No. 22-30087

United States Court of Appeals for the Fifth Circuit

STATE OF LOUISIANA; et al.,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana No. 2:21-cv-1074 (Hon. James D. Cain, Jr.)

BRIEF IN OPPOSITION TO MOTION TO STAY

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INTRODUCTION

Almost immediately upon taking office, President Biden signed Executive Order 13990. Among other things, EO13990 created a new federal agency—the Interagency Working Group—and ordered the IWG to estimate "social costs" of greenhouse gas emissions for carbon, methane, and nitrous oxide. EO13990 also ordered federal agencies to immediately use those numerical SC-GHG Estimates when "monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions…."

Even so, for a year now, Movants have represented to a federal district court that the Executive Branch does not rely on the SC-GHG Estimates to justify administrative actions. But now—after the district court enjoined their usage—Movants say enjoining the Estimates will have dramatic consequences and interfere with the Executive Branch's ability to function. Both assertions cannot be true.

The extent of the contradiction between Movants' stay brief and their prior representations—and even between parts of Movants' stay brief—is striking. To demonstrate they're likely to succeed on the merits, Movants must argue that the Estimates are not in use and do not raise major questions. But to try to prove irreparable harm, Movants must

concede that the Estimates are in use and represent major questions. Plaintiff States (and Judge Cain) agree the Estimates are in use across the Executive Branch and represent questions of major political, economic, and social importance. That is precisely why—as the district court recognized—the injunction must not be stayed despite Movants' nebulous, unsubstantiated allegations of irreparable harm. In fact, the government's entire motion can be answered in one sentence: "[T]he Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take." *State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021).

STATEMENT OF THE CASE

I. CIRCULAR A-4'S LONGSTANDING RULEMAKING PROCEDURES.

One critical check on the growth of the Administrative State is the now-decades-old bipartisan consensus on cost/benefit analysis. Presidents Nixon, Ford, Carter, Reagan, and Clinton required agencies to perform vigorous cost/benefit analysis before regulating. *See* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 Harv. J.L. & Pub. Pol'y 447, 454-57 (2014). Embodying this consensus are President Clinton's Executive Order 12866, which directs

agencies to only regulate when benefits outweigh costs, and President Bush's Circular A-4, which standardizes agency regulatory analysis.

Circular A-4, adopted after exhaustive notice and comment and peer review, contains two cornerstone instructions to agencies. First, agencies are to estimate costs and benefits using discount rates of both 3% and 7%. Circular A-4 at 33-34 (Sept. 17, 2003), https://bit.ly/3KxAVae. The discount rate is a vital part of the analysis; it balances present and future benefits and costs. *See id.* Second, agencies are to consider domestic—rather than global—costs and benefits. *See id.* at 15; *see also Wyoming v. U.S. Dep't of the Interior*, 2020 WL 7641067, at *21 (D. Wyo. Oct. 8, 2020) (noting that Circular A-4 mandates a domestic focus).

II. THE CREATION AND DEVELOPMENT OF SC-GHG ESTIMATES.

Carbon dioxide, methane, and nitrous oxide are ubiquitous by-products of everyday American life produced by every imaginable American activity from energy production to agriculture to waste disposal. *Cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting).

A. Estimates in the Obama Administration.

No statute requires agencies to consider a "social cost" of carbon as part of their regulatory cost/benefit analysis in rulemakings. But in 2008,

the Ninth Circuit relied on a concession by a single Assistant United States Attorney about the cost of carbon to hold that NHTSA must account for the economic effects of a reduction of carbon dioxide emissions when analyzing the impacts of fuel economy standards. *See Ctr. For Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008). The Obama Administration did not let this holding go to waste—it provided an opening to remake the American economy without congressional authorization and to do so through the first iteration of an executive order-created "Internal Working Group."

