
No. 21-3013

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATES OF MISSOURI, ALASKA, ARIZONA, ARKANSAS, INDIANA, KANSAS,
MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., ET AL.

Defendants-Appellees.

Appeal from the United States District Court for the Eastern
District of Missouri, The Honorable Audrey G. Fleissig

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The Interagency Working Group is a strange beast. The Government concedes: “No statute establishes it, nor delegates it any legislative authority.” App. 294; Doc. 28, at 54. Yet that has not stopped it from *exercising* legislative authority on a massive scale. Under Section 5(b)(ii) of Executive Order 13990 (“EO 13990”), the Working Group has dictated specific numerical values for the “social costs of greenhouse gases” that all federal agencies “shall” use in formulating “regulations and other relevant agency actions.” App. 72, R. Doc. 6-1, at 5. In the aggregate, these projected “social costs” approach \$1 trillion per year, and thus they mandate an enormous and unprecedented expansion of the federal regulatory state, at a single stroke. The power to dictate specific, binding numerical values on an indeterminate policy question is a quintessentially legislative power. Congress has not delegated this “power[] of vast economic and political significance,” *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021), to any agency—least of all the Working Group, to which Congress has not delegated any power at all. As a violation of the separation of powers, “this wolf comes as a wolf.” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

In their brief, Defendants-Appellants (“the Government”) concede that the Working Groups’ Interim Values are *binding* on federal agencies when they formulate rules and take other actions that have the force of law to the regulated

public. This concession fatally undermines virtually all of the Government's arguments. Because the Interim Values are binding, the States' injuries from future rulemakings are by no means "speculative" or "conjectural," but virtually certain to occur—indeed, they are already occurring. Because the Interim Values are binding, they have caused the States' injuries, and those injuries are redressable. Because the Working Group can issue binding directives to other federal agencies, it is itself an "agency" subject to the APA. Because the Interim Values are legally binding, they determine rights and obligations from which legal consequences flow, so they constitute a "final agency action" for which notice-and-comment was required. Because the Interim Values provide specific, binding values on "highly contested and exceedingly difficult questions of science, economics, ethics, and law," App. 104, R. Doc. 6-2, at 27, they are fundamentally legislative in character. And because the Interim Values constitute legislation without a valid delegation from Congress, they violate the separation of powers.

The Government raises a battery of arguments to defend EO 13990 and the Interim Values, but almost all the Government's arguments were refuted in advance by the U.S. District Court for the Western District of Louisiana's recent, persuasive opinion entering a preliminary injunction against the Interim Values. *Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022) ("*Louisiana*"). The Government's main argument here is that "the use of the Interim

Estimates is properly judged in the context of each agency’s specific action, program, and governing statutes.” Brief of Appellees (“Gov. Br.”), at 22. But that is the exact opposite of what the Government itself has done. The Interim Values are binding values that each agency must use *regardless* of that agency’s “specific action, program, and governing statutes.” When the Government does not permit individual agencies to conduct their own analysis of the potential costs and benefits of greenhouse-gas emissions, the Constitution does not require the States to play whack-a-mole with dozens of agency actions—all of which are vitiated by the same common legal error. *Bennett v. Spear*, 520 U.S. 154, 169–70 (1997).

ARGUMENT

I. The States Have Standing Because They Face Numerous Imminent Injuries That Are Caused by the Interim Values and Are Redressable.

Plaintiffs-Appellants (“the States”) include large energy-exporting States, States that receive royalties from fossil-fuel production, and States that require fossil fuels to power their economies, help their citizens heat and cool their homes, and transport goods to market. App. 188-192, R. Doc. 18, at 52-55. The States are also consumers of products, such as cars and trucks, that are already becoming more expensive due to the adoption of more stringent emissions controls justified, in part, by the Interim Values. App. 48, R. Doc. 6, at 35. The States’ agencies will be forced to adopt the Interim Estimates in cooperative-federalism programs or risk losing

their autonomy to a partner federal agency that must use the Interim Estimates. App. 44-48, R. Doc. 6, at 31-35. Moreover, Defendants ignored the Administrative Procedure Act’s mandatory notice-and-comment procedures, so the States and everyone else lost their right to demonstrate that the Interim Estimates were arbitrary. All of these factual allegations are sufficient to support standing on a motion to dismiss. *See Louisiana*, 2022 WL 438313, Part II. The Government’s arguments to the contrary are meritless.

