No. 22-30087

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATES OF LOUISIANA, ALABAMA, FLORIDA, GEORGIA, KENTUCKY, MISSISSIPPI, SOUTH DAKOTA, TEXAS, WEST VIRGINIA, and WYOMING,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; CECILIA ROUSE, in her official capacity as Chairwoman of the Council of Economic Advisers; SHALANDA YOUNG, in her official capacity as Acting Director of the Office of Management and Budget; KEI KOIZUMI, in his official capacity as Acting Director of the Office of Science and Technology Policy; JANET YELLEN, in her official Capacity as Secretary of the Treasury; DEB HAALAND, in her official capacity as Secretary of the Interior; TOM VILSACK, in his official capacity as Secretary of Agriculture; GINA RAIMONDO, in her official capacity as Secretary of Commerce; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; JENNIFER GRANHOLM, in her official capacity as Secretary of Energy; BRENDA MALLORY, in her official capacity as Chairwoman of the Council on Environmental Quality; MICHAEL S. REGAN, in his official capacity as Administrator of the Environmental Protection Agency; GINA MCCARTHY, in her official capacity as White House National Climate Advisor; BRIAN DEESE, in his official capacity as Director of the National Economic Council; JACK DANIELSON, in his official capacity as Executive Director of the National Highway Traffic Safety Administration; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; U.S. DEPARTMENT OF TRANSPORTATION; U.S. DEPARTMENT OF AGRICULTURE; U.S. DEPARTMENT OF THE INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,

Defendants-Appellants.

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27.3

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INTRODUCTION AND SUMMARY

The district court's preliminary injunction is unprecedented and wholly unjustified. And Plaintiffs' opposition fails to rehabilitate it. Even if Plaintiffs were correct that the President could not lawfully direct agencies to use specific metrics in their cost-benefit analyses, and even if they could carry their burden on the other requirements for a preliminary injunction, the most relief they could possibly get is an order enjoining the mandatory use of the Interim Estimates. Given Plaintiffs' failure to justify the broader scope of injunctive relief entered here, the need for at least a partial stay is particularly clear.

But even an injunction tailored to Plaintiffs' legal claim would be improper because those claims do not arise in a justiciable case or controversy. The harms Plaintiffs allege to demonstrate standing could be caused only by a future agency regulation, not by Executive Order 13990 (Order). The Order directs the updating and standardization of metrics (the Interim Estimates) used in cost-benefit analyses in agency proceedings, but it does not require agencies to take any particular regulatory action and does not require Plaintiffs to do anything at all.

Unable to demonstrate sufficient injury of their own, Plaintiffs instead argue that the government cannot show irreparable harm caused by the district court's wide-ranging injunction. But that injunction imposes judicially created policy constraints on agency action and interferes with the President's constitutional power to supervise and obtain advice from his subordinates. There is no relief available at final judgment that could undo this ongoing harm to the Executive Branch.

Plaintiffs also mischaracterize the government's position. The government has never asserted that agencies would not use the Interim Estimates, nor did it challenge Plaintiffs' standing on that basis. Rather, the government has consistently maintained that Plaintiffs failed to identify an agency action that has used the Interim Estimates *in a manner that causes them Article III injury*, and that even if Plaintiffs had done so, they could only seek judicial review of that particular agency action. Plaintiffs are entitled to no relief in this litigation against the government as a whole, much less the sweeping preliminary injunction the district court entered.

ARGUMENT

I. THE PRELIMINARY INJUNCTION MUST BE IMMEDIATELY NARROWED

Plaintiffs' opposition confirms that, at minimum, the injunction should be immediately stayed to the extent it goes beyond enjoining agencies' obligation to use the Interim Estimates. Plaintiffs do not dispute that the district court failed to justify the far broader scope of the injunction, which alone constitutes a sufficient ground for narrowing its scope. *See Louisiana v. Becerra*, 20 F.4th 260, 263-64 (5th Cir. 2021) (per curiam). Regardless, the various arguments Plaintiffs now offer in defense of the injunction's scope all fail.

