No. 21-3013

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., in his official capacity as the President of the United States; SHALANDA YOUNG, in her official capacity as Acting Director of the Office of Management and Budget; CECILIA ROUSE, in her official capacity as Chair of the Council of Economic Advisers; ERIC LANDER, in his official capacity as Director of the Office of Science and Technology Policy; U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the Environmental Protection Agency; U.S. DEPARTMENT OF ENERGY; JENNIFER GRANHOLM, in her official capacity as Secretary of Energy; FEDERAL ENERGY REGULATORY COMMISSION; RICHARD GLICK, in his official capacity as Chairman of the Federal Energy Regulatory Commission; U.S. DEPARTMENT OF TRANSPORTATION; PETER BUTTIGIEG, in his official capacity as Secretary of Transportation; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of Agriculture; U.S. DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her official capacity as Secretary of the Interior; U.S. BUREAU OF LAND MANAGEMENT; NADA CULVER, in her official capacity as Deputy Director of the U.S. Bureau of Land Management; and INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, UNITED STATES GOVERNMENT,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

BRIEF FOR APPELLEES

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs, the State of Missouri and twelve other States, bring suit seeking to challenge certain Interim Estimates for the social costs of greenhouse gases issued in February 2021, as directed by Executive Order 13990. The district court dismissed the amended complaint, concluding both that Plaintiffs had failed to satisfy the requirements of Article III standing and that Plaintiffs' claims were unripe. Plaintiffs now appeal that dismissal. Defendants believe that the judgment may be affirmed without oral argument for the reasons given in the district court's cogent decision and further explained in this brief, but stand ready to present argument if the Court would find it helpful.

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INTRODUCTION

This lawsuit involves an attempted challenge to cost estimates used within the Executive Branch's internal cost-benefit analyses. Following in his predecessors' footsteps, in January 2021, the President issued an Executive Order providing instructions to federal agencies on how to comply with longstanding regulatory-review requirements. As relevant here, the Order directed an interagency working group to disseminate temporary estimates for the social costs of certain greenhouse gases to be used by federal agencies in analyzing proposed rulemakings (the Interim Estimates). Plaintiffs, the State of Missouri and twelve other States, brought this suit against numerous federal agencies and officials seeking to challenge the legality and reasonableness of the Interim Estimates in the abstract, before they have been applied by any agency to justify any regulation.

The district court correctly concluded that Plaintiffs' challenge is premature. Plaintiffs do not face any concrete, actual or imminent injury from mere existence of the Interim Estimates. Moreover, the relief they seek—to render the Interim Estimates purely advisory—would do nothing to prevent the regulatory actions they fear. And even if Plaintiffs could establish standing, none of their challenges is yet ripe for review. The

Interim Estimates will be replaced in due course (once the Working Group can resume its operations[1]), rendering it unclear whether their use will ever cause Plaintiffs any concrete harm. If they do, Plaintiffs' remedy is to bring suit at that time.

STATEMENT OF JURISDICTION

Plaintiffs sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1346. R.Doc. 6, ¶ 57 (App. 23). The district court dismissed the suit for lack of jurisdiction on August 31, 2021. R.Docs. 48-49 (App. 500-29). Plaintiffs filed a timely notice of appeal on September 1, 2021. R.Doc. 50 (App. 530-33). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Plaintiffs failed to satisfy the required elements of Article III standing.

- *California v. Texas*, 141 S. Ct. 2104 (2021)
- *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)
- *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)

[1] As discussed below (pp. 20-21), on February 10, 2022, a district court in Louisiana entered a preliminary injunction enjoining various federal agencies and officials from relying on the Interim Estimates or further implementing relevant portions of E.O. 13990. The government is evaluating its options for responding to erroneous decision.

2. Whether the district court correctly concluded that Plaintiffs' abstract challenges to the Interim Estimates are not ripe for review.

- *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803 (2003)
- *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998)

STATEMENT OF THE CASE

A. Legal and Factual Background

1. Presidential Supervision of Agency Rulemaking

The President is responsible for oversight of policymaking and rulemaking processes within the Executive Branch. *See 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 White House's Office of Management and Budget (OMB).

The modern era of centralized review began in 1981, when President Reagan directed that federal agencies 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). E.O. 12291 reflected the President's judgment that the

Executive Branch's internal decisionmaking about whether and how to proceed with significant proposed actions should be informed by an empirical, monetized assessment of their expected consequences—that is, cost-benefit analysis.