A. The Government Admits that the Interim Values Are Binding.

The Interim Values are *binding* on federal agencies. EO 13990 states that “agencies *shall* use [them] when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published.” App.72, R. Doc. 6-1, at 5 (EO 13990 § 5(b)(ii)(A)) (emphasis added). “Shall” means “shall.” *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016). Thus, unless a statute specifically prohibits their use, federal agencies *must* use them, and they *must* use the specific numerical values promulgated by the Working Group. “The EO is not a recommendation, nor is it guidance; EO 13990 directs that agencies ‘shall use’ the SC-GHG Estimates....” *Louisiana*, 2022 WL 438313, at *20.

Critically, the Values bind federal agencies when they perform substantive actions that have the force of law to the regulated public—not only when agencies

conduct cost-benefit analyses for the Executive Branch’s internal review. *See id.* The Government affirmatively concedes this point in its brief, at least five times. The Government admits that “the agencies *must* use the Interim Estimates (and not other estimates)” when conducting substantive agency actions, “unless otherwise provided by law.” Brief of Appellees (“Gov. Br.”), at 31 (emphasis added). The Government concedes that EO 13990 imposes a “requirement[],” and that the “requirement is binding on an agency” if the agency has either an obligation or discretion to consider such costs. *Id.* at 39. “Agencies thus *will* rely on the Interim Estimate,” the Government admits, “when they would otherwise have discretion to do so.” *Id.* “[I]f an agency undertakes such monetization,” says the Government, “it *shall* use the Interim Estimates rather than another set of figures.” *Id.* at 40 (emphasis added). “E.O. 13990 ... requires use of the Interim Estimates in the rulemaking context,” the Government says. *Id.* at 41.¹

Thus, EO 13990 effects a categorical departure from past Executive practice. Past Presidents required agencies to use social-cost-of-carbon calculations only for “inward-facing purpose[s],” Gov. Br. 28, such as the Executive Branch’s internal

¹ Nothing in the OIRA Guidance contradicts this concession. The OIRA Guidance states that (1) agencies should not use the Interim Values if a statute prohibits their use, and (2) agencies should accept comments on their use of the Interim Values. App. 378-380, R. Doc. 28-4. The OIRA Guidance does not purport to countermand the President’s clear directive that agencies “shall” use the Working Group’s specific calculations in formulating all “relevant agency actions,” as long as they are not forbidden to do so by statute. App. 72, R. Doc. 6-1, at 5.

OIRA review. The Government admits that, before EO 13990, “federal agencies were not required to employ th[e] estimates” provided by the Interagency Working Group. Gov. Br. 10. But now they are required to do so. EO 13990 mandates their use in formulating substantive agency policy—not just in rulemakings, but in virtually any agency action that may impact or bind the regulated public. App. 72, R. Doc. 6-1, at 5. “[T]he SC-GHG Estimates bind the entire Executive Branch to a particular numerical measure of the social cost of greenhouse gases.” *Louisiana*, 2022 WL 438313, at *18.

Thus, the Government’s description of EO 13990 as merely providing “instructions to federal agencies on how to comply with longstanding regulatory-review requirements,” Gov. Br. 1, is misleading at best. Under EO 13990, the Interim Values *must* be used, and *are* being used, to formulate agency rules and policies that have the force of law to the American public—not just “advisory planning documents without legal effect.” Gov. Br. 6.

The Government claims that EO 13990 merely “‘prescribe[s] standards and procedures’ to be used in internal cost-benefit analyses under E.O. 12866.” Gov. Br. 26. That is manifestly incorrect. The Interim Values are not “standards and procedures.” They are specific numerical values, found in Tables ES-1 through ES-3 of the Working Group’s document, and those are the numbers that federal agencies must use. App. 77-78, R. Doc. 6-2, at 7-8. Dictating specific numerical values on

an inherently indeterminate policy question is legislation, pure and simple. “[W]hen an agency wants to state a principle ‘in numerical terms,’ terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking.” *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) “EO 13990 and the SC-GHG Estimates are a *legislative* rule that dictates specific numerical values for use across all decisionmaking affecting private parties.” *Louisiana*, 2022 WL 438313, at *16 (emphasis added).

