**No. 22-30087**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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,

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, 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.

On Appeal from the United States District Court
for the Western District of Louisiana

# BRIEF FOR APPELLANTS

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## CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required, as defendants-appellees are government entities and government officials sued in their official capacities. 5th Cir. R. 28.2.1.

## STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully request oral argument in this case. The district court preliminarily enjoined nearly two dozen federal entities and officials from implementing part of an Executive Order issued by the President. Defendants believe oral argument could provide substantial assistance to this Court in understanding the issues in the case.

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## INTRODUCTION

The President has long exercised his constitutional authority to oversee the rulemaking efforts of Executive Branch agencies, including by requiring and supervising the use of cost-benefit analysis in regulatory planning. The most recent such exercise is Executive Order 13990, in which President Biden directed an interagency group of experts to develop monetary estimates of the full costs of greenhouse gas emissions (the "Interim Estimates") for agencies to use in internal regulatory reviews.

Use of this informational tool may lead an agency to conclude that the benefits of a potential regulation outweigh the costs. Or it may not. An agency may decide to rely on this conclusion to justify the regulation to the public. Or it may not. The agency may change its approach in response to comments from the public. Or it may not. And at the end of the process, if the agency exercises its discretion under governing law to adopt a regulation justified in part by a cost-benefit analysis in which the Interim Estimates were one among many inputs, the regulation may affect a concrete interest of the Plaintiff States. Or it may not.

Rather than wait to see if any of this occurs at a particular agency or in a particular regulatory action, 11 States have challenged use of the Interim

Estimates in the abstract and asked the district court to impose wholesale changes on the manner in which numerous agencies account for the effects of greenhouse gas emissions. This lawsuit is not justiciable. As a panel of this Court recently explained, Plaintiffs lack standing to pursue their generalized grievance about how the Executive Branch considers greenhouse gas emissions in its internal analyses. The doctrine of ripeness and sovereign immunity similarly bar abstract challenges like this. Judicial review will be available if and when a particular and identifiable agency action relies on the Interim Estimates to impose some concrete burden that affects Plaintiffs' interests.

But even if the district court did have jurisdiction, it erred in ordering the sweeping and unprecedented relief requested by Plaintiffs. The court's preliminary injunction imposes an impermissible *ex ante* mandate in ongoing agency rulemakings, dictates a particular approach to regulatory analysis not required by any legal authority, and intrudes on the President's constitutional authority to supervise the Executive Branch—all while doing nothing to prevent any harm to Plaintiffs. At a bare minimum, the relief provided was significantly overbroad in relation to the asserted injury and legal violation. The district court's order should be vacated and the

complaint dismissed for lack of jurisdiction; at minimum, the order should be narrowed to an injunction against the *mandatory* use of the Interim Estimates.

## STATEMENT OF JURISDICTION

Plaintiffs sought to invoke the district court's jurisdiction under 28 U.S.C. § 1331. ROA.44. The district court issued a preliminary injunction on February 11, 2022. ROA.4116. Defendants timely appealed on February 19. ROA.4118. This Court has jurisdiction under 28 U.S.C. § 1292(a).

## STATEMENT OF THE ISSUES

1. Whether the district court lacks jurisdiction over Plaintiffs' abstract challenge to the federal government's general approach to considering the effects of greenhouse gas emissions.

2. Whether the district court erred in granting the preliminary injunction.

## STATEMENT OF THE CASE

### A. Legal and Factual Background

#### 1. Presidential Supervision of Agency Rulemaking

The President is responsible for oversight of the policymaking and rulemaking processes within the Executive Branch. *See Seila Law LLC v. CFPB*, 140 S. Ct. 183, 2197-98 (2020); *Free Enter. Fund v. Public Co.*

*Accounting Oversight Bd.*, 561 U.S. 447, 492, 496 (2010); *see also Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (affirming "the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy"). Since the early 1970s, every President has required some form of rulemaking review overseen by the Office of Management and Budget (OMB).

The modern era of centralized review began in 1981, when President Reagan directed federal agencies to prepare comprehensive regulatory analyses for any "major" rule and submit them to OMB before publicly proposing the rule. *See* Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (E.O. 12291). The core premise of E.O. 12291 was that agency decisionmaking about whether and how to proceed with significant proposed actions should be informed by an empirical and (when possible) monetized assessment of their expected consequences—that is, a cost-benefit analysis.

The current framework for presidential oversight of agency rulemaking is provided in Executive Order 12866, which is still in effect today. Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (E.O. 12866). E.O. 12866 creates a detailed regulatory-review process coordinated by OMB and its Office of Information and Regulatory Affairs (OIRA)

covering all agencies, except for "independent regulatory agencies." E.O. 12866, § 3(b). Like its Reagan-era predecessor, E.O. 12866 directs agencies to follow certain principles in conducting regulatory reviews "unless a statute requires another regulatory approach." *Id.* § 1(a).

Among those principles is that an agency ordinarily should "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." E.O. 12866, § 1(b)(6). To that end, an agency must assess the anticipated costs and benefits before it proposes any "significant" action. *Id.* § 6(a)(3)(B)-(C). For actions that are "significant under § 3(f)(1)—because, for example, they are "likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more"—this cost-benefit analysis is a key element of the agency's Regulatory Impact Analysis (RIA), which informs the Executive Branch's internal decisionmaking within the bounds of applicable statutory authority.

Various OMB guidance documents, in particular Circular A-4, set out recommendations to assist agencies in developing RIAs that comply with E.O. 12866. *See* OMB, Circular A-4 (Sept. 17, 2003), https://perma.cc/CVU2-QUCE. Among other things, Circular A-4 emphasizes that agencies "should monetize quantitative estimates whenever possible," for both the direct

effects of the rule and for "any important ancillary benefits and countervailing risks." *Id.* at 26-27. And because regulatory costs and benefits may accrue well into the future, Circular A-4 describes how agencies should value such future effects, including by how to choose appropriate discount rates, and how they should manage the scope of their analysis.[1] *Id.* at 6, 15, 31-32. But Circular A-4 also disclaims any particular "formula," emphasizing that agencies must "exercise professional judgment" in a context-sensitive manner using the best evidence available. *Id.* at 2-3, 17; *see* ROA.4177-81. "Compliance with Circular A-4 is not required by any statute or regulation and is not binding on any agency." Stay Order 3.

Although an RIA will be issued alongside a notice of proposed rulemaking (if an agency proceeds with its proposal), it remains an advisory planning document. And because RIAs, standing alone, do not limit an agency's exercise of its statutory discretion, they are generally not subject to judicial review. *See, e.g.*, *National Truck Equip. Ass'n v. National Highway Traffic Safety Admin.*, 711 F.3d 662, 670 (6th Cir. 2013). But if Congress specifically mandates that an agency weigh costs and benefits, or if an

[1] A discount rate is a tool to convert future monetary sums into present-value equivalents. *See* Circular A-4, at 31-32. The higher the discount rate, the less value a future sum will have in present-day terms.

agency chooses to justify its rule on such grounds, then that part of the RIA may be subject to review in a suit challenging the rule under the Administrative Procedure Act (APA). *See National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012).

### 2. The Social Cost of Greenhouse Gases

"In conducting cost-benefit analyses, agencies consider the impact of the emissions of greenhouse gases." Stay Order 3. To quantify this impact, agencies use scientific models that estimate the net impacts—good and bad—on society broadly and aggregate them into a final dollar sum. The resulting estimates, which reflect the "monetary value of the net harm to society associated with" incremental emissions "in a given year," are commonly known as the "social cost" of greenhouse gases (SC-GHG). ROA.311.

Following the Ninth Circuit's decision in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), federal agencies have deployed SC-GHG estimates to value projected changes in greenhouse gas emissions when preparing cost-benefit analyses. That case concerned a challenge to a fuel-economy standard that had been justified in part based on a cost-benefit analysis. The

court held that the rule was arbitrary and capricious because the agency had failed to "monetize the benefit of carbon emissions reduction" that would accrue from a higher fuel-economy standard. *Id.* at 1203. The court found that omission unreasonable, observing that "while the record shows that there is a range of [possible] values, the value of carbon emissions reduction is certainly not zero." *Id.* at 1200.