The current framework for presidential oversight of agency rulemaking is provided in Executive Order 12866, which was issued in 1993 and is still in effect today. *See* R.Doc. 28-2 (App. 313-22); 58 Fed. Reg. 51,735 (Sept. 30, 1993) (E.O. 12866). E.O. 12866 replaced E.O. 12291 but carried forward its central principles. It creates a detailed regulatory-review process coordinated by OMB and its Office of Information and Regulatory Affairs (OIRA) in which almost all agencies must participate. E.O. 12866, § 3(b).[2] And 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 cost-benefit analysis. For all "significant" actions, before the agency may propose or issue a rule, E.O. 12866 requires an assessment of its anticipated costs and benefits. E.O. 12866, § 6(a)(3)(B)-

[2] "[I]ndependent regulatory agencies" are exempted. E.O. 12866, § 3(b).

(C). "Significant" regulatory actions that require quantification of costs and benefits include those "likely to result in a rule that may … [h]ave an annual effect on the economy of $100 million or more" or adversely affect the economy or its components. *Id.* § 3(f).

One product of this process is a Regulatory Impact Analysis (RIA), which informs the Executive Branch's internal decisionmaking within the bounds of applicable statutory authority. OMB Circular A-4, a longstanding guidance document, sets out recommendations to assist agencies in developing RIAs that comply with E.O. 12866. *See* OMB, Circular A-4 (2003), https://perma.cc/CVU2-QUCE. Among other things, Circular A-4 emphasizes that agencies "should monetize quantitative estimates whenever possible," including not only for anticipated direct effects of the rule but also for "any important ancillary benefits and countervailing risks." *Id.* at 26-27. And because regulatory costs and benefits may accrue well into the future, OMB Circular A-4 describes how agencies should quantify such future effects, including by choosing appropriate discount rates and selecting an end point "far enough in the future to encompass all the significant benefits and costs." *Id.* at 31-32.

Although many RIAs are ultimately made public, they remain advisory planning documents without legal effect, and accordingly are generally not subject to judicial review. *See, e.g.*, *National Truck Equip. Ass'n v. NHTSA*, 711 F.3d 662, 670 (6th Cir. 2013). But if Congress specifically mandates that an agency weigh costs and benefits, or if an agency chooses to rely upon its RIA as the official public basis for adopting or justifying a rule, the reasoning contained within the RIA (including any cost-benefit analysis) may be subject to arbitrary-and-capricious review under the Administrative Procedure Act (APA) in a suit challenging the resulting rule. *See National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012).

2. Social Costs of Greenhouse Gases

Since the latter part of the George W. Bush Administration, federal agencies conducting cost-benefit analyses under E.O. 12866 have regularly considered their proposals' impacts on atmospheric emissions of certain greenhouse gases (GHGs)—including carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O)—known to contribute to global climate change. Agencies have sought to quantify these impacts by using scientific models that estimate the effects of GHG emissions and aggregate them into a final dollar sum. Among the effects considered are "changes in net agricultural

productivity, human health, property damage from increased flood risk, and the value of ecosystem services." R.Doc. 28-1, at 5 (App. 308). 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 costs" of each greenhouse gas (SC-GHG). R.Doc. 28-3, at 2 (App. 326).

The federal government's increasing use of SC-GHG metrics was motivated in significant measure by judicial review. In 2008, a federal court of appeals invalidated the fuel-economy standard for light trucks, concluding that the rule was arbitrary and capricious because the agency failed to "monetize the benefit of carbon emissions reduction[s]" that would accrue from a higher fuel-economy standard. *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1203 (9th Cir. 2008). In declining to monetize those effects, the agency had reasoned that "the value of reducing emissions of CO_2 and other greenhouse gases [w]as too uncertain to support their explicit valuation," in part because of "extremely wide variation in published estimates of damage costs." *Id.* at 1200. 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.* The court accordingly remanded for the agency to "include a monetized value for th[e] benefit [of carbon emissions reductions] in its analysis of the proper [fuel-economy] standards." *Id.* at 1202-03.

Federal agencies thereafter began to account for carbon emissions in their cost-benefit analyses. Despite the fact that the social cost of carbon (SCC) as a logical and mathematical matter does not vary across regulatory contexts, agencies nonetheless employed quite different estimates in their analyses. *See* Working Group, *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*) (noting the "wide range of values" used by agencies in "estimat[ing] the benefits associated with reducing carbon dioxide emissions").

In 2009, to encourage use of the best available science and promote consistency across agencies, OMB convened an interagency process "to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions." *February 2010 TSD* 4. The resulting Working Group was constituted by leaders of various agencies and co-chaired by

OMB and the White House Council of Economic Advisors.[3]

In 2010, the Working Group derived a set of SCC estimates using a methodology that has continued to underlie successive sets of estimates (including those Plaintiffs seek to challenge). This methodology reflects a synthesis of three independent models that are the most widely cited peer-reviewed frameworks for translating GHG emissions into climate impacts and, in turn, dollar figures. 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, and after running thousands of simulations, it averaged the resulting estimates.