The Obama IWG's first round of "interim" SCC estimates "did *not* undertake *any* original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values." IWG 2010 Technical Support Document at 4 (Feb. 2010), https://bit.ly/2RNRoBh (emphasis added). The Obama IWG purported to use Circular A-4 as its starting point but expressly rejected two of Circular A-4's fundamental tenets. First, it focused on global rather than domestic effects. *Id.* Second, it rejected Circular A-4's discount rates—3 and 7 percent—and instead mandated discount rates of 2.5, 3, and 5 percent. The Obama IWG also ignored the APA by failing to hold a dedicated public comment period for

the SCC estimates. Although the Obama IWG issued some technical tweaks, the SCC values remained the same until 2016.

B. Estimates in the Trump Administration.

Given the significant flaws in the Obama IWG's SCC estimates, President Trump issued Executive Order 13783, which disbanded the IWG and rescinded its technical support documents. EO13783 also directed agencies to return to Circular A-4's methodologies. Agencies complied with EO13783 and returned to Circular A-4's longstanding 3% and 7% discount rates and focus on domestic costs and benefits. For example, the EPA promulgated SCC values based upon Circular A-4's methodologies. Kate C. Shouse, Cong. Research Serv., *EPA's Proposal to Repeal the Clean Power Plan: Benefits and Costs*, at 9 (Feb. 28, 2018), https://bit.ly/37jvFJa.

III. PRESIDENT BIDEN ISSUES EO13990 REQUIRING AGENCIES TO EMPLOY SC-GHG ESTIMATES CREATED BY A NEW IWG.

A. Executive Order 13990.

On January 20, 2021, President Biden issued Executive Order 13990. 86 Fed. Reg. 7037 (Jan. 25, 2021). Section 5 of this Order directs federal agencies to "capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account." 86 Fed. Reg. at 7040. To accomplish this, EO13990 resurrects the Obama-

era IWG and directs it (in §5(b)(ii)(A) of the Order) to "publish an interim SCC, SCN, and SCM within 30 days of the date of this order, which agencies *shall use* when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published." *Id.* (emphasis added).

B. The Biden IWG Issues SC-GHG Estimates Effectively Identical to the Obama IWG's Discredited Estimates.

On February 26, 2021, the IWG released the SC-GHG Estimates that Section 5 of EO13990 commands agencies to employ. *See* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide, Interim Estimates Under Executive Order 13990 (Feb. 26, 2021), https://bit.ly/3HUKUVr ("Biden SC-GHG Estimates"). The Biden SC-GHG Estimates are identical to those in the Obama Administration's 2016 Technical Support Document and addendum, adjusted for inflation. But they depart radically from the Trump Administration's values. And the Biden IWG did not solicit or receive comments or any public input or peer review despite EO13990's directive to "solicit public comment; engage with the public and stakeholders; [and] seek the advice of ethics experts." 86 Fed. Reg. at 7041.

The Biden IWG itself recognizes the inherent uncertainty surrounding the SC-GHG Estimates and acknowledges that it is engaged in an inherently legislative function. *See* Feb. 2021 TSD at 2 (noting it was balancing "affected interests" such as "net agricultural productivity, human health effects, property damage from increased flood risk natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services"). The Biden SC-GHG Estimates' two most radical breaks from past regulatory practice are the same as the Obama IWG's: (1) the rejection of the longstanding 7% discount rate, and (2) the focus on global rather than domestic effects.

The Biden Administration used the SC-GHG Estimates across the board from their promulgation in February 2021 until the district court's injunction in February 2022. Indeed, in a Federal Register notice filed after the injunction, the Administration stated that it continued to employ the SC-GHG Estimates. *See* Dep't of Energy, Proposed Rule, *Energy Conservation Program: Energy Conservation Standards for*

Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps, 87 Fed. Reg. 11335, 11348 (**Mar. 1, 2022**).[1]