At the end of the George W. Bush Administration, agencies were using varying estimates of the social cost of carbon dioxide (SCC). *See* Interagency Working Grp. on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866*, at 3-4 (Feb. 2010), https://perma.cc/2KYP-6JTX (*February 2010 TSD*). Seeking to encourage use of the best available science and to promote consistency across agencies, OMB convened an interagency process in 2009 "to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced $CO_2$ emissions." *Id.* at 4. The resulting Working Group was composed of technical experts from various agencies and co-chaired by OMB and the White House Council of Economic Advisers.

In 2010, the Working Group derived a set of SCC estimates using a methodology that synthesized three widely cited, peer-reviewed models for translating carbon dioxide emissions into climate change impacts and, in turn, dollar figures. *February 2010 TSD* 5. The Working Group used five different socioeconomic and emissions "scenarios" and three different discount rates (2.5%, 3%, and 5%) to apply in running each model. After running thousands of simulations, it combined the results to create a set of SCC values that varied by discount rate. *Id.* at 15-23, 28.

In 2013, the Working Group issued revised SCC estimates to incorporate new versions of the three models used in the peer-reviewed literature. OMB sought public comment on the revised estimates and their methodology, including on the selection of the three underlying models, the method for synthesizing the models' results, and the key inputs used to produce the estimates (such as discount rates and climate sensitivity parameters). After receiving tens of thousands of comments, the Working Group issued a public response and announced that it would request a review of the estimates by the National Academies of Sciences, Engineering and Medicine (National Academies). *See* ROA.319-20.

Although federal agencies were not required to employ these estimates, many chose to do so. In 2016, a federal court of appeals upheld consideration of the 2013 estimates in reviewing a Department of Energy rule setting energy-efficiency standards for commercial refrigeration equipment. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-78 (7th Cir. 2016).

Recognizing that carbon dioxide is not the only contributor to climate change, the Working Group also developed estimates of the social costs of methane (SCM) and nitrous oxide (SCN) using the same general methodology. After considering the peer-reviewed literature and public comments, it published its first peer-reviewed SCM and SCN estimates in August 2016, along with an expanded discussion of its SCC estimates in response to initial recommendations from the National Academies. *See* ROA.319. The January 2017 final report by the National Academies provided additional recommendations for future updates to ensure that the estimates continue to reflect the best available science and methodologies.[2]

[2] National Academies, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017).

Shortly thereafter, President Trump issued an executive order disbanding the Working Group and withdrawing its prior analyses as "no longer representative of governmental policy." Exec. Order No. 13783, § 5(b), 82 Fed. Reg. 16,093 (Mar. 28, 2017). The order nonetheless contemplated that agencies would continue to "monetiz[e] the value of changes in greenhouse gas emissions resulting from regulations" and directed that agencies ensure, "to the extent permitted by law," that "any such estimates are consistent with the guidance contained in OMB Circular A-4." *Id.* § 5(c). Agencies thereafter continued to use standardized SC-GHG estimates, but those new estimates differed from the Working Group's 2016 estimates in two principal respects: they attempted to capture only the domestic (*i.e.*, U.S.-specific) impacts of climate change, and they applied higher discount rates (3% and 7%).[3]

[3] *See* U.S. Envtl. Prot. Agency, *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal* 42-46 (Oct. 2017), https://perma.cc/68U4-5YC4 (developing interim estimates "under E.O. 13783" to "be used in regulatory analysis until improved domestic estimates can be developed"); *see also, e.g.*, *Waste Prevention*, 83 Fed. Reg. 49,184, 49,190 (Sept. 28, 2018) (Bureau of Land Management rule using "interim values" for SCM "adjusted" to comply with E.O. 13783).

### 3. Executive Order 13990 and the Interim Estimates

Against this backdrop, President Biden issued Executive Order 13990 in January 2021. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (E.O. 13990). The President determined that it "is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions." *Id.*, § 5(a). Capturing "the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account," the President explained, "facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues." *Id.*

Accordingly, Section 5 of E.O. 13990 reconvened the Working Group to consider expert recommendations, survey scientific literature, engage with the public and stakeholders, and formulate updated SC-GHG estimates. E.O. 13990, § 5(b).[4] It set a January 2022 target for publication of revised SC-GHG estimates and also directed the Working Group to "provide

[4] The Working Group is now formally named the Interagency Working Group on the Social Cost of Greenhouse Gases and is co-chaired by the Council of Economic Advisers, OMB, and the Office of Science and Technology Policy.

recommendations to the President" regarding use of such estimates in contexts other than rulemaking. *Id.* § 5(b)(ii)(B)-(C).

In the interim, Section 5 directed the Working Group to "publish an interim SCC, SCN, and SCM within 30 days" and stated that "agencies shall use" those Interim Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published." E.O. 13990, § 5(b)(ii)(A). This direction, like the rest of E.O. 13990, does not affect "the authority granted by law" to any agency and must be implemented in a manner "consistent with applicable law." *Id.*, §§ 5(b)(ii), 8.

In February 2021, the Working Group published a Technical Support Document providing a set of SCC, SCM, and SCN estimates for use until revised estimates are issued that will address the recommendations of the National Academies. ROA.309-56. Other than adjustments for inflation, these Interim Estimates were identical to the Working Group's prior 2016 estimates. The Working Group explained that it found these estimates better justified methodologically than estimates used under the prior Executive Order for multiple reasons, including that they use more appropriate discount rates and account for global impacts. ROA.312. OMB

invited public comments on the Interim Estimates, including on "how best to incorporate the latest peer-reviewed science and economics literature in order to develop [the] updated set of SC-GHG estimates" required by E.O. 13990. *Notice*, 86 Fed. Reg. 24,669, 24,669 (May 7, 2021).[5]

In June 2021, OIRA issued a guidance document to assist agencies in applying Section 5 of E.O. 13990. ROA.358 (OIRA Guidance). As that guidance makes clear, the Interim Estimates will be used when agencies prepare cost-benefit analyses "for purposes of compliance with E.O. 12866." ROA.358. The guidance confirms, though, that any use of the Interim Estimates is "subject to applicable law" as enacted by Congress, including "principles of administrative law." ROA.359. It thus instructed that "[w]hen an agency conducts benefit-cost analysis pursuant to specific statutory authorities," those statutory provisions "must dictate whether and how the agency monetizes changes in greenhouse gas emissions in the context of the agency action." ROA.359. Similarly, when an agency relies on a cost-benefit analysis using the Interim Estimates to justify a final action, it "must

[5] Six of the Plaintiffs submitted comments, as did thousands of other parties. *See* OMB, *Comment on Federal Register Doc # 2021-09679* (June 22, 2021), https://perma.cc/G97Q-SCY3.

respond to any significant comments on those estimates and ensure its analysis" is "not arbitrary or capricious." ROA.359.

### B. Procedural History

#### 1. *Missouri v. Biden*

In March 2021, Missouri and 12 other States brought suit in the Eastern District of Missouri to challenge the directive in E.O. 13990 to use the Interim Estimates. The *Missouri* plaintiffs moved for a preliminary injunction, and the federal defendants moved to dismiss the complaint. The district court in that case granted the motion to dismiss, concluding that the States lacked standing and that their claims were not ripe, and denied the motion for preliminary injunction as moot. *Missouri v. Biden*, 558 F. Supp. 3d 754 (E.D. Mo. 2021), *appeal pending*, No. 21-3013 (8th Cir.).

#### 2. *Louisiana v. Biden*

On April 22, 2021, Louisiana and nine other States filed their own suit in the Western District of Louisiana against 23 federal entities or officials, including the President. Plaintiffs claim that the Interim Estimates are procedurally invalid, arbitrary and capricious, inconsistent with various agency-specific statutes, and *ultra vires*. ROA.80-82. Three months after filing suit, Plaintiffs moved for a preliminary injunction. ROA.536.

On February 11, 2022, without ruling on Defendants' earlier filed motion to dismiss, the district court granted Plaintiffs' motion and adopted their proposed order for injunctive relief.

