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.)

PETITION FOR REHEARING EN BANC

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March 30, 2022

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Parties:

Plaintiff-Appellees: States of Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia and Wyoming

Defendant-Appellants: 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,

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In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Appellees have any parent corporation and that no publicly held corporation holds more than 10% of their stock.

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Dated: March 30, 2022

RULE 35(B) STATEMENT

This case presents issues of exceptional importance. The panel decision granting a stay of the district court's preliminary injunction ignores extensive jurisdictional factual findings gathered during an exhaustive proceeding. It ignores irreparable harm to the States and relies on an alleged type of amorphous harm to the federal government courts routinely reject. It ignores special solicitude owed to the States that is fundamental to this Circuit's standing precedents. And it ignores harms to States in their sovereign capacity.

Making matters even worse, the panel's opinion contains an irreconcilable contradiction: It denies Plaintiffs standing by holding that the federal government is *not* using the Social Cost of Greenhouse Gas Estimates. Then it finds an injunction preventing the government from using the SC-GHG estimates would irreparably harm the federal government. Both cannot be simultaneously true.

By staying the injunction, the panel lets one of the most consequential regulations in history remain in effect despite the lack of any statutory authorization or notice and comment, despite its fundamental arbitrariness, and despite the irreparable harm it's causing the States *right now*. In short, the panel's opinion strikes at the

core of this Circuit's precedents allowing States to sue and obtain injunctive relief to prevent irreparable harm to their sovereign interests. Immediate en banc review is required to vacate the panel's stay of the district court's preliminary injunction.

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ISSUES MERITING EN BANC CONSIDERATION

Whether the motions panel improperly stayed a district court's preliminary injunction that precluded the federal government from using unlawful estimates of the Social Cost of Greenhouse Gas emissions in every federal agency in regulatory cost/benefit analysis and "other decisionmaking."

STATEMENT OF FACTS & PROCEDURAL HISTORY

On January 20, 2021, President Biden issued Executive Order 13990. That Order establishes a non-statutory agency—the Interagency Working Group (IWG)—and empowers and directs it to promulgate numerical estimates for the "social costs" of greenhouse gases. EO13990 further orders federal agencies to use those estimates in cost/benefit analyses in rulemakings and, vaguely, "other decisionmaking."

Just over a month later, the IWG released its SC-GHG Estimates. *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 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. Making matters worse, the Estimates upend decades of settled Executive Branch practice in calculating the costs of a wide swath of potential regulations by (1) employing artificially low discount rates and (2) considering *global* benefits (not just domestic ones).

A coalition of States challenged EO13990 and the SC-GHG Estimates. After extensive briefing, evidentiary submissions, and oral argument, the district court issued a preliminary injunction on February 11, 2022, with detailed findings. Doc. 99.[1] The court first held it had jurisdiction to adjudicate Plaintiff States' claims. Doc. 98 at 11-27. The court then held EO13990 and the Estimates likely exceed the Executive Branch's authority because they are not authorized by *any* grant of statutory power. *Id.* at 29-34. The Estimates are likely unlawful under the Administrative Procedure Act, it reasoned, because they 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 EO13900 and the Estimates irreparably

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

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 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. A panel of this Court granted the motion, holding the States likely lacked standing and the injunction would irreparably harm the federal government.

ARGUMENT

I. THE PANEL'S ORDER CONTRADICTS SETTLED IRREPARABLE-HARM PRECEDENT.

The Panel's *one-paragraph-long analysis* that the federal government will suffer irreparable harm 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." *State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021). As explained below, the federal government never has been able to point to *any* statute authorizing the Estimates. Accordingly, the Estimates are

unlawful, and an injunction preventing their use cannot harm the government—irreparably or otherwise. *Id.*

Compounding that problem, at every stage of this litigation, the federal government has 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. The Panel relied on those representations in its stay order to hold that the Estimates are not harming the States. The internal inconsistency in the Panel's opinion is sufficient reason to consider it en banc: by definition, the federal government cannot be irreparably harmed by an injunction preventing it from using a regulatory measure it claims it is not using anyway.