IV. THE STATES OBTAIN INJUNCTIVE RELIEF.

After the IWG promulgated the immediately binding SC-GHG Estimates, a coalition of States challenged the Executive Order and Estimates. After extensive briefing, evidentiary submissions, and oral argument, the district court issued a preliminary injunction February 11, 2022. Doc. 99.[2] The court initially determined that it had jurisdiction to adjudicate Plaintiff States' challenge to Executive Order 13990 and to the Estimates. Doc. 98 at 11-27. The court then held that Executive Order 13990 and the Estimates likely exceeded the Executive Branch's authority because they are not authorized by any statement of congressional authority. *Id.* at 29-34. The Estimates are likely unlawful under the Administrative Procedure Act, the court held, because they

[1] After Plaintiff States alerted the government to their apparent disregard for the court's order in their stay opposition below, Doc. 110, DOE issued a "Notice of Clarification" that DOE is "adhering to the prohibitions in the preliminary injunction." Energy Conservation Program: Energy Conservation Standards for Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps; Clarification (Mar. 9, 2022), https://perma.cc/DPE5-VVKJ.

[2] All references are to the docket below, *Louisiana v. Biden*, No. 2:21-cv-1074 (W.D. La.).

were not promulgated after notice and comment procedures, are arbitrary and capricious, and violated several statutory provisions. *Id.* at 34-38. The court next found that the Executive Order and Estimates irreparably harm Plaintiff States by reducing their tax revenues, harming their citizens' economic welfare, imposing additional duties on the States and State agencies in cooperative federalism programs, and divesting the States' procedural rights under the APA. *Id.* at 40-43. Finally, the court determined that the balance of harms and public interest "weigh heavily in favor of granting a preliminary injunction." *Id.* at 44.

On February 19, Defendants moved to stay the court's preliminary injunction, or, alternatively, to stay the injunction "to the extent it goes beyond barring the treatment of the Working Group's analysis as mandatory or binding in agency actions." Doc. 103-1 at 3. The district court denied the stay motion March 9. Doc. 111.

ARGUMENT

A stay "is not a matter of right." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). Instead, Movants must establish the *Nken* factors. *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011). Moreover,

irreparable harm is a necessary, but not sufficient, condition of granting a stay. *Planned Parenthood*, 734 F.3d at 410 ("A stay 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'"); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) ("*Nken* held that if the petitioner has not made a certain threshold showing regarding irreparable harm ... then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors.").

I. MOVANTS FAIL TO ESTABLISH IRREPARABLE HARM.

Movants devote a mere page to trying to carry their burden to establish irreparable harm. That is because their argument runs headlong into this Court's holding that "the Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take." *Biden*, 10 F.4th at 558. For this reason alone, this Court should deny the motion.

In any event, at every stage of this litigation, Movants have insisted the Executive Branch *does not actively use* the SC-GHG Estimates, or that, to the extent they are used, *they make no difference* in analysis and decision making. Now, however, Movants maintain that the Executive Branch cannot function without the Estimates. *See, e.g.*, Br. 26-27; *see*

also Doc. 103-1 at 23 ("In the single week that has elapsed since the entry of the injunction, its effects have reverberated across multiple federal agencies, reaching all the way from pending agency rules to internal Government deliberations, and even to work in support of the foreign affairs functions reserved to the President."). This Court should tread carefully when considering Movants' new directly contradictory statements. *Cf. Republic of Ecuador v. Connor*, 708 F.3d 651, 654 (5th Cir. 2013) (noting the need to "protect the integrity of judicial proceedings by preventing litigants from asserting contradictory positions for tactical gain").

Take the Declaration from Deputy OIRA Administrator Dominic Mancini, which purports to detail the extent of Executive Branch reliance on the Estimates. Doc. 104. This is *precisely* the type of information that—if it were correct—the district court expressly directed Movants to submit in response to its order for supplemental briefing. *See* Doc. 82 ("It is ordered that the parties ... specifically address and/or submit evidence of agency use of the interim estimates."). But instead, Movants—over the course of two supplemental briefs—methodically cited agency actions that explicitly relied upon the Estimates and tried to explain how each

action did *not* actually rely upon the Estimates in any material way. *See, e.g.*, Doc. 90 at 4 ("EPA did not 'rel[y] upon' the Interim Estimates in that proposal."); Doc. 95 at 10.

