exercises of its authority, *not* whether they are accurate." *BCCA Appeal Grp*, 355 F.3d at 832 (emphasis added). This circumscribed approach to judicial review forecloses all of Plaintiffs' theories.

First, take Plaintiffs' contention that the Working Group's models "arbitrarily refuse to consider potential benefits from a warming climate" and "systematically refuse to consider . . . economic and health benefits." Pls.' Br. 20. This claim is contradicted by the February 2021 TSD, which explains that the Interim Estimates account for, among other things, "changes in *net* agricultural productivity, human health effects, . . . [and] risk of conflict." Feb. 2021 TSD at 9 (emphasis added). It is also inconsistent with the record. The models used to develop the Interim Estimates *do* capture positive externalities associated with emissions: For example, the DICE model "assume[s] that farmers can adjust land use decisions in response to changing climate conditions," February 2010 TSD at 6, and in the FUND model, the "combined effect of CO_2 fertilization . . . , positive impacts to some regions from higher temperatures, and sufficiently slow increases in temperature across these sectors can result in negative economic damages from climate change," *id.* at 8.

Plaintiffs struggle mightily to identify *some* factor that is not expressly accounted for in *some* underlying model. *See, e.g.*, Pls.' Br. 20 (stating that the DICE model "ignores decreased mortality from wintertime mortality"). But even if they could succeed, "[t]hat a model is limited or imperfect is not, in itself, a reason to remand agency decisions based upon it." *In re Polar Bear Endangered Species Act Litig.*, 709 F.3d 1, 13 (D.C. Cir. 2013) (quoting *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053-54 (D.C. Cir. 2001)). By their nature, models are "'meant to simplify reality in order to make it tractable,' and need not 'fit every application perfectly.'" *Sierra Club v. EPA*, 939 F.3d 649, 687 (5th Cir. 2019) (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1063 (D.C. Cir. 2000)). What matters is that the agency offer a reasonable *explanation* of its decision to use a model—notwithstanding any limitations. *See BCCA Appeal Grp*, 355 F.3d at 832; *see also id.* at 834 (where agency "recognized the model's shortcomings" and "provided plausible explanations that were supported by the record," acceptance of the model was not arbitrary and capricious).

Here, the Working Group fully appreciated that even the best available models are not perfect. *See, e.g.*, Feb. 2021 TSD at 31. Moreover, it acknowledged technical advances that could support *future* updates to those models and its methodology. *Id.* Nevertheless, the Working Group assessed an "immediate need to have an operational SC-GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process." *Id.* at 3. Thus, it issued the Interim Estimates for use "until a comprehensive review and update is developed." *Id.* at 4. That approach was justified among other reasons because the very limitations that Plaintiffs rely on here "suggest that," if anything, the Interim Estimates "likely *underestimate* the damages from [greenhouse gas] emissions." *Id.* at 31 (emphasis added). Any imperfections in the Working Group's approach thus provide no support for these Plaintiffs' claims, which are based on a claimed injury from *inflated* estimates.

Indeed, the use of "an ensemble of three different models was intended to, at least partially, address the fact that no single model includes all of the impacts" that might be relevant to a "true" assessment of the social costs of greenhouse gases. Response to Comments at 10. Here, where the Working Group demonstrated a keen awareness of the challenging task at hand, and the pros and cons of the models they used, the unavoidable factual uncertainties inherent in estimations of the social costs of greenhouse gases cannot be a basis to call those estimates arbitrary and capricious. *Accord EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 135 (D.C. Cir. 2015) (Kavanaugh, J.) ("We will not invalidate EPA's predictions solely because there might be discrepancies between those predictions and the real world."). All the more so in the absence of *any* available perfect approach.[14]

In sum, the Working Group's conservative approach to a difficult-but-important problem of forecasting offers more than a "'rational connection between the facts found and the choice made.'"