B. *Bennett v. Spear* Is Indistinguishable and Dispositive Here.

Because the Interim Values are binding in substantive agency actions, this case is indistinguishable from *Bennett v. Spear*, 520 U.S. 154 (1997). Just as in *Bennett*, so also here “the Government contends” that “the proximate cause of [plaintiffs’] harm is an (as yet unidentified) decision” by another agency, “not [the Interim Values] itself.” *Id.* at 168. Just as in *Bennett*, the Government’s argument “wrongly equates injury ‘fairly traceable’ to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation.” *Id.* at 168-69. Just as in *Bennett*, because the Interim Values are binding, they have “determinative ... effect upon the action of someone else,” *i.e.*, other federal agencies. *Id.* Just as in *Bennett*, because the Interim Values are binding on other agencies, they “alter[] the legal regime to which the [future] agency is subject,” *id.* at 169, and the States are injured by them *now*. To put the same point another way, the Interim Values

change the regulatory landscape in future agency actions by tilting the playing field radically against the States. *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) (“[T]his inability to compete on an even playing field constitutes a concrete and particularized injury.”).

The Government attempts to distinguish *Bennett*, Gov. Br. 45-46, on the ground that *Bennett* involved “an existing, concrete, real-world dispute,” involving a “specific agency” and a “specific project.” *Id.* at 45. But that is even more true here. As *Louisiana* points out, the Interim Values are already being used as binding calculations by federal agencies at least *fourteen* times in the last year—including ten rulemakings and other agency actions, and four NEPA environmental assessments. *Louisiana*, 2022 WL 438313, at *8-*10 (citing, *inter alia*, 86 Fed. Reg. 74434. Here, there is a multiplicity of “existing, concrete, real-world dispute[s],” Gov. Br. 45, just like the one in *Bennett*—now fourteen times over. This includes final agency actions where the Interim Values were explicitly used to justify massive increases in regulatory costs. *See Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, 86 FR 74434-01 (Dec. 30, 2021) (noting overall up-front vehicle costs will increase by approximately \$1,000, but deciding that these costs will be offset by fuel costs savings and reduction of “social costs” of GHG offering “net benefits of \$120 billion to \$190 billion through 2050”).

C. The States’ Asserted Injuries Are Concrete and Not Speculative.

The repeated, consistent use of the Interim Values as binding values in agency actions renders absurd the Government’s contention that the States’ injury is “speculative” and “conjectural.” The Complaint alleged a simple causal chain: The President has ordered agencies he oversees to use the Interim Values, agencies will do so, and the Interim Values that are designed to increase the regulatory burdens that will harm Plaintiff States and their citizens who rely on fossil fuels for nearly every aspect of human economic activity. This causal chain relies “on the predictable effect of Government action on the decisions of [Government] parties.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019); *see also Iowa League of Cities*, 711 F.3d at 870 (“The EPA disputes [Article III] causation because it argues that the letters are *not binding*. Because we have ruled otherwise, we find that the League has established causation.”).

Thus, at the time of the Complaint, there was nothing “speculative” about positing that (1) federal agencies will engage in rulemakings and other agency actions that involve issues relating to the emission of greenhouse gases; (2) when they do, they will obey a direct order from the President to use the Interim Values as binding calculations to justify imposing greater regulatory burdens—which is the whole point of the Interim Values. Sure enough, as the States alleged, federal agencies have now done just that—including multiple agency actions that were well

underway when the district court issued its opinion. *See Louisiana*, 2022 WL 438313, at *8-*10. Indeed, the Government’s argument that federal regulation might not have been forthcoming or might not lead to increased regulatory burdens is very hard to square with EO 13990’s command to agencies to regulate and review *past* agency actions to conform them to the new Administration’s values. App. 70-72, R. Doc. 6-1, at 3-5.

In the face of these repeated agency actions, the Government’s continued insistence that the States “offer nothing but conjecture that the Interim Estimates will help to justify ‘more restrictive regulatory policies’ in the future,” Gov. Br. 31, is baffling. The States’ “conjecture” has already come true many times in the first year alone. When the Complaint was filed, there was not only a “*possibility* of regulation” based on the Interim Values, Gov. Br. 26, but a virtual *certitude*, as subsequent events have amply demonstrated. *See Nat’l Parks Conservation Ass’n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014) (“Even if the timing and extent of NSP’s financial injury from the compelled installation of emission-control technologies on Sherco remains to be determined, NSP has still established standing.”); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (holding that an injury-in-fact is not conjectural or hypothetical if there is “a ‘substantial risk’ that the harm will occur”).