The district court addressed some, though not all, of Defendants' threshold objections. On standing, the court accepted Plaintiffs' assertions that implementation of the Interim Estimates "imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism," including by putting the States to an alleged "forced choice" of either using the Interim Estimates themselves or being subjected to a federal plan based on these values. The court also accepted that agencies' use of the Interim Estimates in environmental reviews of potential oil and gas lease sales "directly causes harm" by reducing the revenue Plaintiffs derive from those leases, and that Plaintiffs had been deprived of their "procedural rights" to comment on the Interim Estimates. ROA.4046-48, 4071. The court further concluded that the Interim Estimates constituted final agency action. ROA.4051-53, 4065-66. The district court did not address ripeness.

The district court next turned to the merits of Plaintiffs' claims. The court did not contend that agencies lack authority to consider the effects of

greenhouse gas emissions in their regulatory analyses (or dispute that agencies sometimes must do so), but it concluded that "the issuance of EO 13990 violates the major questions doctrine" because use of the Interim Estimates will "fundamentally transform regulatory analysis and the national economy" without congressional authorization. ROA.4055-61. The court also concluded that the Interim Estimates were procedurally invalid because they were promulgated without notice and comment; were contrary to a selection of statutes that it believed did not permit consideration of global effects; and were arbitrary and capricious based on "numerous arguments" offered by Plaintiffs, which the court listed but did not further discuss. ROA.4061-65.

The district court concluded that equitable factors supported an injunction. The court stated that Plaintiffs had "sufficiently identified the kinds of harms to support injunctive relief" because their injuries "cannot be undone through monetary remedies." ROA.4069. The court credited Plaintiffs' assertion that "Defendants would suffer no harm from an injunction" and concluded that the balance of equities and public interest weighed in favor of injunctive relief. ROA.4071.

The district court adopted Plaintiffs' proposed order without discussing any of its terms. That order enjoined all Defendants from (1) "adopting, employing, treating as binding, or relying upon the work product of the Interagency Working Group"; (2) using any SC-GHG estimates that are "based on global effects," do not "utilize discount rates of 3 and 7 percent," or do "not comply with Circular A-4"; (3) and "[r]elying upon or implementing Section 5 of Executive Order 13990 in any manner." ROA.4116-17.

Defendants promptly appealed and sought a stay pending appeal. This Court granted a stay. The Court concluded that Plaintiffs lacked Article III standing. Because "[t]he Interim Estimates on their own do nothing to the Plaintiff States," the Court explained, their claims "amount to a generalized grievance of how the current administration is considering SC-GHG." Stay Order 6. The Court determined that the injunction caused Defendants irreparable harm because it interfered with agency decisionmaking processes before any decisions were actually made; ordered relief beyond what was necessary to address Plaintiffs' claims; and ordered the Executive Branch to adhere to a specific policy on regulatory analysis not mandated by any statute or regulation. *Id.* On the other side of the balance, the Court

determined that Plaintiffs would suffer no harm from the absence of injunctive relief because their claimed injury "has yet to occur" and (if necessary) could be redressed through a future challenge to a specific final agency action. *Id.* at 6-7.

Plaintiffs' petition for rehearing en banc of this Court's stay order was denied. Plaintiffs have sought a stay in the Supreme Court.

## SUMMARY OF ARGUMENT

I. Plaintiffs' abstract challenge to E.O. 13990 and the Interim Estimates is nonjusticiable. First, as this Court recognized when it stayed the district court's injunction, Plaintiffs lack Article III standing. E.O. 13990 and the Interim Estimates govern only the conduct of federal agencies; they are not directed to, and do not impose any burden on, Plaintiffs. In the event that some agency issues a future regulation relying on the Interim Estimates in a manner that causes specific and concrete harm to Plaintiffs, they might well have standing to challenge that particular agency action. But at this juncture, Plaintiffs have nothing but a generalized grievance about how the federal government considers the effects of greenhouse gases in its regulatory analyses.

Nor could Plaintiffs establish that any injury they face in the future would be fairly traceable to the conduct they challenge. Given the number of considerations and decisions that form part of a rulemaking, there is no way to predict whether possible future regulations would have any causal connection to E.O. 13990 or the Interim Estimates without resorting to sheer speculation. Standing cannot be based on theories that rest on such speculation about the decisions of independent actors.

Second, the same basic reasons that prevent Plaintiffs from establishing standing also lead to the conclusion that their claims are not ripe. At this point, Plaintiffs have an abstract disagreement over government policy that has yet to be applied to them by a specific action in a manner that causes harm. Should a concrete dispute arise in the future, they will have ample opportunity to seek judicial review at that time, and courts will evaluate their legal claims informed by the specific statutes that authorize and guide the challenged agency action.

Finally, Plaintiffs' challenge to the use of the Interim Estimates does not seek review of any "agency action," as required by the APA. 5 U.S.C. § 702. That requirement prevents the kind of programmatic challenge that Plaintiffs pursue here and also precludes any judicial review of actions taken

by the President and his advisors. Even if those obstacles could be overcome, judicial review under the APA does not extend to non-final orders that can only affect a plaintiff's rights on the contingency of future agency action. *Id.* § 704.

II. The district court erred in granting a preliminary injunction. Plaintiffs cannot succeed on the merits of their claims for several reasons in addition to the justiciability problems described above. Neither E.O. 13990 nor the Interim Estimates present major questions requiring congressional authorization, nor are they contrary to law. To the extent they are subject to APA review at all, they comply with applicable procedural requirements and represent a reasonable approach to a difficult and important problem. The district court did not engage with the Working Group's detailed justification of the Interim Estimates, much less afford the required deference to the group's considerable expertise.

The district court also abused its discretion in evaluating the relative equities. As explained above, Plaintiffs face only the possibility of future harm, which does not suffice to justify injunctive relief. Any harm that does arise in the future can be addressed in the normal course by challenging a specific agency action under the APA. Defendants, on the other hand, were

subjected to several types of immediate, irreparable harm until this Court stayed the district court's injunction. The injunction usurped the President's authority to supervise the Executive Branch, interfered with internal agency decisionmaking processes, and dictated a particular approach to regulatory analysis ungrounded in statute or regulation. These harms were exacerbated by the overbroad scope of the injunction, which far exceeded any relief the district court could lawfully impose or would be necessary to remedy the challenged actions.

For all of these reasons, the district court's preliminary injunction should be vacated and the complaint dismissed for lack of jurisdiction.

## STANDARD OF REVIEW

Questions of subject matter jurisdiction are reviewed de novo. *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. 2009). The grant of preliminary injunctive relief is reviewed for abuse of discretion, with conclusions of law reviewed de novo and findings of fact reviewed for clear error. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013). The scope of an injunction is reviewed de novo. *Texas v. Equal Emp't Opportunity Comm'n*, 933 F.3d 433, 450 (5th Cir. 2019).

# ARGUMENT

## I. The District Court Lacked Jurisdiction To Enter Any Relief.

Plaintiffs' abstract challenge to the manner in which Defendants consider the social cost of greenhouse gases in separate regulatory proceedings across the government, divorced from a specific challenge to any particular final agency action that might concretely affect a judicially protected interest, is precluded on three independent jurisdictional grounds: standing, ripeness, and sovereign immunity. This Court should therefore direct dismissal for lack of jurisdiction. *See Barber v. Bryant*, 860 F.3d 345, 358 (5th Cir. 2017).

### A. Plaintiffs Lack Article III Standing.

#### 1. A Generalized Grievance Regarding the Valuation of the Social Cost of Greenhouses Gases Does Not Present a Justiciable Case or Controversy.

The "irreducible constitutional minimum" of standing requires that a plaintiff "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

561 (1992). Standing is "substantially more difficult to establish" when the party bringing suit "is not himself the object of the government action or inaction he challenges." *Id.* at 562.

**a. Plaintiffs Have Not Suffered Any Judicially Cognizable Injury.**

The requirement of a judicially cognizable injury "helps to ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The alleged injury must represent an "'invasion of a legally protected interest'" that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). "[A]llegations of *possible* future injury are not sufficient." *Barber*, 860 F.3d at 357 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)).