Despite Movants' conflicting arguments, Plaintiff States agree the Estimates are in use across the Executive Branch and represent a major initiative with wide-ranging implications. That's exactly why it was necessary to enjoin them. It is a foundational remedies tenet that halting an illegal measure works no irreparable harm to the Executive. *Biden*, 10 F.4th at 558. And Movants "remain able to make decisions based on other neutral factors"—*i.e.*, factors that Congress actually authorized. *U.S. Navy Seals 1-26 v. Biden*, 2022 WL 594375, at *10 (5th Cir. Feb. 28, 2022). Movants' argument that the Executive suffers irreparable harm when it is enjoined from acting to further what it perceives to be the public interest would mean that "no act of the executive branch asserted to be inconsistent with a legislative enactment could be the subject of a preliminary injunction." *Doe #1*, 957 F.3d at 1059. "That cannot be so." *Id.* Because the district court was exactly right to hold that the Executive Order and Estimates exceed the Executive Branch's authority, its injunction works no irreparable harm on Movants.

II. MOVANTS HAVE A LOW LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The District Court Had Jurisdiction.

Movants come nowhere near a "strong showing that they are likely to succeed on the merits." *U.S. Navy Seals 1-26*, 2022 WL 594375, at *10. This Court "review[s] a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law de novo." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013). "[A]n appellate court may not reverse" district court fact findings "even if it is convinced that it would have weighed the evidence differently in the first instance." *Texas v. Biden*, 20 F.4th 928, 966 (5th Cir. 2021).

1. Plaintiff States Have Standing.

Movants assert (at 12-16) that Plaintiff States lack standing because they suffer no harm caused by the Executive Order or Estimates. But Movants almost entirely ignore the district court's exhaustive jurisdictional findings. The court found that: (1) "mandatory implementation of the SC-GHG Estimates imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism programs," Doc. 98 at 19-20; (2) executive agencies have "already employed the SC-GHG Estimates, such as the

EPA in disapproving state implementation plans under the NAAQS good neighbor provisions and imposing federal implementation plans on several Plaintiff States including Louisiana, Kentucky, and Texas," *id.* at 20; and (3) the Estimates put the Plaintiff States to "a forced choice: either they employ the Estimates in developing their state implementation plan, or the EPA subjects them to a federal plan based on the SC-GHG Estimates," *id.* Movants ignore these specific findings and call them "speculat[ion]." But the court did not speculate—it made specific jurisdictional factual findings that precisely cited to an extensive record. Far from being speculation, such jurisdictional findings are entitled to the highest deference. *See, e.g.*, *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 390 (5th Cir. 2019) ("[J]urisdiction is a legal question. But the facts that underlie a jurisdictional determination are still reviewed only for clear error.").

Movants fail to challenge almost all of the district court's independent findings and its holding regarding standing. For example, the court found that the "SC-GHG Estimates artificially increase the cost estimates of [MLA oil-and-gas] lease sales, which in effect, reduces the number of parcels being leased, resulting in the States receiving less in

bonus bids, ground rents, and production royalties." Doc. 98 at 20. The court thus held that the Administration's use of the Estimates in NEPA reviews "directly causes harm to the Plaintiff States' statutorily vested rights to proceeds from MLA oil and gas leases." *Id.* Movants do not challenge the district court's finding that the Bureau of Land Management is employing the Estimates in lease-sale analyses or the court's holding that such reliance directly harms specific revenue sources for the Plaintiff States.[3] This is fatal to Movants' stay motion because only one basis for standing is needed for the case to proceed to the merits. *Biden*, 10 F.4th at 547-48 (noting importance of government's failure to challenge district court's jurisdictional findings on stay motion).