D. EO 13990 and the Interim Values Directly Injure the States in Their Administration of Cooperative-Federalism Programs.

EO 13990 and the Interim Values directly affect the States in their sovereign capacities because they immediately impose new, unlawful requirements on state officials who cooperatively administer federal regulatory programs. This injury does not depend on any future rulemaking's outcome, and it suffices to establish Article III standing, yet the district court simply ignored it. *See* Add. A15–A22.

The Government argues that the Interim Values do not affect the States in their administration of cooperative-federalism programs, Gov. Br. 40-41, but its arguments are meritless. First, the Government argues that “neither E.O. 13990 nor the Interim Estimates refer to the States at all,” and “[i]t is unclear why Plaintiffs believe themselves bound by orders not issued to them.” *Id.* This argument disregards the reality of cooperative-federalism programs, where state agencies and officials administer federal programs on behalf of federal agencies that *are* bound by the Interim Values. If the state actors purport to disregard the Interim Values in these programs, the federal agencies will reject their work and impose federal standards upon them. *Louisiana*, 2022 WL 438313, at *10.

Just as in *Louisiana*, here “the Plaintiff States have asserted a concrete and particularized injury: mandatory implementation of the SC-GHG Estimates imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism programs.” *Louisiana*, at *10. The States’ injury “is

imminent and certainly impending because [federal] agencies engaged in cooperative federalism programs with the states are required to employ the SC-GHG Estimates,” which means that “the states are confronted with 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.* Indeed, this has already happened in multiple states, where “EPA ... disapprov[ed] state implementation plans under the NAAQS good neighbor provisions and impos[ed] federal implementation plans on several Plaintiff States.” *Id.* Thus, contrary to the Government’s argument, Gov. Br. 25, the States *are* “the object of the government action ... [they] challenge,” when they co-lead and administer cooperative-federalism programs. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

Second, the Government contends that “E.O. 13990 currently only requires use of the Interim Estimates in the rulemaking context,” not when agencies conduct other actions such as NEPA analyses. Gov. Br. 41. This argument contradicts the plain language of EO 13990, which requires their use in all “*regulations and other relevant agency actions*,” App.72, R. Doc. 6-1, at 5 (emphasis added)—not just in “rulemakings.” NEPA analyses, formulation of NAAQS, and other cooperative-federalism tasks plainly constitute “other relevant agency actions.” *Id.* Thus, as *Louisiana* held, “the SC-GHG Estimates create a new cost measure the Plaintiff States must use when running cooperative federalism programs or risk serious

consequences.” *Louisiana*, 2022 WL 438313, at *11. “[T]he SC-GHG Estimates direct agencies to use specific social cost numbers, *not only in rulemaking*, but in ‘other relevant agency actions,’ *such as project-level NEPA reviews*.” *Id.* at *16 (emphasis added).

In fact, Defendants the Department of Transportation, Bureau of Land Management, and Department of Energy are already using the mandatory Interim Values in NEPA analyses, contradicting the Government’s argument here. *Id.* at *10. Regardless of what DOJ says here, these “agencies interpret the SC-GHG Estimates as final and binding,” and will reject state-prepared NEPA analyses that ignore them. *Id.* at *13.

E. The States Have Standing Based on the Denial of the APA’s Procedural Right to Comment on the Interim Values.

The Government contends that, even if the Interim Values are unlawful, unconstitutional, and binding on federal agencies, the States still may not be harmed by their use in federal agency actions, because their use might make no difference to the regulatory outcome. Gov. Br. 31-33. This argument suffers from at least two fatal problems.

First, as to the States’ procedural injury (denial of opportunity for notice-and-comment), the States do not have to allege or prove that the Working Group would have come to a different conclusion if the States had been given a chance to comment. “The person who has been accorded a procedural right to protect his

concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992). The challenger does not have to “establish with any certainty” that the exercise of the procedural right would change the outcome. *Id.* “If a petitioner ‘is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”” *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013) (emphasis added) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)); *see also Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012). “Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures.” *Iowa League*, 711 F.3d at 871. “If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter.” *Id.* (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002)).