The fundamental problem with Plaintiffs' standing is that "[t]he Interim Estimates on their own do nothing to the Plaintiff States." Stay Order 6. They are an informational tool that helps improve efforts to assess the expected costs and benefits of contemplated regulatory actions. To that end, E.O. 13990 directs federal agencies to use the Interim Estimates when they monetize the value of changes in greenhouse gas emissions for purposes of compliance with E.O. 12866. It does not require any federal agency to

take a particular administrative action. It does not require any agency to rely on a cost-benefit analysis when choosing whether, or how, to regulate. It does not even require an agency that does choose to regulate based on a cost-benefit analysis to use the Interim Estimates. *See* ROA.359 (explaining that applicable statutes, including the APA, might require a different approach in a given rulemaking). And E.O. 13990 certainly "neither requires nor forbids any action" at all by the States. *Missouri v. Biden*, 558 F. Supp. 3d 754, 766 (E.D. Mo. 2021), *appeal pending*, No. 21-3013 (8th Cir.).

Plaintiffs allege that the Interim Estimates are "potentially relevant" across a wide variety of regulatory contexts and that agencies might use them to "justify unprecedented increases in regulatory restrictions on agriculture, energy, and virtually every other human activity," costing "trillions of dollars" and posing "existential threats to Plaintiff States and their citizens." ROA.34, 60-61. While dramatic, this claimed effect "hardly meets the standards for Article III standing because it is, at this point, merely hypothetical." Stay Order 5. A plaintiff does not establish standing by invoking the "*possibility* of regulation." *National Ass'n of Home Builders v. EPA*, 667 F.3d 6, 13 (D.C. Cir. 2011). Only if the Interim Estimates are used as a basis for a final agency action that in turn causes a

judicially cognizable injury would that component of standing be satisfied to challenge that particular agency action.

The Supreme Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), illustrates why Plaintiffs' speculative fears of future regulation are not enough. In that case, the Court held that environmental groups lacked standing to challenge regulations that prescribe "standards and procedures" to "govern only the conduct of Forest Service officials engaged in project planning" and "neither require nor forbid any action on the part of [the plaintiffs]." *Id.* at 493. The Court explained that the environmental groups could "demonstrate standing only if application of the regulations by the Government will affect *them*," but they had failed to identify a "particular timber sale" that would "impede [their] specific and concrete" interests. *Id.* at 494-95.

E.O. 13990 likewise applies only to the consideration of issues by federal agencies. No plaintiff has identified any final regulation relying on the Interim Estimates in a manner causing specific and concrete harm to it. *See Barber*, 860 F.3d at 353 ("Where a statute or government policy is at issue, the policy must have some concrete applicability to the plaintiff."); *Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017) (no standing to

challenge a methodology for measuring a pollutant where petitioners had not identified "any concrete application" that threatened imminent and concrete harm).

If such a regulation were issued, any challenge would be limited to that regulation as applied to that plaintiff because the basis for standing—the asserted injury in fact—would be *the burden imposed by the regulation* on the plaintiff's judicially protected interest, not the Interim Estimates in the abstract. The allegedly erroneous cost-benefit analysis would be relevant, if at all, only to the merits of the suit (*i.e.*, whether the regulation is consistent with law and based on reasoned decisionmaking). The use of the Interim Estimates alone, untethered from an exercise of regulatory authority, does not affect any Plaintiff State (or anyone else, for that matter) in a "personal and individual way." *Spokeo*, 578 U.S. at 339.

Without a concrete and particularized injury to a legally protected interest caused by a final agency action based on the Interim Estimates and E.O. 13990, Plaintiffs' claims "amount to a generalized grievance of how the current administration is considering SC-GHG." Stay Order 6. Plaintiffs would prefer that the Executive Branch use a different input in its cost-benefit analyses in preparing, or perhaps finalizing, rules in the future. But

the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art[icle] III without draining those requirements of meaning." *Lujan*, 504 U.S. at 576.

**b. Any Injury Would Be Fairly Traceable to Future Regulations, Not E.O. 13990 and the Interim Estimates.**

To satisfy the second element of standing, Plaintiffs must establish that their claimed injury is "'fairly traceable' to the 'allegedly unlawful conduct' of which they complain." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). The provision Plaintiffs challenge here is the requirement in Section 5 of E.O. 13990 that agencies "shall" use the Interim Estimates when monetizing the value of changes in greenhouse gas emissions. But this provision does not itself impose any regulatory burden or mandate any particular regulatory action by a federal agency.

Plaintiffs' complaint confirms as much: they allege that the Interim Estimates will "increas[e] their regulatory burdens" when they are used to "justif[y] tighter, job-killing regulations." ROA.36, 78. In such a hypothetical scenario, the burden would be imposed by a future regulation, meaning that any cognizable injury would be fairly traceable to any such

final agency action. A challenge to that final agency action *on the merits* could then include a challenge to the use of the Interim Estimates to justify the action.

Further, "it is unknowable in advance whether [any] harm caused by possible future regulations would have any causal connection to EO 13990 or the Interim Estimates." *Missouri*, 558 F. Supp. 3d at 767. While agencies will take greenhouse gas emissions into account, they will also "consider a great number of other factors in determining when, what, and how to regulate." Stay Order 5. In setting their regulatory agendas, agencies necessarily undertake "policy judgment[s] committed to the[ir] broad and legitimate discretion," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (quotation marks omitted), and "courts cannot presume either to control or to predict" how that discretion will be exercised, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989). Whenever a final agency action is justified by considerations other than a cost-benefit analysis using the Interim Estimates, any cognizable injury the agency action may cause would not be traceable to that analysis.

In addition, monetization of greenhouse gas emissions might have no material effect on the bottom-line of a cost-benefit analysis. The balance

might be tipped by other inputs, such as improvements to public health and safety, even if potential climate change impacts were removed from the analysis altogether.

Finally, the regulatory proposal for any future, hypothetical regulation, including a cost-benefit analysis that turns on the Interim Estimates, would be presumptively subject to notice and comment. The agency would need to respond to any significant comments on the estimates and ensure that its analysis (including whatever SC-GHG value it uses) is reasonable, supported by the record, and consistent with applicable law. ROA.358-59.

In short, "[t]here is simply no way to predict how the Interim Estimates will affect an agency's analysis, if at all, without resorting to sheer speculation." *Missouri*, 558 F. Supp. 3d at 767. And the Supreme Court has repeatedly rejected "standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414.

### 2. The District Court's Standing Analysis Contains Several Legal Errors.

The district court asserted that Plaintiffs suffered a judicially cognizable injury because "mandatory implementation of the [Interim] Estimates imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism," pointing

specifically to an EPA rulemaking. ROA.4046-47 (citing *Revised Cross-State Air Pollution Rule Update for 2008 Ozone NAAQS*, 86 Fed. Reg. 23,054 (Apr. 30, 2021)). That EPA action is currently subject to litigation in the D.C. Circuit. *See Midwest Ozone Grp. v. EPA*, No. 21-1146 (D.C. Cir.). But none of the Plaintiffs here has challenged that action through the process required by the Clean Air Act, 42 U.S.C. § 7607(b)(1).

In any event, as this Court previously recognized, "[t]he Interim Estimates on their own do nothing to the Plaintiff States." Stay Order 6. The district court's need to invoke that EPA rulemaking demonstrates that E.O. 13990 and the Interim Estimates are not themselves the source of any injury to Plaintiffs. Moreover, while EPA conducted a cost-benefit analysis using the Interim Estimates to comply with E.O. 12866, the basis for its final action had nothing to do with the Interim Estimates. *See* 86 Fed. Reg. at 23,086-87 (explaining the multi-factor approach EPA used to address regional ozone); *see also* EPA, *Revised Cross-State Air Pollution Rule Update—Response to Comment* 546 (Apr. 29, 2021), https://perma.cc/RGW8-G2DT ("Information from the [Working Group] used to estimate climate benefits is not relied upon as part of the record basis for this rulemaking . . . .").