In 2013, the Working Group issued revised SCC estimates.[4] OMB simultaneously sought public comment on the revised estimates and their methodology, including about 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

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[3] The Working Group is today known as the Interagency Working Group on the Social Cost of Greenhouse Gases (formerly the Interagency Working Group on the Social Cost of Carbon).

[4] Working Group, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866* (May 2013; revised Nov. 2013), https://perma.cc/CNU7-P8ED.

parameters). After receiving tens of thousands of comments, the Working Group issued a public response and technical revision to its estimates.[5]

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). A January 2017 report by the National Academies of Sciences broadly endorsed the Working Group's estimates while providing recommendations for future updates in light of scientific developments.[6]

Recognizing that carbon dioxide is not the only contributor to climate change, the Working Group also worked to develop 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

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[5] Working Group, *Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866* (July 2015), https://perma.cc/QR2J-85WP.

[6] National Acads. of Sci., Eng'g & Med., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017).

comments, it published its first SCM and SCN estimates in August 2016, along with an expanded discussion of its SCC estimates.[7]

In 2017, President Trump issued an executive order disbanding the Working Group and withdrawing its prior analyses. Exec. Order No. 13783, § 5(b), 82 Fed. Reg. 16,093. He 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 SC-GHG estimates, albeit ones that were generally lower than those previously calculated by the Working Group.[8]

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[7] *See* Working Group, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under E.O. 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide* (Aug. 2016), https://perma.cc/C47M-SKUF; Working Group, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under E.O. 12866*, (Aug. 2016), https://perma.cc/YB9X-YSRU.

[8] *See, e.g.*, EPA, *Regulatory Impact Analysis for Review of the Clean Power Plan: Proposal* 42-46 (Oct. 2017), https://perma.cc/68U4-5YC4; 83 Fed. Reg. 49,184, 49,190 (Sept. 28, 2018) (Bureau of Land Management rule).

3. Executive Order 13990 and the Interim Estimates

Against this backdrop, President Biden issued Executive Order 13990 in January 2021. *See* R.Doc. 28-1 (App. 305-11); 86 Fed. Reg. 7037 (Jan. 20, 2021) (E.O. 13990). Section 5 of the Order states the President's determination that "[a]n accurate social cost 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." E.O. 13990, § 5(a). The Order states that, by "captur[ing] the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account," agencies' use of SC-GHG estimates "facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues." *Id.*

To assist agencies, 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). It set a January 2022 target for publication of revised SC-GHG estimates, and also directed the Working Group to "provide

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 also directed the Working Group, "as appropriate and consistent with applicable law," 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).

Pursuant to that instruction, in February 2021, the Working Group published a Technical Support Document providing interim SCC, SCM, and SCN estimates to be used until revised estimates are issued. *See* R.Doc. 28-3 (App. 324-71). Other than adjusting 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 than estimates used during the Trump Administration, including by using a more appropriate discount rate and by accounting for global impacts. *Id.* at 3 (App. 327). OMB then 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" ultimately required by E.O. 13990. 86 Fed. Reg. 24,669 (May 7, 2021).[9]

In June 2021, OIRA issued a guidance document to assist agencies in applying Section 5 of E.O. 13990. *See* R.Doc. 28-4 (App. 373-75) (the OIRA Guidance). The OIRA Guidance clarified that agencies must use the Interim Estimates when preparing cost-benefit analyses for OMB review "for purposes of compliance with E.O. 12866." *Id.* at 1 (App. 373); c*f. supra* pp. 4-6 (discussing E.O. 12866). It also reaffirmed that E.O. 13990 makes any use of the Interim Estimates "subject to applicable law" as enacted by Congress. OIRA Guidance 2 (App. 374). It thus instructed that "[w]hen an agency conducts benefit-cost analysis pursuant to specific statutory authorities," those statutory requirements "must dictate whether and how the agency monetizes changes in greenhouse gas emissions in the context of the agency action." *Id.*

[9] Eleven of the Plaintiffs submitted comments, *see* https://perma.cc/G97Q-SCY3, as did thousands of other persons and entities.

B. Procedural History

1. Plaintiffs' Lawsuit

Missouri and twelve other States brought this suit seeking to challenge the Interim Estimates issued under E.O. 13990. In their amended complaint, Plaintiffs name as defendants some 19 federal entities or officials, including the President, and assert four causes of action: "(1) 'Violation of the Separation of Powers,' (2) 'Violation of Agency Statutes,' (3) 'Procedural Violation of the [APA],' and (4) 'Substantive Violation of the APA,'" R.Doc. 48, at 6 (App. 505) (Op.) (citing R.Doc. 6). Plaintiffs also sought a preliminary injunction, asserting that they were likely to succeed on their separation-of-powers and procedural APA claims and seeking an order enjoining the defendants from treating the Interim Estimates as "binding." R.Doc. 18, at 50 (App. 196).