In any case, 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*. Contrary to the Panel's determination (at 6) that the injunction "halts the President's directive to agencies in how to make agency decisions, before they even make those decisions," the Estimates are a legislative rule promulgated without statutory authority or following required

notice and comment procedures. The Panel thus ignores the foundational remedies tenet that halting an illegal measure works no irreparable harm to the Executive. *Biden*, 10 F.4th at 558.

What's more, the Panel assumes the conclusion. *See* Op. 6 ("All of this effectively stops or delays agencies in considering SC-GHG in the manner the current administration has prioritized within the bounds of applicable law."). The predicate question is whether Defendants *have* authority to promulgate them; and there is no irreparable harm when the Executive is "stop[ped] or delay[ed]" from performing acts *beyond* statutory authority. *Biden*, 10 F.4th at 558. The Panel's conclusion that the Executive Branch suffers irreparable harm when it is enjoined from acting to further what it merely *perceives* to be the public interest—without regard to statutory authority—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 correctly held that EO13990 and the Estimates exceed the Executive

Branch's authority, the Panel's conclusion that the injunction works irreparable harm on the Executive cries out for en banc review.[2]

II. THE PANEL'S ORDER UPENDS SETTLED FIFTH CIRCUIT STANDING PRECEDENT.

A. The Panel Ignores Clear Bases of Jurisdiction.

In holding that the federal government made a "strong showing that they are likely to succeed on the merits," the Panel ignored clearly established precedent and the district court's express jurisdictional findings. "[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). Even so, the Panel flatly ignored most of the district court's express findings.

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[2] Rather than citing an irreparable-harm precedent involving the federal Executive Branch, the Panel resorts to an opinion interpreting Texas law. Op. at 6-7 (citing *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021)). That opinion was premised on the express provision in Texas law that executive orders "have the force and effect of law," and thus an injunction restraining the implementation of an executive order amounts to an injunction against the execution of a law. *E.T.*, 19 F.4th at 770. Restraining the implementation of the President's *policy preference* is not equivalent to restraining the implementation of a *law* enacted through the constitutional process of bicameralism and presentment or an executive order *expressly authorized by law*.

The Panel begins (at 5) by incorrectly stating that Plaintiff States suffered only one potential injury—"increased regulatory burdens." This conclusion ignores that the government failed to challenge almost all of the district court's independent findings (and its holding) about standing that had nothing to do with increased regulatory burdens. For example, the court found the "SC-GHG Estimates artificially increase the cost estimates of [Mineral Leasing Act 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 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.*

The Panel also ignores the district court's holding and jurisdictional finding—entitled to clear-error deference—that the Bureau of Land Management is employing the Estimates in lease-sale analyses, and the court's holding that doing so directly harms specific

revenue sources for the Plaintiff States.[3] This should have been fatal to the government's stay motion because Plaintiffs need only one basis for standing for the case to reach the merits. *Biden*, 10 F.4th at 547-48.

The Panel also ignored the district court's holding that Plaintiff States suffered a procedural injury in fact based on the Executive's failure to submit the Estimates to notice-and-comment rulemaking. *See* Doc. 98 at 43-44 ("In addition, the implementation of SC-GHG Estimates without complying with the APA and the notice and comment period have divested Plaintiff States of their procedural rights."). States have standing to protect those rights when their concrete sovereign interests are at stake. *See Texas v. United States*, 809 F.3d 134, 161 (5th Cir. 2015) ("Enjoining DAPA based on the procedural APA claim could prompt DHS to reconsider the program, which is all a plaintiff must show when asserting a procedural right.").

[3] The government's stay briefing relies on *El Paso Cty., Texas v. Trump*, 982 F.3d 332 (5th Cir. 2020), but that case actually 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.*, 982 F.3d at 340.