Pointing to that same EPA rulemaking, the district court asserted that Plaintiffs have been confronted with a "forced choice" to either "employ the Estimates in developing their state implementation plan" or have EPA "subjec[t] them to a federal plan" based on them. ROA.4047. But the court did not identify any language in either E.O. 13990 or EPA's rule that requires States to use the Interim Estimates or imposes any consequences for a failure to do so. The Federal Register pages cited by the court simply describe the cost-benefit analysis that EPA conducted for its own action. *See* ROA.4047 (citing 86 Fed. Reg. at 23,061, 23,153-55). And as noted above, the agency did not rely on the Interim Estimates to justify its rule.

The district court also asserted that Plaintiffs would be harmed by agencies' use of the Interim Estimates in environmental reviews under the National Environmental Policy Act (NEPA) of potential oil and gas lease sales. ROA.4047. The court stated that using the Interim Estimates under NEPA "reduces the number of parcels being leased," which in turn reduces Plaintiffs' revenue. ROA.4047. But reviews under NEPA do not dictate any substantive decisions about which parcels will be made available for competitive action. *See Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) ("As a procedural statute, NEPA does not mandate any particular

outcome.").[6] And those reviews would be subject to challenge in the future, should the agency concerned take final agency action and the substantive decisions cause any cognizable injury to Plaintiffs' interests.

Moreover, E.O. 13990 does not require use of the Interim Estimates under NEPA. While the Order refers to use in "other relevant agency actions," E.O. 13990, § 5(b)(ii)(A), no decisions have yet been made regarding contexts other than rulemaking, *see id.* § 5(b)(ii)(C) (requesting recommendations). Any voluntary decision by an agency to consult the Interim Estimates outside of rulemaking therefore would not be fairly traceable to E.O. 13990 for this reason as well.

The district court's reliance on Plaintiffs' assertion that they had been deprived of their "right to submit comments" likewise misses the mark. ROA.4048. Merely being "denied the ability to file comments" is "insufficient

[6] The district court's vague reference to "EPA's mandate that the FERC use the [Interim] Estimates," ROA.4047, in fact relates to various comments submitted by EPA *recommending* that FERC use the Interim Estimates in NEPA reviews. *See* 42 U.S.C § 7609. This purported harm is not alleged in Plaintiffs' complaint and would fail for the same reasons described above. The court also noted (but did not appear to endorse) Plaintiffs' argument that the Interim Estimates would harm industry in their States and thereby reduce "tax revenues." ROA.4040, 4068. But the "loss of general tax revenues as an indirect result of federal policy is not a cognizable injury in fact." *El Paso Cty. v. Trump*, 982 F.3d 332, 339 (5th Cir. 2020).

to create Article III standing." *Summers*, 555 U.S. at 496; *see also Spokeo*, 578 U.S. at 341. Plaintiffs have suffered no concrete harm. Indeed, Plaintiffs (and everyone else) will have the opportunity to comment if and when an agency announces an intent to rely on the Interim Estimates when proposing new regulations.

The district court attempted to bolster its standing analysis by affording Plaintiffs "special solicitude in the standing inquiry." ROA.4049. But such "special solicitude does *not* eliminate the state [plaintiff's] obligation to establish a concrete injury." *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1238 (10th Cir. 2012) (quoting *Delaware Dep't of Nat. Res. & Envtl Control v. FERC*, 558 F.3d 575, 59 n.6 (D.C. Cir. 2009)); *see also Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022) (explaining that special solicitude "does not allow [States] to bypass proof of injury in particular or Article III in general"). Moreover, such "special solicitude" is not available (at least) "unless a 'quasi-sovereign' interest is at stake." *Texas v. Biden*, 20 F.4th 928, 974 (5th Cir. 2021), *cert granted*, 142 S. Ct. 1098 (2022). There is no such interest here, such as the sort of concrete effect on a State's coastline and boundary in *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). The district court claimed to find such an interest in what it stated was the

"substantial pressure," *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), placed on Plaintiffs to change their laws. ROA.4049. As explained above, neither E.O. 13990 nor the Interim Estimates have any effect whatsoever on Plaintiffs' law or policy. Nor can States assert an interest in the health and well-being of their citizens against the federal government. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179-83 (D.C. Cir. 2019). This doctrine does not support Plaintiffs' standing here.

### B. Plaintiffs' Claims Are Not Ripe.

The same basic reasons that prevent Plaintiffs from establishing standing also demonstrate that their claims are not ripe. *See Trump v. New York*, 141 S. Ct. 530, 535-36 (2020) (per curiam) (explaining that standing and ripeness are "[t]wo related doctrines of justiciability," which in that case "both le[d] to the conclusion that judicial resolution of this dispute is premature"). If an agency one day relies on the Interim Estimates to justify some action that actually causes Plaintiffs a concrete and cognizable injury, Plaintiffs will have ample opportunity to challenge that specific agency action (including its use of the Interim Estimates) in the normal course. Until then, ripeness prevents a court from interfering in an agency's ongoing

decisionmaking process simply because Plaintiffs object to the Executive Branch's methodological approach to monetizing the societal impacts associated with greenhouse gas emissions.

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . ." *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 807 (2003) (quotation marks omitted). This doctrine bears particular relevance to attempted facial challenges to agency actions. *See, e.g.*, *id.* at 812 (challenge to agency regulation governing contracts unripe because "judicial resolution" of the regulation's validity "should await a concrete dispute about a particular concession contract"); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-61 (1993) (challenge to immigration regulation not ripe unless and until it was applied in a particular agency action). Instead of rushing into court immediately, a plaintiff 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 regulation to [his] situation in a fashion that harms or threatens to harm him." *National Park*, 538 U.S. at 808 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

Only if "the impact of the regulation" can "be said to be felt immediately by those subject to it in conducting their day-to-day affairs," and "irremediabl[y] adverse consequences flo[w] from requiring a later challenge," does a case generally qualify as ripe. *Id.* at 810 (first alteration in original).

Plaintiffs present the kind of "abstract disagreemen[t] over administrative policies" that the ripeness doctrine renders nonjusticiable. *National Park*, 538 U.S. at 807. E.O. 13990 provides instructions to federal agencies for how to comply with longstanding Executive Branch provisions governing the proposal of new regulations. The Supreme Court has repeatedly held that a challenge to such an intra-governmental directive is not ripe because, by itself, it "does not affect [anyone's] primary conduct." *Nat'l Park*, 538 U.S. at 810; *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998); *Catholic Social Servs.*, 509 U.S. at 58-61.

The lack of ripeness is underscored by the sweeping nature of Plaintiffs' claims (that use of the Interim Estimates is always unreasonable and never permitted by statutes), the number of defendants they sue (23 federal entities and officials), and the variety of regulatory contexts they seek to influence ("agriculture, energy, and virtually every other human

activity," ROA.60-61). Plaintiffs' arguments cannot be addressed "*en masse*" and in the abstract because a "determination of the legality of an agency's reliance on the Interim Estimates will necessarily be informed by the specific statutory directives that Congress has provided to guide the agency's actions." *Missouri*, 558 F. Supp. 3d at 772.

The importance of case-by-case, statute-by-statute analysis is borne out by courts' experiences to date in addressing other challenges involving the social cost of greenhouse gases. Many courts have held that (at least in some circumstances) an agency *must* consider SC-GHG estimates as part of its cost-benefit analysis, and some of these have reached context-specific conclusions about whether the agency employed an appropriate methodology.[7] Other courts have recognized, in view of the statutes at issue,

[7] *See, e.g.*, *Center for Biological Diversity*, 538 F.3d at 1203 ("NHTSA's decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious . . . ."); *WildEarth Guardians v. Bernhardt*, No. 17-cv-80, 2021 WL 363955, at *10 (D. Mont. Feb. 3, 2021) (failure to quantify "the costs of greenhouse gas emissions" was arbitrary and capricious given availability of Working Group estimates); *Wyoming v. U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1078-81 (D. Wyo. 2020) (use of SCM estimate was arbitrary and capricious given lack of statutory authority to "address *global* climate change"); *California v. Bernhardt*, 472 F. Supp. 3d 573, 611-14 (N.D. Cal. 2020) (use of "interim domestic measure" for SCM, rather than Working Group's prior figures, was arbitrary and capricious).

that agencies may have a range of options in terms of whether to quantify the social cost of greenhouse gases and what methodologies to use.[8] Such varied outcomes confirm why the legality of the Interim Estimates cannot be litigated in the abstract.