Defendants moved to dismiss. They argued that Plaintiffs lack standing because their alleged injuries stem not from the Interim Estimates themselves, but rather, from hypothetical future agency rulemakings that would rely on those Estimates. Defendants also argued that Plaintiffs' alleged future injuries would not be redressed by the relief they seek

because, even if the Estimates were declared non-binding, agencies could independently consider them or even choose to adopt higher estimates.

Defendants further asserted that Plaintiffs' challenges are not ripe for review. They explained that if a federal agency were someday to rely upon the Interim Estimates in seeking to justify an action that would cause Plaintiffs a concrete injury, Plaintiffs could challenge that specific agency action (including its reliance upon the Interim Estimates) at that time.

In the alternative, Defendants moved to dismiss for failure to state a claim. They explained that the President acted well within his constitutional authority in promulgating E.O. 13990 and, in any event, the Interim Estimates are not agency action reviewable under the APA. Finally, Defendants opposed Plaintiffs' motion for a preliminary injunction on further grounds, including that Plaintiffs have not shown they face irreparable harm.

2. The District Court's Decision

The district court dismissed the amended complaint, concluding both "that Plaintiffs lack standing and that their claims are not ripe for adjudication." Op. 2 (App. 501).

a. The district court concluded that Plaintiffs "failed to establish any of the[] three elements" of Article III standing. Op. 15 (App. 514). First, as to

injury in fact, the court found that the "Interim Estimates, alone, do not injure Plaintiffs." Op. 17 (App. 516). Likewise, "EO 13990 neither requires nor forbids any action on the part of Plaintiffs," but rather "merely prescribes standards and procedures governing the conduct of federal agencies" performing regulatory cost-benefit analyses that involve monetizing GHG emissions. Op. 16-17 (App. 515-16). The injuries asserted by Plaintiffs were instead economic harms from "hypothetical future regulation possibly derived from these [Interim] Estimates." Op. 17 (App. 516). Plaintiffs' theory was that "at some point in the future, one or more agencies will 'inevitably' issue one or more regulations that rely in some way upon the Interim Estimates; that such agenc[ies] will 'inevitably' disregard any objections to the methodology by which the Interim Estimates were calculated; and that this yet-to-be-identified regulation will then harm Plaintiffs." Op. 15-16 (App. 514-15). The court noted that this theory did not identify any "concrete," "imminent" injury. Op. 17 & n.12 (App. 516).

Second, Plaintiffs failed to establish causation. The district court explained that, even if Plaintiffs could reasonably fear future regulatory burdens, "neither EO 13990 nor the Interim Estimates mandate [that] agencies issue the particular regulations that Plaintiffs fear will harm them."

Op. 19 (App. 518). Indeed, even if agencies employ the Interim Estimates in such rulemakings, it is "unknowable in advance" whether their use would make any difference: "[t]here is simply no way to predict how the Interim Estimates will affect an agency's analysis, if at all." Op. 18-19 (App. 517-18).

Third, the district court concluded that redressability was lacking because Plaintiffs' requested relief would neither avoid nor delay the burdens they fear. Op. 19 (App. 518). The court explained that "[e]ven if the Court were to declare the Interim Estimates non-binding, agencies would be free to—and may be required [by precedent] to—consider the social costs of greenhouse gas emissions." Op. 19-20 (App. 518-19) (citation omitted).

The district court observed that these various shortcomings reflected that Plaintiffs are "attempting to do what the Supreme Court [has] cautioned against": seek review of a "more generalized level of Government action" (here, principles of cost-benefit analysis) rather than the particular actions that would "allegedly caus[e] them harm." Op. 20 (App. 519) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992)). But the "case-by-case approach" is "the traditional, and remains the normal, mode of operation of [Article III] courts." *Id.* (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990)).

The district court also rejected Plaintiffs' assertion that standing requirements should be "relaxed" either because Plaintiffs claim "procedural injury" or because States are "entitled to special solicitude." Op. 20 (App. 519). The court explained that a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). And Article III requirements cannot be excused "merely because a state sues in its sovereign capacity." Op. 21 (App. 520); *see* Op. 21-22 & n.13 (App. 520-21).

b. The district court also dismissed the suit as unripe. The court noted that the ripeness requirement generally postpones judicial review "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Op. 23 (App. 522) (quoting *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 807-08 (2003)). Here, "any impact of EO 13990 and the Interim Estimates cannot 'be said to be felt immediately' by Plaintiffs (if at all) 'in conducting their day-to-day affairs.'" Op. 24 (App. 523). Moreover, Plaintiffs' arguments that the Interim Estimates are unlawful cannot be addressed "*en masse*, divorced from the context of particular agencies operating under specific statutory

delegations of authority." Op. 28 (App. 527). Rather, "[a] court's 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." *Id.*