Here, “there is some possibility that the requested relief ... would prompt the [Working Group] to reconsider the decision that allegedly harmed” the States, *id.*, and no more is required. The Working Group simply adopted wholesale the flawed analysis of its predecessor Working Groups, which engaged in wildly speculative analysis that purports to project the progress of human history over the next 300

years. *See* App. 210, R. Doc. 19, at 5 (Dayaratna Decl.); App. 427, R. Doc. 35-2, at 6 (comment to Working Group). At the very least, proper notice-and-comment might “avoid[], or at least delay[],” the imposition of such regulatory costs. *Kennett, Missouri v. EPA*, 887 F.3d 424 (8th Cir. 2018) (“Redressability is met where a favorable decision ‘avoids, or at least delays,’ a regulatory burden.”). Before the Interim Values were mandatory, agencies came to different conclusions about their calculation and use. Gov. Br. 8. Indeed, some agencies professed inability to develop their own “social costs” where it is beyond the agency’s expertise and statutory authority. *California v. Bernhardt*, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020) (“BLM concedes that the social cost of methane is beyond BLM’s expertise and is outside BLM’s statutory authority to consider.”).

Second, the Government’s argument contradicts common sense. As noted above, the whole point of the Interim Values is to justify imposing higher regulatory costs on greenhouse-gas-producing human activities, and it is glaringly obvious that they will do so. The Interim Values are designed to “fundamentally transform regulatory analysis and the national economy.” *Louisiana*, 2022 WL 438313, at *14. They force regulatory agencies to formulate policies based on the erroneous, wildly speculative assumption that GHG emissions are causing up to a *trillion dollars* of hidden costs every year. App. 40, R. Doc. 6, ¶ 127 (based on Working Group calculations, the total “social cost” of carbon dioxide, methane, and nitrous oxide is

\$9.7 trillion over 10 years at the 3 percent discount rate). This trillion-dollar “cost,” in turn, will be used to justify hundreds of billions of dollars of new regulatory burdens on the American economy, affecting every foundational sector of the economy. “The increased SC-GHG Estimates will necessarily cause regulatory standards for air quality, energy efficiency, and power plant regulation to become more stringent and result in significant costs increases,” and “this increased stringency will directly harm the economies and revenues of Plaintiff States.” *Louisiana*, 2022 WL 438313, at *6.

As *Louisiana* notes, “[t]he Executive cannot ‘bring about enormous and transformative expansion in [its] regulatory authority without clear congressional authorization,’” *id.*, at *14 (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)), which is sorely lacking here. “[T]he President lacks power to promulgate fundamentally transformative legislative rules in areas of vast political, social, and economic importance, thus, the issuance of EO 13990 violates the major questions doctrine.” *Id.* at *16.

Finally, the Government argues that the States have no real procedural injury from the Working Group’s denial of notice-and-comment because, under the OIRA Guidance, the future agencies “must permit comment on those Estimates.” Gov. Br. 43. But the opportunity to comment on the methodological flaws and other deficiencies of the Interim Estimates will be meaningless before the future agencies,

because they are bound by EO 13990 to use the Interim Estimates, regardless of what comments they receive on them. *See supra* Part I.A. Before the Working Group, the States at least had “some possibility” of convincing the agency to adopt a different outcome. Before the future agencies, they do not. Regardless of what the States say in their comments, the future agencies will follow the President’s command that they “shall” use the Interim Estimates in all “rulemakings and other relevant agency actions.” App. 72, R. Doc. 6-1, at 5.

F. The “Interim” Estimates Are *Final* Values for Current and Future Agency Actions.

The Government claims that the Interim Values are “soon-to-be-superseded,” Gov. Br. 21, and argues that any injury to the States from them may soon disappear, *id.* at 33. This argument is factually misleading and legally irrelevant. As a matter of fact, the Working Group is not about to promulgate the next set of “final” values any time soon. EO 13990 instructed them to do so by January 2022, but that date passed without action. And the Government represented to the Western District of Louisiana that the “final” values will be not be forthcoming for months: “Defendants inform the Court that they will probably not be finalized until the summer of 2022.” *Louisiana*, 2022 WL 438313, at *13. So the “Interim” Values are, and will remain, the final, binding values for the indefinite future, until the “Final” values are promulgated. They will be the authoritative values for at least a year and a half of federal regulatory actions.