Awaiting a concrete dispute would not create hardship for Plaintiffs. Because E.O. 13990 does not apply to States, it "do[es] not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Nor, as explained above, does anything in E.O. 13990 or the Interim Estimates "force [a State] to modify its behavior in order to avoid future adverse consequences." *Id.* at 734.

Plaintiffs suggest that "agencies will use the [Interim] Estimates" to "fundamentally transfor[m] the way States conduct business and Americans live." ROA.34. But there is more than "considerable legal distance" between the inclusion of specific values in an internal cost-benefit analysis for use in

[8] *See, e.g.*, *Zero Zone*, 832 F.3d at 677 (agreeing that agency had the authority to consider SCC); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (rejecting argument that agency was obligated by statute to consider SCC). *But see Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329-30 (D.C. Cir. 2021) (remanding to FERC to decide whether consideration was required by a regulation).

proposing agency actions and the sort of transformation Plaintiffs posit. *Ohio Forestry Ass'n*, 523 U.S. at 730. The "contingent future events" that Plaintiffs fear "may not occur at all," *Texas v. United States*, 523 U.S. 296, 300 (1998), for many reasons. Among these is that an agency's reliance on the Interim Estimates in any particular rulemaking would be presumptively subject to notice and comment, providing Plaintiffs with an opportunity to persuade the agency that use of the Estimates in that context is unreasonable, contrary to record evidence, or inconsistent with applicable law. ROA.358-59. In the event that the agency adopts the rule over such objections, Plaintiffs "will have ample opportunity later to bring [their] legal challenge at a time when [their] harm is more imminent and more certain," by challenging that particular rule. *Ohio Forestry Ass'n*, 523 U.S. at 734; *see also* Stay Order 7 (finding "no obstacle to prevent the Plaintiff States from challenging a specific agency action" in the future).

Plaintiffs no doubt would find it "easier, and certainly cheaper, to mount one legal challenge" than to wait and challenge individual final agency actions later. *Ohio Forestry* Ass'n, 523 U.S. at 734. But "this kind of litigation cost saving" is not "sufficient by itself to justify review in a case that would otherwise be unripe." *Id.* at 735.

### C. Plaintiffs Fail To Challenge Agency Action, Much Less Final Agency Action, Under the APA.

Even if Plaintiffs could establish that they had standing to bring suit and that their claims were ripe, their suit would be barred by sovereign immunity under this Court's precedents.

**1.** This Court has held that one of the "requirements for establishing a waiver of sovereign immunity" under 5 U.S.C. § 702 is that "the plaintiff must identify some 'agency action' affecting him in a specific way, which is the basis of his entitlement for judicial review." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014).

In *Lujan v. National Wildlife Federation*, an environmental group challenged the Bureau of Land Management's (BLM) "land withdrawal review program" instead of "direct[ing] its attack against some particular 'agency action' that cause[d] it harm," like "a single BLM order or regulation." 497 U.S. at 890-91. The Supreme Court held that such a program was "not an 'agency action' within the meaning of § 702." *Id.* at 890. The Court acknowledged that a "case-by-case approach" does not offer "as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire," but it is "the traditional, and remains the normal, mode of operation of the courts." *Id.* at 894.

This decision "announced a prohibition on programmatic challenges—challenges that seek wholesale improvement of an agency's programs by court decree, rather than through Congress or the agency itself." *Alabama-Coushatta*, 757 F.3d at 490 (quotation marks omitted). Thus, in *Alabama-Coushatta*, this Court held there was no "agency action" where a Tribe contended that "all of the leases, permits, and sales administered by multiple federal agencies" were unlawful. *Id.* And in *Sierra Club v. Peterson*, the Court rejected a suit that challenged the Forest Service's timber management practices throughout Texas Forests instead of focusing on "individual timber sales." 228 F.3d 559, 566-569 (5th Cir. 2000) (en banc).

Plaintiffs here bring the same kind of programmatic challenge rejected in all of these cases. Rather than challenge a "particular and identifiable action" that harms them, *Alabama-Coushatta*, 757 F.3d at 491, they seek review of the way greenhouse gas emissions may be accounted for in cost-benefit analyses across many government agencies, in separate agency proceedings.

Further, neither of the relevant actions at issue here was taken by an "agency." *See* 5 U.S.C. § 551(13) (defining "agency action" to include certain types of action taken by "an agency"). The Supreme Court has squarely held

that "the President is not an agency." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

Nor is the Working Group. The D.C. and Second Circuits have considered whether an entity that serves or advises the President qualifies as an "agency."[9] While the test has been formulated in different ways, "common to every case" in which an entity was determined to be an "agency" "has been a finding that the entity in question 'wielded substantial authority independently of the President.'" *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009).

The Working Group wields no such independent authority. No statute establishes it or delegates it any independent authority. *See, e.g.*, *Soucie v. David*, 448 F.2d 1067, 1073, 1075 (D.C. Cir. 1971) ("agency" found where Congress "delegat[ed] some of its own broad power of inquiry"). Whatever authority the Working Group has flows solely and directly from the President through E.O. 13990. Such "presidential delegations of authority . . . simply make the entity an extension of the President." *Main*

[9] These cases were decided under the Freedom of Information Act, which borrows from the APA's definition of agency. *See* 5 U.S.C. § 552(f); *see also Main St. Legal Servs. v. National Sec. Council*, 811 F.3d 542, 546-47 (2d Cir. 2016).

*St.*, 811 F.3d at 558. While many of Working Group's members are agency staff, when they serve on the Working Group, they act "as the functional equivalents of assistants to the President." *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993) (holding that presidentially convened "Task Force on Regulatory Relief" was not an agency).

The district court noted Plaintiffs' argument that the Working Group "has been granted authority to create SC-GHG Estimates that will be binding on executive agencies." ROA.4066. But the Interim Estimates are binding only to the extent that the President made them so. This situation is therefore quite unlike *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259 (D.C. Cir. 1980), cited at ROA.4066. That case concerned a body created by statute and "independently authorized" by that statute "to evaluate federal programs." *Id.* at 1262-63; *see also* 42 U.S.C. §§ 4342, 4344. The Working Group has no statutory responsibilities. Its "'sole function is to advise and assist' the President." *Meyer*, 981 F.2d at 1298.

**2.** Even if the Interim Estimates could be considered "agency action," they would not be "final agency action," a separate prerequisite to judicial review under the APA. *See Alabama-Coushatta*, 757 F.3d at 489; 5 U.S.C.

§ 704. "Final agency actions are actions which (1) 'mark the consummation of the agency's decisionmaking process,' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Sierra Club*, 228 F.3d at 565 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). "Conversely, a non-final agency order is one that 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 337 (5th Cir. 2004) (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)).

The Interim Estimates fall in the latter category. They are simply numbers that reflect experts' best attempt to assign a monetary value to the impacts of incremental emissions of greenhouse gases. The technical document in which the Interim Estimates were announced is the kind of "informational report" that "many courts" have held do not create "legal consequences" on their own. *See Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 169-70 (6th Cir. 2017) (describing examples). "Even if other agencies" rely on such a report in future rulemakings, "these regulations are not direct consequences of the [r]eport, but are the product of independent agency

decisionmaking." *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 313 F.3d 852, 860 (4th Cir. 2002).

E.O. 13990 does not transform the Interim Estimates into final agency action. That order provides that agencies "shall use" the Interim Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations," E.O. 13990, § 5(b)(ii)(A), thus expressly contemplating future administrative action. It is only these future regulations, if anything, that could "adversely affect" Plaintiffs' interests. *Peoples Nat'l Bank*, 362 F.3d at 337.