2. Plaintiff States' Claims Are Ripe.

Movants again assert (at 16-17) that Plaintiff States' challenge is not yet ripe. But as the district court recognized, this argument is at war

[3] Movants' reliance (at 13) on *El Paso County v. Trump* aids Plaintiff States, who have identified numerous sources of specific revenue to which they are entitled that will be harmed by the Estimates—including Kentucky's coal severance-tax revenues and MLA oil-and-gas leasing revenues. *See* Doc. 46-2 at 19-20 (collecting examples). As the district court found, Doc. 98 at 13, 19 n.46, 20-21, 26, 37, 41, 43, Plaintiff States easily satisfied their burden of identifying "specific tax revenues" directly harmed by the Estimates, *El Paso Cty., Texas v. Trump*, 982 F.3d 332, 340 (5th Cir. 2020).

with reality. Doc. 98 at 25-26. And Plaintiff States have extensively explained, Doc. 76 at 16-20, that this is their "only adequate opportunity to challenge the Executive Order itself and the 2021 SC-GHG Estimates themselves," Doc. 76 at 20. Harm is being done to the States *now* from the Estimates themselves. *See State of Fla. v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974) (case was ripe because challenged "regulation is final and is formally and actually in effect"). Accordingly, "the lines are drawn, the positions are taken and the matter is ripe for judicial review." *State of La. v. Dep't of Energy*, 507 F. Supp. 1365, 1372 (W.D. La. 1981), *aff'd sub nom*. 690 F.2d 180 (Temp. Emer. Ct. App. 1982).

B. Plaintiff States Have Multiple Causes of Action.

Movants' attempts (at 18-19) to rebut the Plaintiff States' causes of action fail.

First, the IWG is an agency because it was "granted authority to create SC-GHG Estimates that will be binding on executive agencies," which is a "hallmark of an APA agency." Doc. 98 at 39 (citing *Pac Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980)). Moreover, the IWG is an APA agency because it is tasked with ongoing and independent research and investigative functions, another

hallmark of agency status. EO 13990, §5(b)(ii)(C)-(E), (b)(iii); *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) ("By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency.").

Second, Movants' assertion (at 16-17) that the Estimates are not final agency action is facially implausible now given Movants' admission that the Estimates are in use across the Executive Branch and that the injunction significantly undermines Executive Branch decisionmaking. That can only be true if the Estimates are final and have binding legal effects. At a minimum, the Estimates are final agency action because (1) they represent the consummation of the Executive's decisionmaking process and (2) they have binding legal effects. The Estimates are "final agency action under the principle that, 'where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action' under the APA." *Texas v. Biden*, 20 F.4th at 948.

Third, Movants' brief effort (at 19) to rebuff the ultra vires cause of action is easily answered by the long line of cases holding that "[u]ltra vires review is available to review 'whether the President has violated

the Constitution, the statute under which the challenged action was taken, or other statutes, or did not have statutory authority to take a particular action.'" Doc. 98 at 39-40 (collecting cases).

C. The Executive Order and Estimates Are Unlawful For Several Independently Sufficient Reasons.

Defendants fail to engage with the district court's numerous independently sufficient holdings about the unlawfulness of the Executive Order and SC-GHG Estimates. For example, the court held that by requiring agencies to consider global effects, EO13990 "contradicts Congress' intent regarding legislative rulemaking." Doc. 98 at 33. Movants fail to carry their burden of contesting this holding. This failure alone supports a holding that Movants have not made a "strong showing" that they are likely to succeed on the merits. Instead, Movants cherry pick three areas to attack the district court's reasoning. Not one has any merit.

First, Movants attack (at 19-21) the court's reliance on the Major Questions Doctrine by again suggesting that the Order and Estimates are routine exercises of Executive supervision over rulemaking. Not true. These actions undermine decades of bipartisan regulatory review practice by placing a weight so heavy on Executive Order 12866's neutral

cost-benefit scale that it collapses. Unlike the *process* established by EO12866, EO13990 and the Estimates dictate a *specific binding rule* to the agencies that predetermine nearly all outcomes by mandating massive numbers for the cost side of the scale. *See* Doc. 91 at 22-23. Thus, far from being a mere process, "EO 13990 and the SC-GHG Estimates are a legislative rule that dictates specific numerical values for use across all decisionmaking affecting private parties." Doc. 98 at 33 (citing *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010)). And Movants cannot simultaneously claim that the Executive Order and Estimates do not work "on a dramatic scale" and then later contend precisely the opposite to establish irreparable harm.