[14] These same principles offer a complete response to Plaintiffs' critiques that the models are "antiquated," Pls.' Br. 22, and the estimates "out of date," *id.* at 23. So long as the reasons for relying on more seasoned methods are clearly explained and not irrational, the APA does not require use of more recent models. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010) (where a model "was an acceptable and conservative method when the analysis was carried out, the [agency] reasonably decided to retain the old estimates rather than undertake a new . . . analysis.").

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (2009) (citation omitted); *see also Vill. of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006) (decision not to use newer data was "a reasonable means of balancing" certain "competing considerations," where "full modeling with new data" would take "many months"); *cf. Ctr. for Biological Diversity*, 538 F.3d at 1200 ("[W]hile the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero."). It therefore survives deferential APA review.

2. These bedrock principles of deference to agency experts are similarly dispositive of Plaintiffs' objections to the Working Group's broader methodological choices. Plaintiffs take particular exception to the long timeframe the Working Group analyzed. *See* Pls.' Br. 25. But these models were designed for the precise purpose of measuring distant, long-lasting impacts. *See* February 2010 TSD at 25 ("The default time horizon is 2200 for PAGE, 2595 for DICE, and 3000 for the latest version of FUND."). In the face of peer review, Plaintiffs offer only conclusory incredulity. *See, e.g.*, Pls.' Br. 25 (referring to the "impossibility of forecasting that far into the future."). Given that, if anything, the Working Group took a conservative approach by *shortening* the time periods assessed by two of the three models, Plaintiffs cannot meet their "considerable burden" to rebut the "presumption of regularity" accorded to this "choice of analytical methodology." *Sierra Club*, 939 F.3d at 687-88; *cf. id.* at 683-84 (approving reliance on a model that overestimated real-world conditions by nearly 500%).

In any event, the Working Group offered a reasonable basis for its choice of a long analytical time frame: greenhouse gases accumulate in the atmosphere over time and "are long lived such that subsequent damages resulting from emissions today occur over many decades or centuries." Feb. 2021 TSD at 16. Thus, the Working Group engaged (at least) in "reasoned decisionmaking," *State Farm*, 463 U.S. at 52, when it decided to analyze the social cost of greenhouse gases far off in the future, notwithstanding the unavoidable imprecision in any such estimate. *See* Feb. 2021 TSD at 26 ("[E]ven in the presence of uncertainty, scientific and economic analysis can provide valuable information to the public and decision makers."); *accord* Response to Comments at 29 (agreeing that "the trajectory of socioeconomic-emission scenarios beyond 2100 is uncertain," but noting that "the long atmospheric lifetime" of greenhouse gases means that "using too short a time horizon could miss

a significant fraction of damages"); National Academies of Sciences, Engineering, and Medicine, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*, at 12 (2017) (endorsing analysis well beyond 2100). The APA requires no more. *See BCCA Appeal Grp.*, 355 F.3d at 832.[15]

Plaintiffs' passing objection to the Working Group's decision to average the annual results from across its modeling exercises also lacks merit. That such averages may not represent the "true" impact of greenhouse gas emissions is irrelevant, for "[t]hat possibility is inherent in the enterprise of prediction." *EME Homer City Generation*, 795 F.3d at 135. As the Working Group has previously noted, in keeping with Circular A-4, estimates of costs and benefits used in regulatory analysis are "usually based on the average or the expected value." February 2010 TSD at 30; *see also* OMB Circular A-4, at 42. Such an approach has much to recommend it, including the analytical simplicity noted by the Working Group. *See* Response to Comments at 25 ("[U]sing the full distribution of the SCC estimates from the 45 scenarios would be impractical in a regulatory impact analysis."); *see also Vill. of Bensenville*, 457 F.3d at 71 (agency was "reasonably concerned that an unyielding avalanche of information might overwhelm an agency's ability to reach a final decision"). And the Working Group was under no illusions that such an average would represent the only "true" impact of greenhouse gas emissions. *See* Response to Comments at 26 ("[T]he modeling of uncertainty in our analysis, including the uncertainty explicitly represented in the IAMs, may not capture the full range of uncertainty of the 'true' value of [the social cost of carbon]."). But, as the Working Group appreciated, that is true of "most quantitative assessments of uncertainty," and, in any case, is the type of problem that "[u]sing three models rather than one helps address." *Id.* Once the Working Group selected the three models, it was not irrational to average the estimates those models produced.