The district court wrongly concluded that the Interim Estimates were final agency action because they "bind the entire Executive Branch" by "'den[ying] the decisionmaker discretion in the area of its coverage.'" ROA.4052, 4066 (quoting *Texas*, 809 F.3d at 171). E.O. 13990 does not remove agency discretion in any relevant sense. It does not require agencies to regulate or refrain from regulating. It does not even require agencies to rely on a cost-benefit analysis when doing so. And even where agencies do regulate and do rely on a cost-benefit analysis, they must decide for themselves if use of the Interim Estimates is "justified as not arbitrary and capricious, as required by principles of administrative law." ROA.359.

## II. The District Court Erred in Granting a Preliminary Injunction.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

### A. Plaintiffs' Claims Lack Merit.

Plaintiffs cannot succeed on the merits of their claims for reasons that go beyond the justiciability problems described above.

The district court held that Plaintiffs are likely to succeed on their claim that "EO 13990 violates the major questions doctrine" because it affects "areas of vast political, social, and economic importance." ROA.4060-61. But any requirement that Congress "speak clearly when authorizing an agency to exercise [such] powers," *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam), has no application here. Most fundamentally, neither E.O. 13990 nor the Interim Estimates require authorization from Congress. The President has

independent constitutional authority to seek advice from experts and exercise "general administrative control of those executing the laws." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492, 496 (2010). The Interim Estimates are an input into internal Executive Branch consideration of an issue (cost-benefit analysis) that guide agency decisions on whether and how to take action.

It is undisputed that agencies may properly conduct cost-benefit analysis for internal purposes, as well as pursuant to many statutes, and that they are able to consider the effects of greenhouse gas emissions when doing so. The district court's order contemplates that agencies will do both. ROA.4116-17. Indeed, the district court's remedy lays bare the error at the heart of its reasoning that § 5 of E.O. 13990 required congressional authorization—the court ordered Defendants "to comply with prior administrations' policies on regulatory analysis" even though those policies were "not mandated by any . . . statute in the first place." Stay Order 6.

Quite apart from the absence of any need for statutory authorization, the district court erred in its assessment that the Interim Estimates "will impose significant costs on the economy." ROA.4058. The Interim Estimates cannot impose any costs on the economy by themselves; they are a

tool to be used in the analysis of subsequent agency rulemakings. Whether any one (let alone every one) of those future agency actions requires additional statutory authority or raises a "major question" cannot possibly be determined now.

The district court concluded that the Interim Estimates were "contrary to law" because they were based on, and therefore require agencies to consider, "factors Congress did not authorize," most notably the global effects of greenhouse gas emissions (i.e., effects occurring outside U.S. borders). ROA.4059-60, 4064-65. In doing so, the court disregarded the express text of E.O. 13990, which makes clear that its provisions may be implemented only where consistent with applicable law. *See* E.O. 13990, §§ 5(b)(ii), 8(a)(i). The court also failed to identify any statutory provision that actually prohibits agency reliance on the Interim Estimates. For example, the district court cited a provision in the Energy Policy and Conservation Act of 1975 directing the Department of Energy "to consider the need for *national* energy and water conservation." ROA.4059 (quoting 42 U.S.C. § 6295(o)(2)(B)(i). As the Seventh Circuit explained when rejecting this very same proposition, "national energy conservation has global effects, and, therefore, those global effects are an appropriate consideration when

looking at a national policy." *Zero Zone*, 832 F.3d at 679. Moreover, in the "event that an agency does contravene the law in a particular instance, an aggrieved party may seek redress" through an APA suit "challenging that specific decision." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002).

Nor is there any notice-and-comment problem here. ROA.4061-62. Because the Working Group is not an agency for purposes of the APA, *see supra* pp. 43-44, it is not subject to that statute's requirements for rulemaking. Even if it were, the Interim Estimates have no binding effect outside the Executive Branch. Nor do the Interim Estimates themselves compel a particular outcome in any future agency rulemaking. They are inputs in analyses of proposed agency actions that, as explained above, might not have any causal connection to a final rule. Because the Interim Estimates "are not binding on the regulated public," they "need not be preceded by notice-and-comment rulemaking." *Walmart, Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 308 (5th Cir. 2021). The district court erred in concluding otherwise. ROA.4061-62.

Regardless, any error in this regard would be harmless. *See* 5 U.S.C. § 706; *United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011). The

Interim Estimates simply apply inflation adjustments to prior estimates that underwent multiple rounds of notice and comment. ROA.312. Plaintiffs have had (and will have again) ample opportunity to comment when the Interim Estimates are used in connection with actual and specific agency actions.

Plaintiffs would fare no better on their arbitrary-and-capricious claim. The Interim Estimates—which are based on a careful combination of widely cited models, themselves derived from peer-reviewed (and Nobel-Prize winning) economic and scientific literature—are a reasonable response to a difficult but important problem: how to monetize the wide-ranging impacts of greenhouse gas emissions. The Working Group was clear-eyed about its estimates' limitations, acknowledging that, although they are currently the best available, they are subject to unavoidable uncertainty and would benefit from future updates. *See, e.g.*, ROA.339-40; *see also BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 834 (5th Cir. 2003) (upholding the selection of a model where the agency "recognized the model's shortcomings" and "provided plausible explanations that were supported by the record").

The Working Group considered prior comments from the public and balanced known concerns against the "immediate need to have an operational SC-GHG for use in regulatory benefit-cost analyses and other applications

that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process." ROA.312. It also acknowledged the possibility of other approaches, and it explained where (and why) its approach differed from that of the previous Administration. *See, e.g.*, ROA.312, 320, 323-31.

The Seventh Circuit has rejected an arbitrary-and-capricious challenge to an agency's use of the Working Group's estimates raising the same sort of critiques that Plaintiffs advance here. *See Zero Zone*, 832 F.3d at 677-79. And if the Working Group were an agency and subject to APA review, then its reasoned approach, "based upon [an] evaluation of complex scientific data within its technical expertise," would be entitled to this Court's "'most deferential'" review. *BCCA Appeal Grp.*, 355 F.3d at 824 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

The district court afforded no such deference to the Working Group's expertise. Its opinion does not address the Working Group's 36-page discussion of its methodology and decisionmaking, nor does it acknowledge either the Working Group's explanations for why it considered global effects and used discount rates below 7 percent or the judicial decisions that approved substantially the same methodology. Instead, the opinion simply

lists Plaintiffs' complaints with the Working Group's approach, *see* ROA.4062-64, without discussing them or even saying that it agreed with them. This lack of independent analysis cannot support the extraordinary relief of a preliminary injunction.

Finally, in addition to their APA claims, Plaintiffs attempted to bring a non-statutory claim, asserting that E.O. 13990 and the Interim Estimates are "ultra vires" "[b]ecause no statute authorizes the President or [Working Group] to employ a global-effects measure and discount rates deviating from the standard 3 percent and 7 percent discount rates." ROA.82. The district court did not appear to express any views as to the merits of this claim, *see* ROA.4066-67, but it plainly lacks merit. Plaintiffs have not identified any statute containing a clear statutory prohibition against the methodology supporting the Interim Estimates. *See Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002). (Nor do they identify any statutory requirement for the specific approach they asked the district court to impose.) And because either a specific statutory review procedure or the APA will ultimately provide an adequate opportunity for meaningful review of any individual agency's future use of the Interim Estimates as a basis for issuing a final rule or other final agency action, Plaintiffs cannot invoke a non-statutory *ultra*

*vires* cause of action. *See id.*; *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293-94 (5th Cir. 1999).

### B. Plaintiffs Failed To Demonstrate Irreparable Harm.

Plaintiffs cannot show any Article III injury, much less an irreparable one, because "[t]he Interim Estimates on their own do nothing to the Plaintiff States" and "the claimed injury, increased regulatory burdens, has yet to occur." Stay Order 6-7. Further, to the extent that Plaintiffs might experience cognizable harm from some hypothetical future final agency action, there would be "no obstacle to prevent the Plaintiff States from challenging a specific agency action in the manner provided by the APA." *Id.* at 7. Injunctive relief may not issue "based only on a possibility of irreparable harm." *Winter*, 555 U.S. at 22. And any harms that can be addressed "in the ordinary course of litigation" challenging such future agency action are not irreparable. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012); *see also Allbaugh*, 295 F.3d at 33-34 (vacating injunction against executive order because an aggrieved party could obtain redress against a specific agency action under the APA).