Given the Estimates' transformative effect on the economy, infringement on the legislative power, and usurpation of traditional State powers, the burden is on the Executive Branch to identify clear congressional authorization. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022). Despite having numerous chances, Movants have still not even tried to locate a clear statutory authorization for the Executive Order and Estimates. Doc. 98 at 29-34 (collecting cases).

Second, Movants contend (at 21) that the Estimates are not legislative rules requiring notice and comment procedures because they do not directly regulate private conduct. But the question is not whether the Estimates regulate private conduct (which they do by imposing obligations on State agencies), but whether they have binding legal effect. *See* Doc. 98 at 34-35; *see also United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) ("Precedent ... recognizes that a specific numeric amount ... generally will not qualify as a mere 'interpretation' of general nonnumeric language." (collecting cases)). Moreover, failing to subject one of the most important rules in regulatory history to public comment is not harmless by any stretch of the term. And because the Estimates were actually in effect, Plaintiff States were subjected to their harms for months. Movants thus do not remotely carry their heavy burden of establishing harmless error. *See United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011).

Third, Movants' only argument (at 21-22) to revive the Estimates' reasonableness is that this Court must accept the Administration's politicized explanation for the Estimates. But arbitrary-and-capricious review "under the APA is not toothless." *Sw. Elec. Power Co. v. EPA*, 920

F.3d 999, 1013 (5th Cir. 2019). And this Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). Moreover, this Court is not required to ignore the fevered rush to judgment behind the Estimates. Though Movants claim the Estimates represent the best scientific evidence, they were rushed out in a month without public comment and without peer review. Indeed, Movants take no account of years of scientific developments. These facts confirm that the Estimates were rushed out the door for political, not scientific, reasons. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021). Finally, Movants do not even pretend global effects are within the factors that *any* statute allows an agency to consider. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007).

D. The States Face Irreparable Harm.

Movants assert (at 22) that the Estimates do not require the States "to do (or not do) anything." False. The Estimates immediately apply coercive pressure to the States to change their approach to greenhouse gas regulation. *See, e.g.*, Doc. 98 at 21 ("Plaintiff States have clearly established that: (1) the SC-GHG Estimates create a new cost measure

the Plaintiff States must use when running cooperative federalism programs or risk serious consequences."). This pressure, in itself, "constitutes an injury" to the States' "sovereign interest[s]," whether or not States actually change their policies, *Texas v. EEOC*, 933 F.3d at 446-47 (cleaned up), and that continuing harm cannot be erased or remedied through after-the-fact relief, *see Texas v. Biden*, 20 F.4th at 975. Moreover, the harm to Plaintiff States' statutorily entitled oil-and-gas lease-sale revenues is irreparable. And contrary to Movants' assertion, these presently occurring damages cannot be remedied in the ordinary course of litigation because of the federal government's sovereign immunity. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015).

III. THE INJUNCTION IS APPROPRIATELY TAILORED TO ADDRESS PLAINTIFF STATES' HARMS.

Movants make much (at 23-26) of the scope of the Court's injunction. But their arguments do not undermine this Court's application of the ordinary remedy for unlawful agency activity. "'[V]acatur is the normal remedy' under the APA." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 518 (D.C. Cir. 2020). So at the preliminary injunction stage, if the Court finds the preliminary injunction factors are met, the ordinary remedy is to restrain Executive officers from complying

with the agency action as if it were vacated. Courts routinely do so upon a preliminary finding that agency action is unlawful. *See, e.g.*, *Louisiana v. Biden*, 543 F. Supp. 3d 388, 419 (W.D. La. 2021). What movants are really asking for is a remand without vacatur in the preliminary injunction posture. It is unclear whether this is even appropriate, but even if it is, remand without vacatur is not appropriate here because Movants do not expressly ask for it. *Cf. Am. Great Lakes Ports Ass'n*, 962 F.3d at 518.