Plaintiffs contend (Opp. 22-23) that, because "'[v]acatur is the normal remedy' under the [Administrative Procedure Act (APA)]," a district court at the preliminary injunction stage may "restrain Executive officers from complying with the [challenged] agency action as if it were vacated." That in fact is an argument for narrower relief. Here, the specific action Plaintiffs challenged was the President's directive that "agencies shall use" the Interim Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from agency actions." Exec. Order 13990, § 5(b)(ii)(A). Thus, if they could demonstrate a basis for any preliminary relief at all (*but*

see infra pp. 7-11), it would only be to enjoin that particular directive ("shall use"). *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013) (explaining that a preliminary injunction "would need to be limited only to vacating the unlawful action, not precluding future agency decisionmaking"); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 164-66 (2010).

Plaintiffs have not offered legal arguments that would support broader relief. For example, they have not demonstrated that agencies government-wide are statutorily barred from exercising their scientific judgment and general discretion to use various greenhouse gas valuations, including the Interim Estimates, as part of their normal cost-benefit analysis. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-78 (7th Cir. 2016) (upholding use of 2013 estimates on which Interim Estimates were based). Nor did Plaintiffs claim that the President lacks the power to assemble an ad hoc group of expert advisors to develop values for the social cost of greenhouse gasses. But the injunction prohibits all of this.

Plaintiffs contend (Opp. 18-19) that the Order implicates "Major Questions" and amounts to a legislative rule because it "dictates" a "*specific binding rule* to the agencies." The solution to those asserted problems would

be to make the Order non-binding on agencies. Similarly, they argue (Opp. 2) that a stay is unwarranted because the government cannot be harmed by being enjoined from taking unlawful action. But there is no dispute that the injunction prohibits conduct that would otherwise be lawful.

Plaintiffs' response is to mischaracterize what the injunction actually says. They assert (Opp. 23) that the injunction simply "prevents the Executive Branch from employing the Estimates," with the result that preexisting guidance "snap[s] back into place." But the injunction goes far beyond that guidance. For example, the injunction prohibits agencies from using any estimate that is "based on global effects" or "does not utilize discount rates of 3 and 7 percent." Mot. Ex. B. Agencies could do both of these things under OMB Circular A-4. Mancini Decl., Mot. Ex. F ¶¶ 10-12; *see also Zero Zone*, 832 F.3d at 677-79. An injunction limited to the Interim Estimates' alleged mandatory effect would preserve the latitude that agencies normally have to conduct cost-benefit analysis based on the specific context and comments received from the public.

Plaintiffs contend this overbroad scope is necessary to ensure the government's adherence to narrower relief in light of the history of this litigation. Their suggestions (Opp. 1, 10-11, 24) that the government has

offered misleading arguments are seriously mistaken. The government never claimed that it does not use the Interim Estimates; rather, it argued that judicial review would be appropriate only if and when the Estimates were actually relied upon by an agency to justify a particular final agency action. *See, e.g.*, Dkt. No. 31-1, at 2.[1] Nor did the government violate the district court's injunction, as Plaintiffs imply (Opp. 7-8, 25). The proposed rule they point to, from the Department of Energy, *declined* to monetize emissions in reliance on the Interim Estimates. 87 Fed. Reg. 11,335, 11,348 (Mar. 1, 2022). And language suggesting that the Department still uses the Estimates in other contexts was written and signed by the relevant policymaker before the injunction was entered. *Id.* at 11,354. The Department has since reconfirmed that it is complying with the district court's order. 87 Fed. Reg. 14,186 (Mar. 14, 2022), https://go.usa.gov/xzRUH.