[15] Indeed, several courts have explicitly held that *not* making best efforts to estimate these future costs is *itself* arbitrary and capricious (at least in the context of certain rulemakings), despite the inevitable imprecision. *Cf. California v. Bernhardt*, 472 F. Supp. 3d at 623 (agencies "cannot ignore scientifically robust methods that exist to assess the actual effects of greenhouse gas emissions by . . . insisting they are too speculative or not 'reasonably foreseeable'"); *Ctr. for Biological Diversity*, 538 F.3d at 1200 (noting that "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero").

Plaintiffs' disagreements with the Working Group's decision to use global cost estimates are also insufficient to satisfy the deferential standard of review. *See* Pls.' Br. 23-24. In explaining its approach, the Working Group emphasized that climate change is "distinctive[ly] global," making greenhouse gas emissions "a global externality" that "contribute[s] to damages around the world regardless of where they are emitted." Feb. 2021 TSD at 15. Further, the Working Group emphasized the sparse literature around regional or country-specific estimates of climate damages, *see id.* at 15-16, noting that because the available models "do not capture . . . regional interactions and spillovers," they could offer only an "incomplete" and "underestimate[d]" picture of the share of total damages that accrue to U.S. citizens and residents, *id.* at 16. The Working Group also pointed to literature emphasizing the need for each country to use global valuations in order to support reciprocity in international efforts to address climate change. *See id.* at 22; *see also id.* at 15 (citing study by the National Academies). And it emphasized that even "climate impacts occurring outside U.S. borders can directly and indirectly affect the welfare of U.S. citizens and residents." *Id.* at 3. All of these factors could reasonably have led the Working Group to consider global costs, as the Seventh Circuit has already held. *See Zero Zone*, 832 F.3d at 678-79 (carbon emissions are "a global externality" so "global effects are an appropriate consideration when looking at a national policy").

Finally, there is no merit to Plaintiffs' objection to the Working Group's chosen discount rates. *See* Pls.' Br. 24-25. The Working Group discussed, in detail, its decision to omit a 7-percent discount rate, giving particular emphasis to the preference of economists to use the consumption rate of interest (3%, per Circular A-4) in order to appropriately evaluate long-term impacts. *See* Feb. 2021 TSD at 17. The Working Group also pointed out that recent data indicates that Circular A-4's estimate of 3% for the consumption rate of interest is *itself* likely an overestimate. *See id.* at 19-20. And the Working Group presented economics literature suggesting that, given the uncertainty surrounding the discount rate appropriate for assessing the impacts of greenhouse gas emissions, the effective discount rate would decline over time. *See id.* at 19. This frank acknowledgement of the pros and cons of alternative approaches is more than enough to warrant deference to the Working Group's rational choices.

3. Leaving behind substance, Plaintiffs ultimately resort to rhetoric: accusing the Working Group of having "dress[ed] up a political decision in the cloak of science." Pls.' Br. 22-23. But even if there were any basis for those accusations, a court may not "set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

b. OMB Circular A-4 does not provide a basis for holding that the Interim Estimates are arbitrary and capricious.

A distinct theme in Plaintiffs' arbitrary-and-capricious arguments is their criticism of purported deviations from OMB Circular A-4. *See* Pls.' Br. 23-25. Yet Plaintiffs' arguments misunderstand both the nature of Circular A-4 (as non-binding guidance), and its substance (which is not at all inconsistent with the Interim Estimates).