The argument is also legally irrelevant, because (as the Government repeatedly concedes), the “Interim” values are final values for 2021 (and beyond) with binding effect for every agency action taken until the “Final” values are announced—if ever. There have already been, and will continue to be, “numerous instances where agencies are using the SC-GHG Estimates” that have already caused “increased costs, delayed projects and the loss of Plaintiff States’ revenues.” *Id.* “As a result, the ‘Interim’ SC-GHG Estimates are indeed final,” *id.*, and they will continue to “bind the entire Executive Branch to a particular numerical measure of the social cost of greenhouse gases.” *Id.* at *18.

II. The States’ Claims Are Ripe For Review.

The Government’s unlawful attempt to stack the deck in every rulemaking through a “whole of Government” approach to regulation is ripe for judicial review. The States’ claims are fit for judicial resolution, and delaying review will cause hardship to the States. First, their claims present legal questions, and the Interim Values are “interim” in name only—agencies are bound by them until the “final” values issue. Br. of Appellants (“App. Br.”) 43-45. No further factual development is necessary to determine whether the Interim Values are arbitrary and capricious. Further, the Interim Values and the President’s command to use them create uncertainty and coerce State agencies administering cooperative federalism programs. App. Br. 45-47. The Government never explains why issuing a blanket,

binding rule for agencies to use “one input” in regulatory decisionmaking is supposedly fine, but somehow “it is both impractical and unwise to adjudicate the legality of” that “one input” when it is issued. Gov. Br. 53.

To establish ripeness, “plaintiffs need not ‘await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.’” *Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The hardship prong is satisfied by “the heightened uncertainty and resulting behavior modification that may result from delayed resolution.” *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). Where, as here, “the question presented was purely legal, the nature of the challenge required no further factual development and the resulting legal uncertainty placed millions of dollars in investment at risk,” the Court has found a dispute to be ripe. *Id.* at 1039.

Defendants do not dispute that the States’ claims present purely legal questions, but they insist that the case presents only an “abstract disagreement over administrative policies for which ripeness doctrine was designed to defer review.” Gov. Br. 50 (internal quotations omitted). Defendants insist that “case-by-case, statute-by-statute analysis” is required because some courts “reached fact-based conclusions about whether the agency employed an appropriate methodology,” and others found “agencies may have a range of options in terms of whether to quantify

the social costs of greenhouse gases and what methodologies to use.” Gov. Br. 52-53. Those two concerns do not apply here, where EO 13990 has dictated the “appropriate methodology” to the agencies in advance, and the Interim Values have removed any “range of options” about methodologies and their results. *Id.* And the Government’s concession that, “as a logical and mathematical matter,” the Interim Values “do[] not vary across regulatory contexts,” Gov. Br. 8, directly undermines its argument.

The Government likens the mandatory Interim Values—which affect nearly all human economic activity—to a Forestry Plan in Ohio, arguing that neither dictates a particular result. Gov. Br. 49 (citing *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 729 (1998)). But *Ohio Forestry Association* bears no resemblance to this case. There, the Forestry Plan announced general principles by setting logging goals, identifying places suitable to timber protection, and identifying methods of logging that were appropriate. *Id.* The Forestry Plan was merely a “tool[] for agency planning and management” that “through standards guide[d] future use of forests.” *Ohio Forestry Ass’n*, 523 U.S. at 737. The Interim Values do not merely announce general principles, but impose specific numerical values based on the Working Group’s application of its general principles. App. 77-78, R. Doc. 6-2, at 7-8. Because the Working Group’s actions in promulgating

the Interim Values are complete, the States' claims "can never get riper." *Ohio Forestry Ass'n*, 523 U.S. at 737.

