

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' MOTION FOR LEAVE TO FILE RESPONSE**

Defendants respectfully request leave to file a response to Plaintiffs' recently filed supplemental brief. That response would be limited to addressing the new arguments and examples regarding alleged agency uses of the Interim Estimates that Plaintiffs identify, for the first time, in their supplemental brief. As good cause for this request, Defendants offer the following:

1. After the December 7, 2021 hearing on Defendants' motion to dismiss and Plaintiffs' motion for a preliminary injunction, this Court directed the parties to, among other things, "address its concern regarding the Plaintiff States allegation of a concrete injury." *See* Order, ECF No. 82 (Dec. 9, 2021). In particular, the Court sought "evidence of agency use of the interim estimates as well as specific evidence of the interim estimates actually being utilized." *Id.*

2. In their supplemental memorandum, Defendants explained why the “evidence” that Plaintiffs had relied upon in prior briefs was insufficient to establish an Article III injury, much less any irreparable one, stemming from any Defendant’s use of the Interim Estimates. *See* Defs.’ Suppl. Br., ECF No. 90, at 3-16 (Jan. 21, 2021). They further noted that, because Plaintiffs bear the burden of invoking this Court’s jurisdiction and of showing irreparable harm, Defendants’ supplemental brief was focused on Plaintiffs’ previously asserted evidence of injury. *See id.* at 4 n.1. Nevertheless, Defendants reserved the right to seek leave to file a response in the event that Plaintiffs identified any new evidence for the first time in their supplemental brief. *See id.*

3. In their supplemental brief, ECF No. 91, Plaintiffs raise new arguments and purport to identify new evidence of uses of the Interim Estimates. These newly identified potential bases for standing concern a wide range of government actions, from newly identified agency rules (or proposed rules) and recent agency analyses conducted under the National Environmental Policy Act (NEPA), to certain agency statements in the context of so-called “cooperative federalism” programs. Pls.’ Suppl. Br. 1-16.

4. There are numerous problems, both general and specific, with Plaintiffs’ reliance on these alleged uses of the Interim Estimates. For one thing, Plaintiffs continue to point to *proposed* rules as a basis for injury, notwithstanding the black-letter law that forecloses any challenge to a proposed rule. *In re Murray Energy Corp.*, 788 F.3d 330, 334-36 (D.C. Cir. 2015) (Kavanaugh, J.) (citing *Bennett v.*

*Spear*, 520 U.S. 154 (1997)). For another, while Plaintiffs have, in some instances, identified examples of agencies using or referring to the Interim Estimates, they repeatedly fail to identify any resulting concrete injury from those actions to themselves—let alone any irreparable harm that could support the extraordinary remedy of a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021). And even if any of Plaintiffs’ examples were sufficient to overcome either or both of those hurdles, that might, at most, provide Article III standing only to challenge *that particular agency action*—not the Executive Order or the Interim Estimates, on their face and in their entirety.

5. Even taken on their merits, Plaintiffs’ examples cannot bear the weight that Plaintiffs assign to them. For one example, Plaintiffs claim to fear that the EPA may “refer” the Federal Energy Regulatory Commission (FERC) to the Council on Environmental Quality (CEQ) if FERC declines to use the Interim Estimates in its NEPA analyses. *See* Pls.’ Suppl. Br. 10-11. But such referrals are rare—the only EPA referral involving FERC occurred in 1996—and, in any event, and do not create any private right of action for judicial review. *See* 40 C.F.R. 1504.3(h). Thus, the remote possibility that EPA might someday refer FERC to CEQ cannot be the basis for the “certainly impending” future injury, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (emphasis omitted), necessary to support Plaintiffs’ Article III standing.

6. Of additional relevance, “standing is to be determined as of the commencement of suit.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 (1992). Thus, whatever their merit, it is not clear how Plaintiffs’ latest examples could ever provide standing where it was previously lacking. *Cf. Pederson v. La. State Univ.*, 213 F.3d 858, 870 (5th Cir. 2000) (district court erred in its standing analysis by assessing standing at the time of trial rather than “at the time the suit was filed”).

7. Accordingly, the Court should not rely on any of these belatedly identified uses of the Interim Estimates as the basis for jurisdiction in this case.

8. Nonetheless, to the extent that the Court deems relevant the material cited in Plaintiffs’ supplemental brief, Defendants respectfully request an opportunity to file a response in order to provide a full and accurate context for the new examples that Plaintiffs identify, and to respond to Plaintiffs’ new arguments.

9. Defendants’ proposed response is particularly necessary to correct Plaintiffs’ apparent misunderstandings of the agency actions that they seek to rely upon. For an example of why this is important, Plaintiffs assert that, through EPA’s Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, “the federal government has used the [Interim] Estimates . . . to impose massive, transformative costs on the economy,” and attach four pages of the Federal Register to their supplemental brief. *See* Pls.’ Suppl. Br. 2; Pls.’ Ex. 1, ECF No. 91-3. But Plaintiffs ignore EPA’s clear statement that the agency “weighed the relevant statutory factors to determine the appropriate standard and the analysis of monetized GHG benefits *was not material* to the choice of that standard.” Pls.’ Ex. 1,

at 4 (emphasis added). And the agency was equally clear in other rulemaking documents that were not attached to Plaintiffs' brief: "regardless of the method used in quantifying the benefits of GHG reductions for purposes of this rulemaking, EPA would still adopt the standards of this final rule pursuant to its statutory obligation to set standards for pollutants that contribute to air pollution that endangers public health and welfare." EPA, *Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Response to Comments*, at 14-105 (Dec. 2021), <https://perma.cc/RX8S-FFPJ>. Defendants' proposed response would reveal similar flaws with Plaintiffs' discussions of other of their examples. Defendants do not wish the Court to rely on an incomplete and inaccurate picture in rendering a decision in this case.

10. In light of these serious problems with Plaintiffs' new evidence, Defendants should, at a minimum, be afforded some opportunity to respond. In the absence of that opportunity, the Court will not have the full picture necessary to properly evaluate its jurisdiction in this case. Moreover, any finding of jurisdiction that relies on Plaintiffs' new evidence would lack the sort of firm foundation generally provided by an adversarial testing of litigants' allegations, and would rest on an incomplete record that could create significant inefficiencies in connection with future proceedings in this case, including any appeal by either side.

11. For these reasons, Defendants respectfully request that they be permitted to file a response to Plaintiffs' supplemental brief, addressed only to

Plaintiffs' new arguments and to their new purported examples of agency reliance on the Interim Estimates.

12. A proposed order is attached.

**LOCAL RULE 7.9 CERTIFICATION**

Before filing this motion, counsel for Defendants conferred with counsel for Plaintiffs, who reported their position as follows: "Plaintiff States take no position on Defendants' motion."

Dated: January 28, 2022

Respectfully submitted,

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