The district court explained that awaiting a concrete dispute would impose no cognizable hardship. "Plaintiffs will have ample opportunity to bring legal challenges to particular regulations if those regulations pose imminent, concrete, and particularized injury" by pursuing "the normal review process under the APA." Op. 25-26 (App. 524-25). In the meantime, "no irremediably adverse consequences flow" from the Estimates' mere existence. Op. 24 (App. 523) (quoting *National Park*, 538 U.S. at 810).

c. Having found it lacked jurisdiction, the district court dismissed the suit "without reaching the merits of Plaintiffs' claims" or addressing Defendants' other threshold arguments for dismissal. Op. 29 (App. 528). The court denied Plaintiffs' motion for a preliminary injunction as moot. *Id.*

3. The *Louisiana* Litigation

On February 11, 2022, a district judge in the Western District of Louisiana—in a suit brought by a different group of States challenging the same Interim Estimates—entered a preliminary injunction enjoining various

federal agencies and officials from, *inter alia*, "adopting, employing, treating as binding, or relying upon the work product" of the Working Group or from "[r]elying upon or implementing Section 5 of Executive Order 13990 in any manner," pending further district court or appellate order. Order at 1-2, *Louisiana v. Biden*, No. 2:21-cv-1074 (W.D. La. Feb. 11, 2022) (ECF 99); *see also* Mem. Ruling, 2022 WL 438313 (ECF 98) ("*Louisiana* slip op."). The United States is evaluating its options for responding to that injunction.

SUMMARY OF ARGUMENT

Pursuant to his constitutional authority to supervise the Executive Branch, the President issued Executive Order 13990 to reconvene an interagency working group and instruct federal agencies about how to assess the social costs of greenhouse gases for purposes of internal cost-benefit analysis. The Working Group disseminated Interim Estimates (its prior estimates, adjusted for inflation) to be used by agencies pending further revision. Plaintiffs then brought this lawsuit against numerous federal agencies and officials, expressing fear that agencies will be forced to use the Interim Estimates against their own preferences to impose regulatory burdens that Plaintiffs would consider unreasonable.

The district court properly dismissed this suit. Plaintiffs lack standing because they cannot identify any actual or imminent injury directly traceable to the Interim Estimates, much less show that an order rendering the Estimates non-binding would do anything to forestall future regulation. To the extent Plaintiffs' appellate arguments even take issue with the court's reasoning, those arguments reflect a misunderstanding of E.O. 13990, the Interim Estimates, and the requirements of Article III standing.

The district court also correctly determined that, in any event, Plaintiffs' claims are unripe. Plaintiffs cannot challenge principles of cost-benefit analysis in the abstract before those principles are applied to justify imposing some regulation. The lawfulness or reasonableness of an agency's use of the Interim Estimates is properly judged in the context of each agency's specific action, program, and governing statutes. And because Plaintiffs can promptly bring suit when, if ever, the (soon-to-be-superseded) Interim Estimates are used to justify imposing some regulatory burden against them, Plaintiffs face no substantial hardship from mere existence of the Estimates in the meantime.

STANDARD OF REVIEW

A dismissal for lack of jurisdiction is reviewed de novo. *See, e.g.*, *Agred Found. v. U.S. Army Corps of Eng'rs*, 3 F.4th 1069, 1073 (8th Cir. 2021).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING

A. Article III Does Not Permit Suits Founded On Generalized Fears Of Future Regulation.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Every plaintiff "must 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). To survive a Rule 12(b) motion, a plaintiff must "assert[] facts that affirmatively and plausibly suggest" each of those elements is satisfied for each claim raised and form of relief requested. *In re Polaris Mktg., Sales Practices & Prods. Liab. Litig.*, 9 F.4th 793, 796 (8th Cir. 2021); *see also Lujan*, 504 U.S. at 561; *Hawse v. Page*, 7 F.4th 685, 688-89 (8th Cir. 2021); *Frost v. Sioux City*, 920 F.3d 1158, 1161 (8th Cir. 2019).

Plaintiffs have failed to satisfy any, much less all, of those elements. As the district court explained, Plaintiffs have not suffered any injury in fact; the burdens they fear are traceable not to the Interim Estimates, but to future agency regulations; and an order declaring the Interim Estimates to be non-binding would not prevent the burdens that Plaintiffs seek to avoid.

1. Plaintiffs Have Not Suffered Any Injury.

a. The first element of standing—injury in fact—itself incorporates several requirements. An 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 "'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 578 U.S. at 340. A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 339. And to show an "actual or imminent" injury, "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

In disputes involving feared government action, the latter requirement bears particular salience. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure

that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565 n.2); *see City of Kennett v. EPA*, 887 F.3d 424, 431 (8th Cir. 2018) ("In future injury cases, the plaintiff must demonstrate that 'the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'").