First, Circular A-4 (Ex. 6) is simply not the binding mandate Plaintiffs describe. Generally, private parties cannot enforce internal Executive Branch rules intended only for the benefit of the Executive Branch. *See Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003); *Am. Fed'n of Gov't Emps. v. United States*, No. Civ. A. SA00CA1508, 2001 WL 262897, at *7 (W.D. Tex. Mar. 7, 2001) ("OMB Circular A-76 cannot create enforceable rights in third parties"). And as the first sentence of Circular A-4 makes clear, it represents only OMB's "guidance to Federal agencies on the development of regulatory analysis as required under . . . Executive Order 12866." OMB Circular A-4, at 1. Circular A-4 pertains only to compliance with Executive Order 12866, so it causes no conflict with the APA (or any other statutory authority) for an agency to consider "deviating from Circular A-4 in ways large and small." *Mozilla Corp. v. FCC*, 940 F.3d 1, 70 (D.C. Cir. 2019). Thus, even accepting Plaintiffs' premise—that the Working Group deviated from Circular A-4 by estimating global rather than domestic damages and by employing discount rates other than 3 and 7 percent—that deviation would not even be *reviewable*, standing alone, much less sufficient to render the Interim Estimates arbitrary and capricious. And, in any event, agencies may (and frequently do) change positions without running afoul of the APA. *See infra* at 41.

Even if there were some basis for judicial enforcement of the non-binding guidance in Circular A-4, Plaintiffs' arguments would still fail, for the simple reason that the Interim Estimates are not at all inconsistent with that guidance. Plaintiffs emphasize what they call Circular A-4's "clear and reasoned directive to 'focus on benefits and costs that accrue to citizens and residents of the United States,'" Pls.' Br. 23 (quoting OMB Circular A-4 at 15), and its instruction that a 7 percent discount rate "is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector," *id.* at 25 ((quoting OMB Circular A-4 at 33). But each of these (non-binding) recommendations in Circular A-4 come with significant caveats, and each was invoked by the Working Group. Circular A-4 does not limit agencies' discretion to analyze a regulation's global effects; indeed, it expressly provides that agencies should separately report such effects—as the Working Group explained. *See* OMB Circular A-4 at 5; Feb. 2021 TSD at 15. And as for discount rates, Circular A-4 expressly contemplates that, when comparing benefits and costs that accrue across generations, agencies should consider discounting future costs and benefits "at a lower rate than for intragenerational analysis." OMB Circular A-4 at 36. It specifically notes that experts have estimated discount rates for policies with significant intergenerational effects to "range[] from 1 to 3 percent," *id.* at 36—thus endorsing discount rates even lower than the 2.5, 3, and 5 percent rates selected by the Working Group. Given the Working Group's rational judgment that greenhouse gas emissions will have important intergenerational effects, it was fully consistent with Circular A-4 to employ "lower but positive" discount rates, *id.*, rather than blindly adhering to what even Circular A-4 only refers to as the "default position" of 3 and 7 percent discount rates.

c. The Working Group complied with the APA when it adopted different estimates of the social cost of greenhouse gas emissions than those used during the prior administration.

Another theme in Plaintiffs' arbitrary-and-capricious arguments is their contention, presented in various forms, that the Interim Estimates reflect some improper change in position. As Plaintiffs see things, because the Working Group's approach differs from that of the Trump Administration (and, in Plaintiffs' view, from Circular A-4), the Working Group's adoption of the Interim Estimates was necessarily arbitrary and capricious. This view is meritless.

First, Plaintiffs have not identified any specific reliance interests that were impacted by the Working Group's adoption of the Interim Estimates. Moreover, like Circular A-4, discussed *supra* at 39-40, the findings and directives of E.O. 13783's (issued by President Trump) are unenforceable against federal agencies. *See* E.O. 13783 § 8(c) ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."). Given this fact, if any party actually relied on E.O. 13783's approach to estimating the social cost of greenhouse gases—and Plaintiffs offer no examples of such reliance—it did so unreasonably.[16]

That leaves Plaintiffs' contentions that the Working Group improperly "ignore[d] the specific factual findings made by the previous Administration justifying its reliance on Circular A-4 in regulatory proceedings," Pls.' Br. 21, and thus ran afoul of Supreme Court precedent, *see id.* at 22, 24 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). But in fact, the Working Group *did* acknowledge that the Interim Estimates constituted a break from the prior approach taken during the Trump Administration. *See* Feb. 2021 TSD at 11. It explained why "the SC-GHG estimates used since E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways," *id.* at 3, and offered detailed justifications for its current approach, *see, e.g.*, 14-22. Thus, any change was thoroughly addressed with "a reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 516. No more was required.[17]