Finally, Plaintiffs recognize (Opp. 26) that the public interest favors judicial orders that maintain the separation of powers. But the district

[1] Plaintiffs further suggest (Opp. 11) that the government should have submitted evidence on Plaintiffs' behalf in response to an order of the district court. But the district court itself raised no similar concern after the government explained its approach. *See* Dkt. No. 90, at 4 n.1.

court's injunction itself causes grave separation-of-powers concerns. That injunction affirmatively constrains the President's ability to control his own internal regulatory-review process and imposes restrictions on agencies not required by any statute, even though "[t]he entire 'executive Power'"—including the authority to maintain "general administrative control of those executing the laws"—"belongs to the President alone." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197-98 (2020). That is a fundamental constitutional principle that a court may not disregard.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON OTHER GROUNDS AS WELL

Beyond the overbreadth of the district court's injunction, Plaintiffs' underlying claims suffer from several fundamental defects.

A. Plaintiffs' Broad, Abstract Challenge Is Not Justiciable

Federal courts sit to decide "real controvers[ies] with real impact on real persons," not to "exercise general legal oversight" of the "Legislative and Executive Branches." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Thus, in challenges to administrative action, courts are limited to "review of specific final agency actions" on a "case-by-case" basis. *Sierra Club v. Peterson*, 228 F.3d 559, 569 (5th Cir. 2000) (en banc). Plaintiffs' effort to preemptively control the framework for future decisionmaking by

separate agencies throughout the Executive Branch runs afoul of multiple justiciability requirements.

Plaintiffs have failed to make a "'clear showing' that they have standing to maintain the preliminary injunction." *Daves v. Dallas County, Texas*, 22 F.4th 522, 542 (5th Cir. 2022) (en banc). Any regulatory burdens and costs would result from future agency regulations, not from the Interim Estimates themselves. The Estimates are simply a tool of regulatory cost-benefit analysis that will often play no part in the agency's eventual decision. Plaintiffs thus cannot demonstrate standing to challenge the Interim Estimates by asserting that agencies will use the Estimates in the future. To demonstrate standing, Plaintiffs must identify—and focus their challenge on—a specific final agency action that will harm them *because the agency has justified that action based on the Interim Estimates*. They have failed to do so.

Plaintiffs rely (Opp. 14) on supposed "factual findings" made by the district court. But that court's assessment of the legal effect or basis of various administrative actions is not a factual finding entitled to deference. And none of the specific administrative actions mentioned has caused Plaintiffs any concrete harm traceable to use of the Interim Estimates.

More fundamentally, invocation of those separate administrative actions only underscores that it is such other actions, not the Order, that would be the source of any injury.

This same point establishes the lack of ripeness. Plaintiffs attempt to litigate "abstract disagreements over administrative policies" that have no "immediate[]" impact on "their day-to-day affairs." *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 807, 810 (2003). They contend (Opp. 16) that such an abstract suit "is their 'only adequate opportunity'" to be rid of the Order and the Interim Estimates once and for all. But the Supreme Court has made clear that they 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 [Order] … in a fashion that harms or threatens to harm" them. *National Park Hosp. Ass'n*, 538 U.S. at 808. And even then, Plaintiffs may obtain relief only with respect to that particular final agency action. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 890-94 (1990).

B. Plaintiffs' Claims Lack Merit

The government explains in its motion that Plaintiffs' claims are not reviewable under the APA because neither the President nor the Working

Group are agencies, and the Interim Estimates are not reviewable final agency action. Mot. 18-19. Plaintiffs fail to engage with the case law cited by the government on the first point and do not dispute that the Order neither determines, nor has any direct legal consequences for, the rights or obligations of anyone outside the federal government.

Regardless, Plaintiffs' claims are meritless. Arguments concerning "major questions" have no application here. Such arguments go to issues of statutory construction in some circumstances concerning whether the statute invoked by an agency authorizes the agency's action. Here, there is no dispute that agencies can undertake a cost-benefit analysis or that, when they do, they may take into account the effects of greenhouse gas emissions. And no statutory authorization is required when the President exercises his constitutional authority to manage internal Executive Branch procedures.