Because these requirements play a fundamental role in preserving the "separation of powers," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), they are often difficult to meet. Where, as here, a plaintiff challenging government action is not itself the "object" of that action, standing is "ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493-94 (2009) (quoting *Lujan*, 504 U.S. at 562). Moreover, application of standing doctrine is "especially rigorous" when, as here, a plaintiff claims that the Executive Branch has acted unconstitutionally. *Clapper*, 568 U.S. at 408.

b. Plaintiffs have not alleged any concrete, particularized, and actual or imminent injury. As the district court observed, the "Interim Estimates, alone, do not injure Plaintiffs." Op. 17 (App. 516). Neither the Interim Estimates nor E.O. 13990 impose obligations on Plaintiffs at all. Nor do they

require any *agency* to issue any regulation. Rather, they "prescribe[] standards and procedures" to be used in internal cost-benefit analyses under E.O. 12866 when such analyses involve monetization of greenhouse gas emissions. Op. 16-17 (App. 515-16).

Plaintiffs have not seriously disputed those points.[10] Instead, their amended complaint reflects that their alleged injuries are future burdensome regulations. As the district court summarized, their theory is that "at some point in the future, one or more agencies will 'inevitably' issue one or more regulations that rely in some way upon the Interim Estimates; that such agenc[ies] will 'inevitably' disregard any objections to the methodology by which the Interim Estimates were calculated; and that this yet-to-be-identified regulation will then harm Plaintiffs in a concrete and particularized way." Op. 15-16 (App. 514-15).

That reasoning is insufficient. Plaintiffs have not alleged that any particular concrete burden from any particular regulation is "certainly impending." *Clapper*, 568 U.S. at 401. They cannot simply rely on the "*possibility* of regulation" in the abstract. *National Ass'n of Home Builders*

[10] Plaintiffs' mistaken assertion that States are themselves bound to apply the Interim Estimates in administering "cooperative-federalism programs" (Br. 18-21) is addressed below at pp. 40-42.

v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011). Their failure to identify any specific impending injury is illuminated by the fact that they have chosen to bring suit against 19 separate federal agencies or officials and that they offer no basis to distinguish among countless hypothetical scenarios. *Cf., e.g.*, R.Doc. 6, ¶ 129 (App. 36) (fearing "increases in regulatory restrictions on agricultural practices, [or] energy production, [or] energy use, or any other economic activity that results in the emission of such gases"). A plaintiff cannot salvage a lack of imminent injury simply by adding additional defendants or brainstorming a lengthier list of hypothetical future harms.

As the district court recognized, this case is analogous in key respects to *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), which involved a federal agency's policy for timber sales. There, the plaintiffs—after reaching a settlement as to one specific, disputed sale—sought to continue the litigation by challenging at a general level the governing agency regulations, which exempted certain kinds of sales from regulatory notice and comment.[11]

[11] Plaintiffs' effort to distinguish *Summers* on its procedural history is unavailing. The Supreme Court's holding that the *Summers* plaintiffs lacked standing to bring their abstract challenge did not turn on the fact that "the Burnt Ridge dispute [had] settled," Br. 26. Rather, the problem was that the plaintiffs could not identify any concrete injury flowing from mere existence of the regulations. The same is true here as to the Interim Estimates.

The Supreme Court held that the plaintiffs lacked standing to bring that general challenge. The regulations themselves "neither require[d] nor forb[ade] any action on the part of [the plaintiffs]," but instead prescribed "standards and procedures" for "the conduct of Forest Service officials engaged in project planning." *Id.* at 493. And the plaintiffs did not "allege that any particular timber sale" would occur that would "impede a specific and concrete" interest of the plaintiffs. *Id.* at 495 (emphasis omitted).

So too here. "EO 13990 neither requires nor forbids any action on the part of Plaintiffs," Op. 16 (App. 515), but instead prescribes internal standards. And Plaintiffs have not identified "*any* particular [regulation]" that will imminently issue and apply the Interim Estimates in a manner causing "specific and concrete" harm. *Summers*, 555 U.S. at 493.

A proper understanding of E.O. 13990 and the Interim Estimates only underscores why their mere existence does not cause any imminent injury. Those pronouncements establish certain requirements for agency cost-benefit analyses, but only when those analyses are otherwise undertaken and only to the extent permitted by law. In many instances, cost-benefit analyses are undertaken solely for the inward-facing purpose of satisfying administrative requirements (*e.g.*, E.O. 12866), and not for the outward-

facing purpose of publicly justifying or defending the regulation. For that reason, a plaintiff generally cannot obtain judicial review of RIAs performed under E.O. 12866, even if the plaintiff believes that the agency employed arbitrary-and-capricious metrics. *See, e.g.*, *Helicopter Ass'n Int'l v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) (alleged errors in cost-benefit analyses under E.O. 12866 are not "subject to judicial review").