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[16] The recent decision denying a stay in *Texas v. Biden*, --- F.4th ----, 2021 WL 3674780 (5th Cir. Aug. 19, 2021), is no help to Plaintiffs here. There, the Fifth Circuit concluded that the Department of Homeland Security had agreed to consult with Texas prior to a change in policy, *id.* at *1, but then failed to consider states' undisputed fiscal harms, *id.* at *10, or their reliance interests, *9-10. There are no analogous circumstances here.

[17] As a factual matter it is also hard to conclude that the Working Group has truly adopted a "new" position at all: the Working Group was disbanded for the duration of the Trump Administration and, upon being reassembled, promptly readopted its previous approach, with adjustments only for inflation. Thus, there was no need for any detailed explanation of any "change" here. Regardless, it suffices that the Interim Estimates are "permissible" under the APA, "there are good reasons for" them, and the Working Group "*believes* [them] to be better." *Fox*, 556 U.S. at 515.

d. The Working Group was not required to address issues irrelevant to the calculation of the social cost of greenhouse gas emissions.

Finally, another consistent flaw undermines Plaintiffs' arbitrary-and-capricious arguments: Plaintiffs' incorrect (and inflated) understanding of the Working Group's mission. Repeatedly, Plaintiffs conflate the Interim Estimates—which narrowly estimate projected costs and benefits of greenhouse gas emissions—with a typical agency action creating rights or obligations for regulated parties. Indeed, at least half of Plaintiffs' arbitrary-and-capricious theories rest on the Working Group's alleged failure to consider important factors in its estimation of the social cost of greenhouse gases—yet they only involve the type of considerations that might be important to an entirely different sort of decision, such as agency decisions that actually *regulate* greenhouse gas emissions, as opposed to *estimating* their future effects. This misguided approach demonstrates precisely why Plaintiffs' challenge to the Interim Estimates is altogether premature—until the Interim Estimates have been fleshed out in a specific agency action that actually uses them in some fashion, it is entirely unknowable whether that agency will fail to consider all "important aspect[s] of the problem" at issue. *Sierra Club*, 939 F.3d at 663. Indeed, until that point, it is entirely uncertain what the problem even is.

For example, Plaintiffs contend that the Working Group should have considered the benefits of "affordable energy" when setting the Interim Estimates. Pls.' Br. 20. But such benefits would be relevant, if at all, to an overall cost-benefit analysis of an actual agency action that has effects on the availability of affordable energy. As the Working Group previously explained:

> A rule that affects CO_2 emissions may also affect the production or consumption of goods and services, in which case it could create costs and benefits for businesses and households that either produce or use those goods and services. These costs and benefits are important to include in an analysis of the rule's impacts, but are not a result of changes in CO_2 emissions.

Response to Comments at 11 (footnote omitted). In other words, the Interim Estimates would provide at most one potential input to an agency's broader cost-benefit analysis—and, depending on the rulemaking, that broader analysis might very well account for all of the factors that Plaintiffs identify in their brief as having allegedly been omitted from the Working Group's analysis. *See id.*

Plaintiffs raise other factors relating to the particular policy contexts in which the Interim Estimates might be employed. In particular, they argue that the Working Group should have addressed CEQ's 2020 NEPA rule, and that the Working Group "has relied upon statutorily impermissible factors and has not even considered the statutorily mandated factors under which agencies operate." Pls.' Br. 28. But again, whatever the merits of those arguments, specific statutory prohibitions or contextual limits on the *relevance* or the *use* of the social costs of greenhouse gas emissions have no effect whatsoever on the rationality of the *estimates themselves*. Plaintiffs' generic invocation of federalism concerns is unavailing for similar reasons: the legal or constitutional issues that may be relevant to some future, hypothetical agency action (including those arising under "cooperative federalism programs") are simply not relevant to the Working Group's scientific predictions or monetary estimates. In short, the Interim Estimates are intended to provide accurate, broadly applicable estimates of the social cost of greenhouse gas emissions: thus, considerations about whether, when, and how those estimates should be *used*, in the future, by particular agencies operating under particular delegations of authority, were not for the Working Group to address, but for those *agencies* to address in future rulemakings, as appropriate and if necessary. And of course, if those hypothetical future rules insufficiently address their concerns, Plaintiffs can challenge those specific agency actions in the normal course. *See Missouri*, 2021 WL 3885590, at *11-13.