Yet the Panel whistled past this jurisdictional holding that independently supports Plaintiff States' standing.

In any event, Plaintiff States *did* establish they suffered immediate harm from increased regulatory burdens. The Panel ignores the district court's exhaustive jurisdictional findings. It 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.*

The assertion that the Estimates do not require the States to do anything is 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 433, 446-47 (2019) (cleaned up). And that continuing harm cannot be erased or remedied by after-the-fact relief. *See Texas v. Biden*, 20 F.4th at 975. Beyond that, the harm to the oil-and-gas lease-sale programs and revenues is irreparable. 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).

The Panel ignores these specific findings and (at 7) mischaracterizes them as "speculat[ion]." But the district court did not speculate—it made specific jurisdictional factual findings supported by an extensive record. Far from 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).

Finally, the Panel (at 6, 7) insinuates that Plaintiff States' claims are not ripe because Plaintiffs may challenge the Estimates in future rulemakings. But as the district court recognized, this argument ignores the reality that the Estimates are themselves a final rule with immediate legal consequences. Doc. 98 at 25-26. And Plaintiff States have extensively explained, Doc. 76 at 16-20, this is their "only adequate opportunity to challenge the Executive Order itself and the 2021 SC-GHG Estimates themselves," *id.* at 20. The Estimates are harming the States *now*. *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. The Panel Failed to Consider Special Solicitude.

Though Plaintiff States established standing under the traditional analysis, the "special solicitude" courts must show to State litigants puts Plaintiff States' standing beyond question. *See, e.g.*, *Texas v. Biden*, 20 F.4th at 969 (States are "entitled to 'special solicitude' in the

standing analysis"). But the Panel never once considered special solicitude. This fundamental disregard for a foundational standing doctrine itself merits en banc review.

Because "the states [] 'are not normal litigants for the purposes of invoking federal jurisdiction,'" they are entitled to "special solicitude" in the standing analysis if certain factors are present. *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015). This Court's holding in *Texas v. United States* is on point and controlling. First, as in *Texas*, "'[t]he parties' dispute turns on the proper construction of a congressional statute,' the APA, which authorizes challenges to 'final agency action for which there is no other adequate remedy in a court.'" *Id.* Second, as in *Texas*, the SC-GHG Estimates "affect[] the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their" practices and laws to remain in compliance with federal standards. *Id.* at 153; *see also id.* ("[S]tates may have standing based on ... federal assertions of authority to regulate matters they believe they control."). And "just as in the DAPA suit, [Louisiana] is asserting a procedural right under the APA to challenge an agency action." *Texas*, 20 F.4th at

970. That means Plaintiff States receive special solicitude in the standing inquiry. *Id.*

In these circumstances, courts routinely find traceability and redressability for injuries comparable to those extensively alleged in Plaintiff States' Complaint. *See, e.g.*, *id.*; *Texas v. United States*, 809 F.3d at 159-60. Just as "Massachusetts, armed with special solicitude," could "establish causation between the EPA's decision to not regulate greenhouse gas emissions from new motor vehicles and its interest in protecting its physical territory," *Texas v. United States*, 524 F. Supp. 3d 598, 630 (S.D. Tex. 2021), Plaintiff States are "entitled to the same 'special solicitude as was Massachusetts, and the causal link" between the Estimates and Plaintiffs' sovereign interest, budgets, procedural rights, and citizens' economic wellbeing "is even closer here," *Texas*, 809 F.3d at 159.

By failing to consider special solicitude, the Panel's opinion breaks from this Circuit's standing precedents and blocks Plaintiff States from obtaining relief from unlawful government action.

III. THIS CASE RAISES QUESTIONS OF IMMENSE IMPORTANCE.

The Panel's opinion allows one of the most consequential regulations in the Nation's history to remain in effect and injure Plaintiff States. The Panel asserts (at 7) that the "status quo" is the SC-GHG Estimates. Not so. For decades, bipartisan regulatory review has occurred under Executive Order 12866's neutral cost-benefit scale, which was adopted through notice-and-comment rulemaking. The Executive Order and Estimates undermine EO12866 by placing a weight so heavy on that scale that it collapses. Unlike the *process* established by EO12866, EO13990 and the Estimates dictate a *specific binding rule* to agencies that predetermines 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)).