In some cases, an agency may choose to rely on its cost-benefit analysis as part of its public-facing justification. If "an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). And a plaintiff harmed by the resulting rule will generally have standing to challenge it. But in those instances, the basis for the plaintiff's standing—its injury in fact—is the burden imposed by the regulation. The allegedly erroneous cost-benefit analysis would, in turn, be relevant to the merits: the question whether the regulation is lawful under the APA. For that reason, the June 2021 OIRA Guidance emphasizes that any agency relying upon the Interim Estimates must "respond to any significant comments on those estimates

and ensure its analysis (including any use of the 2021 interim estimates) is justified as not arbitrary and capricious." OIRA Guidance 2 (App. 374).

As the district court recognized, the fundamental problem with Plaintiffs' suit is that they seek review of a "more generalized level of Government action" rather than the particular agency actions that "allegedly caus[e] them harm." Op. 20 (App. 519) (quoting *Lujan*, 504 U.S. at 568). Federal courts "do not exercise general legal oversight of the Legislative and Executive Branches." *TransUnion*, 141 S. Ct. at 2203. The "case-by-case approach," with litigation based on a specific, concrete harm, is "the traditional, and remains the normal, mode of operation of the courts." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990).

2. Plaintiffs' Feared Injuries Are Traceable To Future Regulations, Not The Interim Estimates.

Plaintiffs also fail to satisfy the second element of standing. The Plaintiffs' claimed injury must be "'fairly traceable' to the 'allegedly unlawful conduct' of which they complain," *California v. Texas*, 141 S. Ct. 2104, 2113 (2021), rather than to some other action by defendants or third parties. *See Agred Found. v. U.S. Army Corps of Eng'rs*, 3 F.4th 1069, 1073 (8th Cir. 2021) (requiring "a sufficiently direct causal connection between the challenged action and the identified harm").

Plaintiffs cannot show such a causal connection. Plaintiffs offer nothing but conjecture that the Interim Estimates will help to justify "more restrictive regulatory policies" in the future (R.Doc. 6, ¶ 129 (App. 36)). For multiple reasons, it is simply "unknowable in advance whether th[e] [alleged] harm caused by possible future regulations would have any causal connection to EO 13990 or the Interim Estimates." Op. 18 (App. 517).

First, there is no basis to infer from E.O. 13990 or the Interim Estimates that any particular agency will impose any particular regulatory burden. "[N]either EO 13990 nor the Interim Estimates mandate [that] agencies issue" any rule. Op. 19 (App. 518). Instead, they impose a procedural condition that *if* agencies propose future regulations, *if* they conduct cost-benefit analyses for those regulations, and *if* they choose to monetize GHG emissions in those analyses, then the agencies must use the Interim Estimates (and not other estimates), unless otherwise provided by law. But the Estimates do not mandate any particular substantive result.

Second, 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). Agencies are invested with considerable latitude

to exercise policy judgment within the bounds allowed by Congress, and there are countless reasons aside from concern for GHG emissions why an agency might choose to impose or forgo new regulations, to keep or rescind existing ones, or otherwise shape future policy. And as long as agencies remain within the bounds of their statutory authority, "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).

Third, even assuming that a particular agency exercises discretion in a way that imposes increased regulatory burdens on Plaintiffs, the agency could seek to justify those burdens on any of various grounds. Those grounds will then control the scope of any resulting judicial review. *Cf. SEC v. Chenery*, 318 U.S. 80, 87-88 (1943). If an agency does not justify its rule in cost-benefit terms, then the rule cannot be sustained on that basis, either.

Fourth, even if an agency chooses to rely upon (or is required by Congress to employ) cost-benefit analysis as a legal justification, any monetization of GHG emissions may have no material effect on the bottom-line determination whether the regulation's benefits exceed its costs. A rule may be justified in cost-benefit terms based on other factors, such as

improvements to public health and safety, wholly apart from potential climate-change benefits.

Fifth, even if an agency justifies its rule based on GHG emissions, it is not clear that it will rely on the Interim Estimates in so doing. The Interim Estimates are, by definition, interim; they are due to be replaced by updated estimates (whose target date for issuance was January 2022). Once the Interim Estimates are superseded, and thus no longer "shall [be] use[d]" by agencies under E.O. 13990 in any circumstances, Plaintiffs necessarily cannot be harmed by them. E.O. 13990, § 5(b)(ii)(A); *cf., e.g.*, *California*, 141 S. Ct. at 2119 (state plaintiffs lacked standing where the allegedly burdensome conduct was not traceable to the "'allegedly unlawful' provision of which the plaintiffs complain").