Even if narrower relief were possible, Movants have not demonstrated their entitlement to it. They premise all their arguments on a misrepresentation of the injunction as an affirmative injunction. That is not the case. The injunction prevents the Executive Branch from employing the Estimates. The natural result is that the still-in-force Circular A-4 would snap back into place to once more cover climate-related cost/benefit analysis. With the Estimates enjoined, agencies are once again subject to Circular A-4, which continues to embody the best regulatory practices.

Moreover, if the Mancini Declaration accurately depicts the depth of the Executive Branch's reliance on the Estimates, that declaration is

perhaps the strongest evidence yet that nothing short of an injunction of this scope will adequately protect Plaintiff States from their use. The Mancini Declaration demonstrates that, contrary to the government's prior representations, the Estimates are ubiquitous in Executive Branch decisionmaking. Anything less than their absolute prohibition would leave endless routes to circumvent the injunction.

The Court need not take the States' word for it: Movants previously represented that *even in the presence of an injunction, agencies would continue to employ the Estimates*: "[W]hether or not the Interim Estimates are binding, agencies are not likely to ignore them, as they reflect years of cutting-edge work from leading experts and academics in and out of government." Doc. 31-1 at 24. Thus, taking Movants at their own word, an injunction simply declaring the Estimates to be nonbinding is insufficient to prevent the harms caused by their use by agencies.

Even with the current injunction, there is still a need for vigilance because, as Movants state, "there are many reasons to expect that, given the policy priorities of the President and his Cabinet, agencies will still consider the social costs of greenhouse gases when regulating—even without any binding directive from the President, and even without being

able to rely upon the work product of the Working Group." Doc. 31-1 at 24. Indeed, even since the injunction was entered, executive agencies continue to indicate that they will use the Estimates. *See* Dep't of Energy, Proposed Rule, *Energy Conservation Program: Energy Conservation Standards for Variable Refrigerant Flow Multi-Split Air Conditioners and Heat Pumps*, 87 Fed. Reg. 11335, 11348 (**Mar. 1, 2022**) ("DOE uses the social cost of greenhouse gases from the most recent update of the Interagency Working Group on Social Cost of Greenhouse Gases .... The IWG recommended global values be used for regulatory analysis.").[4] Any relaxation of the injunction invites more defiance and irreparable harm to Plaintiff States.

IV. THE REMAINING EQUITABLE FACTORS OVERWHELMINGLY WEIGH AGAINST A STAY.

The public interest and balance of harms weigh heavily against a stay. Most obviously, Movants "'have no legitimate interest in the implementation of [the] unlawful' SC-GHG Estimates." Doc. 98 at 44; *see also Biden*, 10 F.4th at 559 ("[T]he 'public interest [is] in having

[4] DOE's subsequent notice, *supra* note 1, stating that it was not considering the Estimates in future rulemakings because of the injunction only highlights that the injunction is necessary to prevent further harm from the SC-GHG Estimates.

governmental agencies abide by the federal laws that govern their existence and operations.'"). And the "public interest favors maintenance of [an] injunction" that "maintains the separation of powers." *Texas*, 787 F.3d at 768; *see also Biden*, 10 F.4th at 559. Finally, the injunction prevents major violations of the Tenth Amendment and "the public interest plainly lies in not allowing" Movants "to circumvent those federalism concerns." *Biden*, 10 F.th at 559. Simply put, "[t]he public interest is also served by maintaining our constitutional structure ... even, or perhaps particularly, when those decisions frustrate government officials." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618-19 (5th Cir. 2021).

The irreparable harm Plaintiff States would suffer without an injunction puts the public interest and balance of harms beyond doubt. Any harm to Movants' nonexistent interest in furthering an illegal policy is easily outweighed by Plaintiff States' irreparable harms.

CONCLUSION

For the foregoing reasons, this Court should deny Movants' motion for an emergency stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

/s/ Elizabeth B. Murrill
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Dated: March 11, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 27(d)(2) because it contains 5,160 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

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Dated: March 11, 2022