The Government suggests that any harm from the Interim Values is speculative and temporary because, "[o]nce the Interim Estimates are superseded, agencies will no longer rely upon them." Gov. Br. 54. This argument is meritless for the reasons discussed above. *Supra*, Part I.D. Although characterized as a stopgap measure, *id.*, the Interim Values are being used in rulemakings, even in final rules. App. Br. 14-15; *Louisiana*, 2022 WL 438313, at *8 ("[T]he Executive Branch is employing the SC-GHG Estimates in a range of rulemaking across statutory regimes."). Indeed, such temporary stopgap measures "developed in months without any public comment or peer review" and used in rules are subject to challenge. *Bernhardt*, 472 F. Supp.3d at 614 (finding "BLM's use of the interim domestic measure to be arbitrary and capricious.").

In nearly the same breath as declaring the Interim Values a temporary stopgap, Defendants claim that no immediate review is justified. Gov. Br. 55. They assert that this dispute is too abstract and that "Plaintiffs seek to litigate constitutional and statutory questions entirely apart from any particular agency, regulatory context, legal requirement, or claimed harm." *Id.* at 56. On the contrary, the States are litigating these questions here because the Government chose to make the Interim Values mandatory for *every* relevant "particular agency" and "regulatory context."

Id. The Government seeks to shield this policy decision from direct political and judicial accountability by issuing it without any notice-and-comment from a non-statutory super-agency within the Executive Branch, and then claim to the courts that the problem is too abstract for judicial review.

Moreover, on the sliding scale for ripeness, Plaintiff States have pleaded a “way in which the [Interim Values] could now force [them] to modify [their] behavior,” *Ohio Forestry Ass’n*, 523 U.S. at 734, and harms to their sovereign interests to regulate traditional areas of state authority that are much greater than pecuniary harms. *Louisiana* found that those “states are confronted with a forced choice” to accede to federal agencies or risk losing autonomy.² *Louisiana*, 2022 WL 438313, at *10. Even if state agencies are only faced with uncertainty, any rule involving the Interim Values affects billions of dollars in regulatory burdens. App. Br. 14-15 (quoting EPA finding that “‘social costs’ will offset real-world pocketbook harms from an ‘increase in up-front new vehicle costs [that] has the potential to increase the prices of used vehicles’ and ‘mak[ing] credit more difficult to obtain.’”).

² This past year, federal agencies, citing EO 13990, decided to prepare an entirely new Supplemental Environmental Impact Statement on an Alaska LNG project to further evaluate the “global nature of GHG emissions associated with exports of LNG from Alaska.” *Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Alaska LNG Project*, 86 FR 35280-01 (July 2, 2021).

III. The Court Should Remand With Instructions To Enter a Preliminary Injunction.

A preliminary injunction should issue to prevent Defendants from employing the Interim Values as binding in any rulemaking or other regulatory proceeding because all *Dataphase* factors—including the most important one, the probability of success—favor the States. 640 F.2d 109, 113 (8th Cir. 1981) (en banc). Moreover, the only court to address these issues has agreed with the States on all counts and enjoined the Interim Values in their entirety. *Louisiana*, 2022 WL 438313, at *21.

As a threshold issue, Defendants claim that the district court should decide this issue first. But they ignore *Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020), which provides the exception to *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1021 (8th Cir. 2020). Under *Carson*, the Court may remand with instructions to enter an injunction where “the merits comprise ... purely legal issue[s], reviewable *de novo* on appeal and susceptible of determination without additional factfinding.” *Carson*, 978 F.3d at 1059. That is the case here.

A. The States Are Likely to Succeed on Their Procedural APA Claim.

The States are likely to succeed on their procedural APA claim in Count Three. The Government offers no meaningful response the States’ arguments that the Working Group is an agency, that the Interim Values are final agency actions, and that the Interim Values are legislative rules. *See* App. Br. 49-52. The fact that the Working Group issues *legally binding* orders to federal agencies, directing them

to employ specific numerical values, establishes that it is an agency, its action is final, and its action is legislative. *Supra*, Part I.A.