* * *

At bottom, Plaintiffs seek to bind the Working Group's hands and prevent it from weighing the evidence about the social costs of greenhouse gas emissions differently than the previous administration. But the Working Group made reasoned decisions when developing the Interim Estimates. It explained its reliance on peer-reviewed models and methods while also being clear-eyed about their limitations. It acknowledged the possibility of other approaches, including the previous administration's approach to Circular A-4, and it explained where (and why) it decided to approach some issues differently. And it carefully considered all of the important factors relevant to the narrow, technical question before it. Because the APA requires nothing more, Plaintiffs are not likely to succeed on the merits of their arbitrary and capricious claim.

2. Plaintiffs' statutory and *ultra vires* claims are meritless.

Plaintiffs contend that the Working Group has violated a number of federal statutes. Although those statutory arguments are meritless for reasons Defendants have explained elsewhere, *see* MTD 46; MTD Reply 22, Plaintiffs' statutory and *ultra vires* claims are unlikely to succeed on the merits for a more fundamental reason: Neither E.O. 13990 nor the Interim Estimates purport to override *any* legislative limits on the development or use of estimates of the social cost of greenhouse gases. *See* MTD at 45-46. To the contrary, through Section 5 of E.O. 13990, the President has exercised only the supervisory authority that he possesses over his own subordinates. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010); *Allbaugh*, 295 F.3d at 32. Recognizing that a generally applicable directive like Section 5 of E.O. 13990—with numerous possible applications across varied statutory contexts—might conflict with some pre-existing legal obligations, the President made clear that any relevant Legislative command must take priority: "Nothing in this order shall be construed to impair or otherwise affect . . . the authority granted by law to an executive department or agency." E.O. 13990 § 8(a)(i); *see also id.* §§ 5(b)(ii), 8(b). This is common language, used in many Executive Orders, precisely to avoid any potential conflict with the Legislative Branch or federal law. *See, e.g., Allbaugh*, 295 F.3d at 33. Thus, E.O. 13990, like other executive orders, "recognizes that agencies face various statutory obligations, and it does not—and could not—purport to override those obligations." *California v. Trump*, --- F. Supp. 3d ----, 2020 WL 1643858, at *3 (D.D.C. Apr. 2, 2020). The result is clear: "if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law." *Allbaugh*, 295 F.3d at 33; *see also* OIRA Guidance at 2. Given these clear, substantive limits on the scope of the Executive Order, Plaintiffs are unlikely to prevail on the merits of their statutory and *ultra vires* claims.[18]

Plaintiffs' attempts to suggest a statutory violation by referencing language in the EPCA, CAA, NEPA, MLA, and OCSLA could only succeed if this Court were to assume that agencies will ignore

[18] Plaintiffs do not seriously dispute Defendants' interpretation—they simply ask the Court to ignore the Executive Order's text, disparaging several key provisions as "boilerplate." Pls.' Br. 31 n.4. But there is a reason why certain terms recur—in Executive Orders, much like in contracts, what Plaintiffs dismiss as "boilerplate" plays an important role in ensuring compliance with the law.

the plain text of the Executive Order and any inconsistent statutory commands. But that assumption, and the desire to litigate it now outside the context of any specific statutory application, flips the ordinary presumption of lawful government action on its head. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). If Plaintiffs are correct, then agencies are not permitted to use the Interim Estimates in the ways that Plaintiffs fear, *see* E.O. 13990 § 8(a)(i), and presumably will not do so. And if an agency *does* use the Interim Estimates inappropriately, Plaintiffs may challenge that action at that time.[19]