Worse still, the Panel's opinion is internally inconsistent: it simultaneously claims EO13990 and the Estimates do not represent a

major question yet later holds *precisely the opposite* in a bid to establish irreparable harm.

The SC-GHG Estimates are no "everyday exercise of federal power." *NFIB v. Dep't of Labor.*, 142 S. Ct. 661, 665 (2022). They are among the most significant regulatory actions *in the Nation's history*. The Estimates drive up the cost side of every energy-related regulatory action, making it difficult—if not impossible—to justify anything but the most stringent energy regulations. They also make it more difficult to approve oil and natural-gas projects and leasing under NEPA review. And they reach into the internal affairs of every State that accepts federal highway funds or participates in any cooperative federalism projects.

The SC-GHG Estimates have amply earned their nickname as "the most important number you've never heard of." Cass R. Sunstein, *Arbitrariness Review* (2021), https://bit.ly/3rk2hZC. They reach every aspect of everyday life—"from Frisbees to flatulence." *Massachusetts v. E.P.A.*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting). They are the definition of a contested public policy choice of "deep economic and political significance." *King v. Burwell*, 576 U.S. 473, 486 (2015). They

are used to determine the shape of stoves and refrigerators under EPCA's appliance-efficiency program, 42 U.S.C. §6295; the size and shape of cars under the CAFE standards program, 49 U.S.C. §32902; the design of lightbulbs and air conditioners under EPCA, 42 U.S.C. §6295; the design of manufactured housing, *id.* §17071; whether a power plant can be built or modified, *id.* §7411; and whether the production of concrete to build and repair roads and bridges is too emissions-heavy, *id.* §4331. *There is simply no part of American life that the Estimates do not touch.*

The Estimates impose significant new hidden costs on the economy. Doc. Doc. 98 at 31 ("The total cost of these 83 regulatory actions [using social costs] is estimated to be between $447 billion and $561 billion."). Courts have found less costly and far-reaching regulations triggered the Major Questions Doctrine. *See, e.g.*, *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) ($3 billion in compliance costs).

The Estimates also alter the federal-state balance in cooperative federalism programs. Congress will "not be deemed to have significantly changed the federal-state balance" unless it "conveys its purpose

clearly." *United States v. Bass*, 404 U.S. 336, 349 (1971); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984). As the district court found, the Estimates are being employed to alter the nature of federal-state relations in cooperative federalism programs. *See* Doc. 98 at 19-20.

The Estimates also raise major questions under the Nondelegation Doctrine. Congress lacks authority to delegate "virtually unlimited power" over the American economy to an executive agency. *BST Holdings*, 17 F.4th at 617. And the Estimates' novelty also demonstrates the importance of resolving their legality. *See Util. Air Regul. Grp.*, 573 U.S. at 324 (Major Questions Doctrine triggered when an agency suddenly discovers "in a long-extant statute an unheralded power to regulate a significant portion of the American economy").

Given the Estimates' transformative effect on the economy, infringement on legislative power, and usurpation of traditional State powers, the burden is on the Executive Branch to identify clear congressional authorization. *NFIB*, 142 S. Ct. at 665. Despite having numerous chances, the government has *still* not identified *any* statutory

authorization for implementing the Estimates. Doc. 98 at 29-34 (collecting cases).

The Panel allows the Executive to circumvent the APA by allowing the President to create an agency out of whole cloth and then vest it with authority to issue binding legislative rules without notice and comment. *See* Doc. 98 at 34-35; *see also United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) (action dictating a "specific numeric amount" is a legislative rule (collecting cases)). And because the Estimates were actually in effect, Plaintiff States were subjected to their harms for months.