Further, "the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."

*Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam). Plaintiffs did not move for a preliminary injunction until five months after the Interim Estimates were published, *but see id.* at 1944 (requiring "reasonable diligence" from "a party requesting a preliminary injunction"), and the district court's order was issued one year after publication. "The status quo at this point" that should be preserved pending resolution of Plaintiffs' claims on the merits "is the continued use of the Interim Estimates." Stay Order 7.

The district court believed that, to satisfy this element, Plaintiffs "need only show [their injury] 'cannot be undone through monetary remedies.'" ROA.4067 (quoting *Burgess v. Federal Deposit Ins. Corp.*, 871 F.3d 297, 304 (5th Cir. 2017)). This confuses a necessary condition for preliminary injunctive relief with a sufficient one. The question on a motion for preliminary injunction is not simply whether injunctive relief is appropriate, but whether it is necessary *now*. "[O]nly those injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). Because "the Interim Estimates will not harm" Plaintiffs unless and until an agency relies on them "in reaching a specific final agency action" that in turn adversely affects

Plaintiffs' legally protected interests, any injuries that Plaintiffs may face can be fully remedied in future litigation challenging such an action. Stay Order 7. It necessarily follows that preliminary relief is not warranted now in this litigation.

### C. The Balance of Equities Overwhelmingly Tilts in Defendants' Favor.

While Plaintiffs suffer no risk of harm in the absence of an injunction, the district court's order "irreparably harmed" Defendants in several ways, including the following. Stay Order 6-7.

First, "[t]he preliminary injunction halts the President's directive to agencies in how to make agency decisions, *before* they even make those decisions." Stay Order 6. Until the injunction was stayed by this Court, it interfered with every ongoing rulemaking or other administrative action that in some way referenced the Interim Estimates. *See* ROA.4183-88. Internal deliberations about how to best account for the effects of greenhouse gas emissions were halted, lest agencies run afoul of the injunction's prohibition against "relying upon" or "employing" the Working Group's methodology. ROA.4190-92. "Indeed, the broad injunction entered here essentially pre-empts the very procedure by which [any] agency could determine" how best to consider the effects of greenhouse gas emissions. *Monsanto Co. v.*

*Geertson Seed Farms*, 561 U.S. 139, 164 (2010). Such interference with government agencies' ability to carry out their statutory responsibilities inflicts irreparable injury.

Second, the district court's injunction "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." Stay Order 6 (emphasis omitted). Worse still, the injunction rests on a misunderstanding of that document. OMB Circular A-4 recognizes that when agencies conduct a regulatory analysis, the scope of analysis (*i.e.*, global or domestic) and choice of discount rates will depend on the particular context and the policy under consideration. *See* Circular A-4, at 15, 35-36; ROA.4177-81.

Third, and perhaps most significantly, the district court's injunction "constitute[s] an unwarranted impairment of another branch in the performance of its constitutional duties." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004). "The 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). Every President since President Nixon has invoked

these Article II authorities to require centralized supervision of agency rulemaking, including by imposing requirements and standards for cost-benefit analysis. The district court offered no reason why prior efforts resulting in E.O. 12866 and Circular A-4 are valid but Section 5 of E.O. 13990 and the Interim Estimates are not. Courts have repeatedly invalidated efforts to insulate Executive Branch officials from presidential oversight and control. *See, e.g.*, *id.* at 2203; *Free Enter. Fund*, 561 U.S. at 492. But the district court's order imposes this same kind of irreparable harm. *See Immigration & Naturalization Serv. 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").[10]

The district court agreed with Plaintiffs that "the public interest and balance of equities weigh in favor of granting a preliminary injunction," but it offered no independent analysis of these factors. ROA.4071. As this Court has previously recognized, the significant (and irreparable) harms posed to

[10] The district court's injunction also interferes with the President's conduct of foreign affairs by preventing discussions of the Working Group's estimates and methodology with representatives of other nations. *See* ROA.4192-94.

Defendants by the district court's injunction outweigh whatever hypothetical harms Plaintiffs face. Stay Order 6-7. The public interest points in the same direction because, in this context, "the government's interest is the public interest." *Pursuing America's Greatness v. Federal Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis omitted).

### D. Even if Some Relief Were Appropriate, the District Court's Preliminary Injunction Was Significantly Overbroad.

A district court abuses its discretion if it issues injunctive relief that "is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *ODonnell v. Harris County*, 892 F.3d 147, 155 (5th Cir. 2018), *overruled on other grounds by Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022) (en banc). A preliminary injunction "must be vacated if it 'fails to meet these standards' and 'is overbroad.'" *Id.* at 163.

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 regulations and other relevant agency actions until final values are published." E.O. 13990, § 5(b)(ii)(A). The district court held that it was the "mandatory

implementation" of the Interim Estimates, which the court believed "imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism programs," that gave rise to Plaintiffs' concrete and particularized injury. ROA.4046-47.

To the extent this aspect of E.O. 13990 caused any judicially cognizable injury, it would be fully remedied by an order that simply enjoined the agency defendants from treating the directive as mandatory. Under general equitable and constitutional principles, "a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact." *Gill v. Whitford*, 138 S. 1916, 1930 (2018) (cleaned up). And "under settled principles of administrative law," the district court could go no further at final judgment. *Palisades Gen. Hosp., Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005). Any preliminary relief is subject to the same limitations. *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013) (per curiam) (explaining that a preliminary injunction "would need to be limited only to vacating the unlawful [agency] action, not precluding future agency decisionmaking").

The district court's order here was far broader still, and that overbreadth further exacerbated the harms described above. For example,

Article II gives the President both "the ability to consult with his advisers" and "the flexibility to organize his advisers and seek advice from them as he wishes." *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993); *see also* U. S. Const., art. II, §2, cl. 1. But the district court's order disbands the panel of experts the President selected to advise him on a significant issue that cuts across many portions of the Executive Branch, even though it is completely "unclear how the Plaintiff States' qualms with the Interim Estimates justify halting the President's [Working Group]." Stay Order 6.

Similarly, the district court "order[ed] Defendants to return to the guidance of Circular A-4 in conducting regulatory analysis." ROA.4117. Putting aside the erroneous factual premise (that Defendants had ever abandoned that document), the guidance in Circular A-4 has never been "binding on any agency." Stay Order 3. The only effect of enjoining agencies from following the mandatory directive in E.O. 13990 would be to *broaden* agency discretion in terms of how they conduct cost-benefit analyses, not to tie them to any particular approach. Indeed, the specific relief ordered by the district court "appears outside the authority of the federal courts." Stay Order 6.

The overbreadth of the district court's injunction also prevents Defendants from engaging in conduct expressly approved or required by other legal authorities. For example, the injunction prohibits "[a]dopting" or "relying upon" the Working Group's "work product" or "methodology." ROA.4116. But the Seventh Circuit has held that the Department of Energy acted lawfully and reasonably in doing so. *Zero Zone*, 832 F.3d at 679. And if the administrative record in a future rulemaking establishes that the principles and methodologies underlying Interim Estimates (or subsequent iterations) reflect a general consensus of the scientific community, it may be arbitrary and capricious (or otherwise unlawful) for an agency not to use those methods. *Cf. Vecinos*, 6 F.4th at 1329 (D.C. Cir. 2021) (requiring FERC to decide whether use of the Interim Estimates was required by regulation because they represented "a generally accepted method for estimating the impact of greenhouse gas emissions").

Despite all of these obvious concerns, the district court did not even attempt to justify the breadth of its injunction. That alone provides sufficient justification for, at minimum, narrowing its scope. *See Louisiana v. Becerra*, 20 F.4th 260, 263-64 (5th Cir. 2021) (per curiam).

## CONCLUSION

For the foregoing reasons, the district court's order should be vacated and the complaint dismissed for lack of jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

*s/ Thomas Pulham*
Thomas Pulham

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,704 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

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