Defendants raise the APA’s harmless-error rule, claiming that the Interim Values are merely “inflation-adjusted estimates that already underwent multiple rounds of notice and comment.” Gov. Br. 62-63. That is not true. The Obama-era Working Group accepted public comment on a technical support document only once, and it ignored or rejected all comments on the integrated assessment models (IAMs), which provide the heart of the analysis. Response to Comments, Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 3 (July 2015) (“OMB further clarified that *it was not requesting comments* on the three peer reviewed [integrated assessment models, or] IAMs themselves.”) (emphasis added). That means that the public’s comments were never considered on the central methodological issues in calculating the social cost of carbon dioxide, and the current Working Group issued the social costs of methane and nitrous oxide without undergoing any notice and comment. See Cong. Research Serv., R44657, Federal Citations to the Social Cost of Greenhouse Gases 13 (Mar. 21, 2017), <https://bit.ly/32iHrxr>; 82 Fed. Reg. 5650 (Jan. 18, 2017).

To the extent that the Government argues that either the APA does not apply or that the Interim Values are not legislative rules, Gov. Br. 62 & n.23, *Louisiana* refutes this argument. Because the Interim Values “den[y] the decisionmaker

discretion in the area of its coverage[,], then the statement is binding, and creates rights or obligations.” *Louisiana*, 2022 WL 438313, at *18. This Court confirms that when a regulation “clearly purports to create new substantive requirements, [it] therefore is in character a legislative rule.” *Nw. Nat. Bank, Fayetteville, Ark. v. U.S. Dep’t of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990) (finding regulation to be legislative rule).

B. Plaintiffs Are Likely to Succeed on Their Separation-of-Powers Claim.

It is undisputed that the President created the Working Group without any delegation of statutory authority, App. 307; R. Doc. 28, at 54, and that the Working Group’s decision binds other agencies exercising legislative authority, App. 276, R. Doc. 28, at 36. Those facts alone establish a separation-of-powers violation.

In addressing the States’ separation-of-powers claim, the Government does not dispute that the Interim Values are legislative in nature, claiming instead that Article II provides authority for the President to direct agencies in their exercise of statutory discretion. Gov. Br. 61. Plaintiff States do not dispute that the President must have “general administrative control of those executing the laws,” *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010), but he cannot create nationwide domestic policy without “an act of Congress or [a delegation] from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). EO 13990 breaks with decades of previous Executive

Branch conduct, including the Administration that created the first Working Group, by commanding that agencies must use specific values when monetizing damages from greenhouse-gas emissions whenever Congress is silent. The Constitution “entrust[s] the law making power to the Congress alone in both good and bad times.” *Youngstown Sheet & Tube Co.*, 343 U.S. at 589.³

No statute or provision in Article II assigns this legislative task to the Executive Branch. The violation of the separation of powers is manifest and egregious, and the Plaintiff States are likely to prevail.

C. The Other Equitable Factors Favor an Injunction.

The remaining three equitable factors strongly favor an injunction. *Carson*, 978 F.3d at 1059.

The States face numerous irreparable injuries to their sovereign, quasi-sovereign, and proprietary interests if the Interim Values are allowed to proceed. Defendants complain that there is no evidence of irreparable harm. Gov. Br. 59-60. On the contrary, the States’ injuries, especially those to sovereign interests secured

³ The Government asserts that the President is not subject to the APA and that Plaintiffs cannot imply a cause of action where Congress provides none. But *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), explains that subordinates acting under Presidential directives are subject to the APA, and *Youngstown* and more recent precedent explain that the States need only show that a violation has occurred and their harm flows from it. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020).

by the Constitution and the procedural APA injury, constitute irreparable harm. *Louisiana*, 2022 WL 438313, at *20 (collecting cases).

The Government argues that the public interest favors democratic accountability through the President and a standardized approach to assessing the social costs of greenhouse gases. Gov. Br. 63. Any interest that the President has in directing his subordinates ends when those directions usurp Congress’s role. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (holding that “[t]he public has no interest in enforcing an unconstitutional” policy). Further, whatever supposed public interest exists in a standardized social cost regime to allegedly prevent a climate damages in the year 2300 is entirely eroded by a stopgap measure that reflects outdated science and assumptions. App. 94, R. Doc. 6-2, at 24.

The Working Group’s “promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and [courts] are required by Congress to set these regulations aside.” *U.S. ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). The Court should remand with instructions to enter an injunction.

CONCLUSION

The States respectfully request that this Court reverse the district court’s judgment and remand with instructions to enter a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 32, that it is written in Times New Word 14-point font, and that it contains 6,492 words as determined by the word-count feature of Microsoft Word. Both the brief and addendum have been scanned for viruses and are virus-free.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ D. John Sauer