Plaintiffs' remaining arguments are also unavailing. The Interim Estimates are not a legislative rule because they do not impose any regulatory burdens on anyone. (They were also previously subject to notice and comment, save for an uncontested inflation adjustment. *See* Mot. Ex. D, at 3.) Plaintiffs assert (Opp. 21) that global effects cannot be considered under "*any* statute," without acknowledging that the Seventh Circuit has

expressly held to the contrary. *Zero Zone*, 832 F.3d at 679. They contend (Opp. 21) that the Interim Estimates were adopted in "fevered rush," without accounting for the Working Group's judgment—subject only to a "most deferential" review, *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003)—that the best available option for temporary use needed only an adjustment for inflation. And finally, Plaintiffs assert (Opp. 17-18) that *ultra vires* claims are sometimes viable without demonstrating that their claim fits within the required parameters. *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293-94 (5th Cir. 1999).

III. PLAINTIFFS FACE NO IRREPARABLE HARM WARRANTING AN INJUNCTION

Even if Plaintiffs could show a likelihood of success on any claim, the preliminary injunction nonetheless was improper (and should be immediately stayed) because Plaintiffs failed to show that they would suffer irreparable harm absent preliminary relief. Plaintiffs assert (Opp. 21) that they face "coercive pressure . . . to change their approach to greenhouse gas regulation," but fail to show how any such pressure has been applied when Plaintiffs face no requirements and no consequences for maintaining their current approach. They also rely (Opp. 22) on an asserted reduction in "oil-and-gas lease-sale revenues," but point to no reduction in sales that would

lead to a loss in revenues. Their failure to carry this burden at all in district court—much less on a government-wide basis—further reinforces the government's likelihood of success in this preliminary-injunction appeal.

IV. EQUITABLE FACTORS WARRANT AN IMMEDIATE STAY

By their own account (Opp. 2), Plaintiffs' primary argument is that "[t]he Government cannot claim an irreparable injury from being enjoined against an action that it has no statutory authorization to take." *Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021). That principle has no application here, where the challenged action is based on the President's *constitutional* authority to supervise agencies of the Executive Branch, which in turn generally *do* have statutory authority to conduct cost-benefit analysis. And the district court's order does far more than enjoin the provision of the Order Plaintiffs challenged as unlawful. It dissolves a presidentially convened group of technical advisers; it mandates adherence to the district court's own preferred regime of cost-benefit analysis on terms not required by any statute; and it prevents the Executive Branch from engaging in conduct expressly approved or required by other judicial decisions. As set forth in the Mancini Declaration (Mot. Ex. F), the injunction has already disrupted

the operation of numerous federal programs, inflicting injuries that cannot be remedied later.

The injunction "constitute[s] an unwarranted impairment of another branch in the performance of its constitutional duties." *Cheney v. U.S. Dist. Court for District of Columbia*, 542 U.S. 367, 390 (2004); *see INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (staying injunction that represented "improper intrusion by a federal court into the workings of a coordinate branch"); *Valentine v. Collier*, 978 F.3d 154, 165 (5th Cir. 2020) (finding irreparable harm where injunction taxed state agency's "resources" and "time" and "hinder[ed]" its "flexibility"); *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 149 (5th Cir. 2020) (State "suffers irreparable harm" where "injunction prevents [it] from effectuating" procedures adopted by "elected officials"); *Ruiz v. Estelle*, 650 F.2d 555, 571 (5th Cir. 1981) (staying injunction that imposed "time, expense, and administrative red tape" upon state agency without statutory basis). For that reason alone, the balance of equities and public interest weigh heavily in favor of a stay.

CONCLUSION

The Court should immediately stay the preliminary injunction or, at minimum, grant a partial stay.

Respectfully submitted,

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MARCH 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point CenturyExpd BT, a proportionally spaced font. I further certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,589 words, according to the count of Microsoft Word.

/s/ Thomas Pulham
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CERTIFICATE OF SERVICE

I hereby certify that, on March 14, 2022, I electronically filed the foregoing reply with the Clerk of Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

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