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

The Panel also misapplied the public interest and balance of harms stay factors.

Most obviously, the federal government "'ha[s] no legitimate interest in the implementation of [the] unlawful' SC-GHG Estimates." Doc. 98 at 44; *see also Biden*, 10 F.4th at 559. And the "public interest favors maintenance of [an] injunction" that "maintains the separation of powers." *Texas*, 787 F.3d at 768; *see Biden*, 10 F.4th at 559. Finally, the injunction prevented major violations of the Tenth Amendment and

"the public interest plainly lies in not allowing" the federal government "to circumvent those federalism concerns." *Id.* 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 will suffer without an injunction puts the public interest and balance of harms beyond doubt. Any harm to the federal government's nonexistent interest in furthering an illegal policy is easily outweighed by Plaintiff States' irreparable harms.

Finally, the Panel improperly faulted Plaintiff States for a brief delay between filing the complaint and the motion for a preliminary injunction. Here again, the Panel flatly ignores Defendants' *repeated denials* the numbers were in use in any *material* way. Plaintiff States were required to embark on a deep-dive into every agency's regulatory actions, including permitting and other discrete decisionmaking, to prove what Defendants knew all along: they were implementing the Estimates. Any delay in filing for injunctive relief was reasonable under

the circumstances and should not be held against Plaintiff States when Defendants always had perfect knowledge of *how* and *where* the numbers were in use but *denied* it. Moreover, any delay in *scheduling* resulted from the District Court responding to the devastating impact of Hurricane Ida on South Louisiana.

CONCLUSION

For the foregoing reasons, this Court should grant en banc review of the Panel's order granting a stay and reverse it.

Respectfully submitted,

Dated: March 30, 2022

/s/Elizabeth B. Murrill

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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
Counsel for Appellees
Dated: March 30, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 35 because it contains 3,660 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.

/s/ Elizabeth B. Murrill
Counsel for Appellees
Dated: March 30, 2022

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 22-30087

THE STATE OF LOUISIANA, *by and through its Attorney General, Jeff Landry*; THE STATE OF ALABAMA, *by and through its Attorney General, Steve Marchall;* THE STATE OF FLORIDA, *by and through its Attorney General, Ashley Moody*; THE STATE OF GEORGIA, *by and through its Attorney General, Christopher M. Carr*; THE COMMONWEALTH OF KENTUCKY, *by and through its Attorney General, Daniel Cameron*; THE STATE OF MISSISSIPPI, *by and through its Attorney General, Lynn Fitch;* THE STATE OF SOUTH DAKOTA, *by and through its Governor, Kristi Noem*; THE STATE OF TEXAS, *by and through its Attorney General, Ken Paxton*; THE STATE OF WEST VIRGINIA, *by and through its Attorney General, Patrick Morrisey*; THE STATE OF WYOMING, *by and through its Attorney General, Bridget Hill*,

Plaintiffs—Appellees,

versus

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, *Secretary, U.S. Department of Treasury*; DEB HAALAND, *Secretary, U.S. Department of the Interior*; TOM VILSACK, *in his official capacity as Secretary of Agriculture*; GINA RAIMONDO, *Secretary, U.S. Department of Commerce*; XAVIER BECERRA, *Secretary, U.S. Department of Health and Human Services*; PETE BUTTIGIEG, *in his official capacity as Secretary of Transportation*; JENNIFER GRANHOLM, *Secretary, U.S. Department 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*; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:21-CV-1074

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the opposed motion of Appellants for stay pending appeal is GRANTED.

When federal agencies promulgate regulations or take other agency action with economically significant effects, they conduct a cost-benefit analysis. This has been done since the Carter administration, although presidential oversight of regulatory action through a systematic review process began as early as the Nixon administration. In 1993, President Clinton issued Executive Order 12866 which, among other things, mandates the prepublication review process for economically significant regulations. Exec. Order No. 12866, 58 Fed. Reg. 51,735, 51,736, 51,741 (Sep. 30, 1993). EO 12866 also states "[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and

benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Later administrations retained EO 12866's commitment to cost-benefit analyses and strengthened it with additional directives or guidelines for regulatory analysis.