The cases that Plaintiffs cite are not to the contrary. Instead, they stand primarily for the uncontroversial proposition that when an agency acts in reliance on an executive order, the legality of that executive order may be reviewed in a challenge to that specific agency action—exactly what Defendants have argued. Thus, in *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018), the inclusion of an instruction to act "consistent with law" did not preclude judicial review of an executive order's legality where that order's substantive directives required agency action that was unlawful. *Id.* at 1239-40. *Hias, Inc. v. Trump*, 985 F.3d 309 (4th Cir. 2021), was similar: there, an executive order imposed conditions on refugee resettlement that were incompatible with specific text from the Refugee Act, rendering the order's savings clause "purely theoretical." *Id.* at 325.

This case is different. Here, though Plaintiffs fail to challenge the Executive Order in any specific context or concrete application, there are *many* circumstances, including the regulatory-review process under E.O. 12866, in which an agency may use the Interim Estimates without running afoul of any statute. Moreover, there are clear and familiar standards for discerning when an agency must deviate from the Interim Estimates—most notably, the same organic statutes that govern virtually *all* agency actions, with which agencies will be familiar. *See also* OIRA Guidance, at 2. 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 *Allbaugh*, 295 F.3d at 33).

[19] As detailed in prior filings, *see* MTD 47; MTD Reply 24, Plaintiffs' statutory and *ultra vires* claims effectively merge on the merits, distinguished from one another only by the higher bar to stating an *ultra vires* claim. *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006). So Plaintiffs' failure to identify any statutory violation necessarily dooms their *ultra vires* claim.

3. Plaintiffs' notice-and-comment claims are meritless.

Plaintiffs also seek preliminary relief on their notice-and-comment claim (Count I). *See* Pls.' Br. 17-19. Because the Working Group is not an "agency" under the APA, *see supra* at 29, and because Plaintiffs cannot show prejudice, Plaintiffs are also unlikely to succeed on this claim—even if there would otherwise have been any notice-and-comment obligation here.

To be sure, the Interim Estimates might have been subject to the APA's notice-and-comment requirement if they "affect[ed] individual rights and obligations and [were] binding on the courts." *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000); *see also Williams v. Van Buren*, 117 F. App'x 985, 987 (5th Cir. 2004) (notice and comment required for "rules which affect the rights and obligations of those being regulated"). Yet the Interim Estimates have no such binding effect outside of the Executive Branch: they are tools of economic analysis for use *within* the government in the manner specified by E.O. 12866. At most, they "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citation omitted) (quoted in *Texas v. United States*, 809 F.3d 134, 171 n.123 (5th Cir. 2015)), so they are best characterized as "general statements of policy," 5 U.S.C. § 553(b)(A).

Even if notice and comment were otherwise required, any error would not warrant a preliminary injunction. Plaintiffs have had ample opportunity to comment on the Working Group's estimates and methodology; current changes reflect only inflation adjustments from prior estimates that were subject to notice and comment; and Plaintiffs will have more opportunities to comment in the future.[20] So, even if Plaintiffs could demonstrate that the APA's notice-and-comment requirements apply to the Interim Estimates, they still would be unable to show "prejudicial error." 5 U.S.C. § 706.[21]

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[20] Plaintiffs have asserted that the Interim Estimates "have never been subject to public comment, and never will be absent an order from this Court." Pls.' MTD Opp'n, ECF No. 48, at 48. In fact, the Attorney General of Louisiana submitted a lengthy comment during the recent comment period on the Interim Estimates. *See* Louisiana Comment, https://perma.cc/32BJ-4GHL.

[21] Plaintiffs are incorrect to suggest that the Interim Estimates "effectively repeal key provisions of two regulatory actions"—Circular A-4 and a recent NEPA rule—"that went through

III. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST.