In 2003, the Office of Management and Budget (OMB) issued Circular A-4 to provide guidance to agencies on how to conduct the cost-benefit analysis implemented by EO 12866. *See* OMB Circular A-4 (Sept. 17, 2003). Compliance with Circular A-4 is not required by any statute or regulation and is not binding on any agency.

In conducting cost-benefit analyses, agencies consider the impact of the emissions of greenhouse gases. The impact of these emissions on various factors like health, agriculture, and sea levels, can be quantified into dollar amounts per ton of gas emitted—i.e., the Social Cost of Greenhouse Gases (SC-GHG).

To encourage consistency in determining SC-GHG, in 2009, President Obama instituted the Interagency Working Group (IWG) to develop a method for quantifying the costs and effects of emissions. In 2010, the IWG developed a method to quantify GHG emissions into social costs estimates based on peer-reviewed frameworks.

In 2017, President Trump disbanded the IWG and its method for quantifying SC-GHG in Executive Order 13783. Exec. Order No. 13783, 82 Fed. Reg. 16,093, 16,095 (March 31, 2017). That order still contemplated, however, that agencies would continue to "monetize the value of changes in greenhouse gas emissions resulting from regulations" and that estimates would be consistent with Circular A-4 (to the extent permitted by law). 82 Fed. Reg. 16,096.

In January 2021, President Biden signed Executive Order 13990 and reinstated the IWG to advise him on the SC-GHG. *See* Exec. Order No. 13990, 86 Fed. Reg. 7,037, 7,040, § 5(b)(ii)(A) (Jan. 20, 2021). The IWG was also directed to develop new estimates for the SC-GHG, and until those new estimates are published, to develop Interim Estimates within 30 days, as appropriate and consistent with applicable law. Pursuant to EO 13990, agencies must use the Interim Estimates when they conduct cost-benefit analyses for regulatory or other agency action. The IWG published the Interim Estimates in February 2021. The Interim Estimates are the same as the SC-GHG estimates from 2016, adjusted for inflation.

The Plaintiff States sued the United States' Government Defendants in April 2021 to preemptively challenge the Interim Estimates. They claim the Interim Estimates will lead to increased regulatory burdens when agencies conduct cost-benefit analyses. The Plaintiff States therefore brought several challenges to Interim Estimates pursuant to the Administrative Procedures Act (APA). The Plaintiff States' claims are premised *solely* on the broad use of the Interim Estimates. They do not challenge any specific regulation or other agency action.

In February 2022, the district court entered a preliminary injunction enjoining the Government Defendants from using, in any manner, the Interim Estimates. The Government Defendants move to stay the injunction pending appeal arguing, among other things, the Plaintiff States lack standing, their claims are not ripe, and the Interim Estimates are not final agency action under the APA. Because we conclude the Government Defendants have made a strong showing that they are likely to succeed on the merits, and the balance of harms to the parties favors granting the stay, we GRANT the Government Defendants' motion.

Whether to enter a stay is left to the court's discretion. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). That discretion is bound to four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (citation omitted). The first two factors "are the most critical." *Id.*

The Government Defendants are likely to succeed on the merits because the Plaintiff States lack standing. The Plaintiff States' claimed injury is "increased regulatory burdens" that *may* result from the consideration of SC-GHG, and the Interim Estimates specifically. This injury, however, hardly meets the standards for Article III standing because it is, at this point, merely hypothetical. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (stating "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical" (internal quotation marks and citations omitted)); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016) (requiring an injury to actually exist and affect a plaintiff in a "personal and individual way"). The Government Defendants are also likely to succeed in showing that the Plaintiff States have failed to meet their burden on causation and redressability. The increased regulatory burdens the Plaintiff States fear will come from the Interim Estimates appear untraceable because agencies consider a great number of other factors in determining when, what, and how to regulate or take agency action (and the Plaintiff States do not challenge a *specific* regulation or action). *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–13 (2013) (assuming claimed injury was imminent pursuant to *Lujan* but noting redressability was absent because there was a number of other methods to inflict the same injury which were not challenged in the case).