The President's leadership is an essential source of democratic accountability within the Executive Branch. Indeed, it is presidential leadership that "enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power," and "establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-32 (2001). Thus, it will rarely be in the public interest for a court—especially in preliminary proceedings—to enjoin the Executive Branch from allowing the President to guide agency action according to his assessment of the public interest. *See Golden Gate Rest. Ass'n v. City & Cnty. of S.F.*, 512 F.3d 1112, 1126-27 (9th Cir. 2008) (where "responsible public officials . . . have already considered [the public] interest," the court's authority to substitute its own policy judgment is "constrained").

Moreover, across four presidential administrations, agencies have considered the social costs of greenhouse gas emissions—sometimes, as required by court orders. *See Ctr. for Biological Diversity*, 538 F.3d at 1198. In that time, the methodologies underlying the Interim Estimates have only grown more sophisticated, and the need for them has only increased. A court-ordered halt would pull the rug out from under agencies, raising questions about whether and how they may rely upon the most robust methodology available. To set agencies adrift in this manner—while "the United States and the world face a climate crisis," E.O. 13990 § 6(d)—would disserve the public interest.

A preliminary injunction could also do unwarranted harm to the stature of the United States as an international leader on climate issues. As the President has declared, "[w]e have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of [the climate] crisis," meaning that "[d]omestic action must go hand in hand with United States international leadership, aimed at significantly enhancing global action." Exec. Order No. 14008, *Tackling the Climate*

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notice and comment." Pls.' Br. 18-19. For one thing, OMB Circular A-4 is a guidance document; prior use of notice-and-comment procedures did not transform it into a binding rule. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Regardless, it is simply untrue that the Interim Estimates "effectively repeal," Pls.' Br. 18, any part of OMB Circular A-4, or the 2020 NEPA regulations, none of which are inconsistent with the Interim Estimates. *See* MTD Reply 9-10, 17-18; *supra* at 38-39, 43.

Crisis at Home and Abroad, prmbl., 86 Fed. Reg. 7619, 7619 (Jan. 27, 2021). One component of American leadership has been the Working Group, which serves as a model for other governments in the effort to stabilize our climate. GAO 2020 Report, at 61-64 (describing Canada's use of Working Group estimates). To undermine the Interim Estimates now, as the President works to spur further global action, *see* The White House, *Fact Sheet: President Biden's Leaders Summit on Climate* (Apr. 23, 2021), https://perma.cc/S4F9-NCMN, could do a grave disservice to the American public and the world.

In response, Plaintiffs offer in a paragraph only the argument that a violation of the law is not in the public interest, suggesting that the other preliminary-injunction factors are effectively irrelevant in any case alleging a statutory or regulatory violation (effectively, every APA case against the government). Pls.' Br. 47. That argument proves far too much, and this Court is left to assume once again that Plaintiffs cannot identify any particular obstacle to litigating this case in the normal course.

IV. PLAINTIFFS' REQUESTED RELIEF IS OVERBROAD.

Although Plaintiffs are not entitled to any relief, the relief they request is overbroad, even if the Court otherwise accepted all of their legal theories. "A district court abuses its discretion if it issues an injunction that is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *ODonnell v. Harris Cnty.*, 892 F.3d 147, 155 (5th Cir. 2018). Here, Plaintiffs request an order enjoining all Defendants from "adopting, employing, treating as binding, or relying upon the work product of the Interagency Working Group, including without limitation, any and all Social Cost of Greenhouse Gas estimates published by the Interagency Working Group." ECF No. 53-1. Yet as Defendants have explained, even if *all* of Plaintiffs' legal arguments were adopted, "an order declaring the Interim Estimates to be non-binding would be sufficient to resolve all of Plaintiffs' legal objections." MTD 23-24. Plaintiffs never responded, thus conceding the point. So Plaintiffs' requests for broader relief—*i.e.*, a flat, court-ordered prohibition on more than a dozen federal agencies even voluntarily "relying upon the work product" of a group of government experts—should be rejected.

CONCLUSION

For these reasons, Plaintiffs' motion for a preliminary injunction should be denied.

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