The Interim Estimates on their own do nothing to the Plaintiff States. So we discern no injury that would satisfy Article III at this stage. *See Summers v. Earth Island Inst.*, 55 U.S. 488, 493 (2009) (concluding organizations lacked standing because among other things, the plaintiffs were not the subject of the challenged regulations). The Plaintiff States' claims therefore amount to a generalized grievance of how the current administration is considering SC-GHG. And that fails to meet the standards of Article III standing. *See Lujan*, 504 U.S. at 568 ("[R]espondents chose to challenge a more generalized level of Government action," instead of "specifically identifiable Government violations of law," which is "rarely if ever appropriate for federal-court adjudication." (citation omitted)).

The Government Defendants have shown they will be irreparably harmed absent a stay. The preliminary injunction halts the President's directive to agencies in how to make agency decisions, *before* they even make those decisions. It also orders agencies to *comply* with a prior administration's internal guidance document that embodies a certain approach to regulatory analysis, even though that document was not mandated by any regulation or statute in the first place. The preliminary injunction sweeps broadly and prohibits reliance on § 5 of EO 13990, which creates the IWG, a group created to advise the President on policy questions in addition to creating the Interim Estimates. It is unclear how the Plaintiff States' qualms with the Interim Estimates justify halting the President's IWG. All of this effectively stops or delays agencies in considering SC-GHG in the manner the current administration has prioritized within the bounds of applicable law. The preliminary injunction's directive for the current administration to comply with prior administrations' policies on regulatory analysis absent a specific agency action to review also appears outside the authority of the federal courts. We therefore find the Government Defendants are irreparably harmed absent a stay of the injunction. *Cf. E.T. v. Paxton*, 19 F.4th 760, 770

(5th Cir. 2021) (concluding state was irreparably harmed when an injunction prevented the state from carrying out public policy and enforcing its own laws).

On the other hand, a stay of the injunction will impose minimal injury on the Plaintiff States. In consideration of this factor, the maintenance of the status quo is important. *See Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978). The Interim Estimates were published in February 2021. This lawsuit was filed in April 2021. The Plaintiff States moved for a preliminary injunction in July 2021. And the preliminary injunction was entered in February 2022. By the time the preliminary injunction was entered, the Interim Estimates had been in place for one year. The status quo at this point is the continued use of the Interim Estimates. *See E.T.*, 19 F.4th at 770 (concluding status quo was leaving state order in effect because it had been in effect for nearly four months and plaintiffs alleged a tenuous and speculative injury). And because the claimed injury, increased regulatory burdens, has yet to occur, the continued use of the Interim Estimates will not harm the Plaintiff States until a regulation or agency action is promulgated from the *actual* use of the Interim Estimates. To the extent the agencies will use, or are using, the Interim Estimates in reaching a specific final agency action, we discern no obstacle to prevent the Plaintiff States from challenging a specific agency action in the manner provided by the APA.

In sum, the Plaintiff States' claims are based on a generalized grievance of the use of Interim Estimates in cost-benefit analyses of regulations and agency action. But their claimed injury does not stem from the Interim Estimates themselves, it stems from any forthcoming, speculative, and unknown regulation that *may* place increased burdens on them and *may* result from consideration of SC-GHG. We conclude the standing inquiry shows the Government Defendants' likelihood of success

on the merits in this appeal, and the other factors, including the public interest, favor granting a stay of the injunction.

The Government Defendants' motion to stay the preliminary injunction pending appeal is GRANTED. The district court's preliminary injunction entered on February 11, 2022 is STAYED pending this appeal.