Finally, for reasons that overlap with redressability (*see infra* pp. 35-38), Plaintiffs' feared injuries would be traceable to the Interim Estimates only if, in the absence of those Estimates, agencies justifying their rules in cost-benefit terms would otherwise utilize lower SC-GHG figures or decline to monetize such costs at all. But there is no basis to make that assumption, particularly given that courts have repeatedly recognized that it is consistent with reasoned decisionmaking (if not required in some circumstances) for

agencies to account for such costs. *See, e.g.*, *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678 (7th Cir. 2016); *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1203 (9th Cir. 2008). And if given the freedom to select their own SC-GHG estimates, agencies might well decide to employ *higher* figures than those in the Interim Estimates (which reflect current science only as of 2016). *Cf.* R.Doc. 28-3, at 4 (App. 328) (explaining that the Interim Estimates are based on the scientific record as of 2016 and that, given recent scientific developments, they "likely underestimate societal damages from GHG emissions").

Plaintiffs cannot bypass these requirements simply by positing, as a matter of "inevitab[ility]" (Br. 30), that the Interim Estimates will (before being superseded) play a material role in justifying *some* regulation by *some* agency at *some* point. "[S]tanding is not dispensed in gross," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), but must be demonstrated for each claim against each defendant. *See Summers*, 555 U.S. at 497-98 (rejecting theory of standing that rested on "statistical probability that some of [the plaintiff's] members are threatened with concrete injury," even though organization could not identify any particular member who would likely be harmed).

In sum, to establish standing to mount a challenge directly against the Interim Estimates, Article III requires Plaintiffs to show that a particular federal agency will promulgate a particular rule that will impose concrete harms on them; that that agency will publicly justify that rule using cost-benefit analysis; that that cost-benefit analysis will monetize GHG emissions using the Interim Estimates (not other future estimates); and that, but for E.O. 13990, the agency would place a different dollar value on reducing GHG emissions and would ultimately arrive at a different regulatory outcome. Plaintiffs fall considerably short of satisfying that causal chain. *Cf.*, *e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (plaintiffs lacked standing where "[s]peculative inferences [were] necessary to connect their injury to the challenged actions" of the government); *Agred Found.*, 3 F.4th at 1074 (finding no causation where "[f]or purposes of Article III, too many factors stand in the way of a direct causal relationship"); *Johnson v. Missouri*, 142 F.3d 1087, 1089-90 (8th Cir. 1998) (similar).

3. Granting The Relief Requested By Plaintiffs Would Not Redress Their Feared Harms.

Finally, even if Plaintiffs could identify an imminent harm traceable to the Interim Estimates, they still would lack standing because they have failed to identify any legally proper relief that would redress that harm.

"[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). "To determine whether an injury is redressable," a court "consider[s] the relationship between 'the judicial relief requested' [by Plaintiffs] and the 'injury' suffered." *California*, 141 S. Ct. at 2115. It must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. And because relief operates on "specific parties," not "on legal rules in the abstract," *California*, 141 S. Ct. at 2115, the plaintiff must show that the remedy would likely prevent or delay the defendant from undertaking the feared injurious actions, and not merely that the remedy would alter the legal regime. *See Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) ("[I]t must be *the effect of the court's judgment on the defendant* that redresses the plaintiff's injury[.]").

Plaintiffs fail to meet that requirement. Plaintiffs wisely do not dispute that agencies may lawfully consider (or in some circumstances must consider) the social costs of greenhouse gases when undertaking cost-benefit analyses, and accordingly do not seek an injunction preventing agencies from undertaking such consideration. Instead, Plaintiffs correctly recognize that

the most their claims could logically justify as a remedy would be an order preventing agencies from relying on the Interim Estimates as "binding values." R.Doc. 18, at 50 (App. 196); *accord* Br. 17, 45.

As the district court explained, however, even if the Interim Estimates were declared non-binding, "agencies would be free to—and may be required to—consider the social costs of greenhouse gas emissions." Op. 19-20 (App. 518-19) (citation omitted). And in so doing, agencies could still choose to consult the Interim Estimates—estimates that reflect years of cutting-edge work from leading experts inside and outside of government. Indeed, Plaintiffs themselves emphasize that "even when [agencies] had complete discretion," they relied on the Working Group's estimates in dozens of rulemakings. Br. 31; *cf. Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1278 (D.C. Cir. 2007) (no redressability if "the undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces"). Nor would declaring the Interim Estimates non-binding necessarily occasion any delay; agencies could still issue regulations "at the same speed or even more quickly than Plaintiffs currently predict." Op. 20 (App. 519).

In fact, viewed from Plaintiffs' perspective, their requested relief could even harm, not help, them. Plaintiffs fear an "expan[sion] [of] federal regulatory burdens" motivated by "inflated" social-cost estimates. Br. 29-30. But as the district court explained, rendering the Interim Estimates non-binding would simply give agencies discretion to consider other, even higher estimates. Plaintiffs offer no response to this aspect of the district court's decision, thereby effectively conceding the lack of redressability. *See, e.g.*, *Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1046 (8th Cir. 2013) (appellant waived alleged errors by district court that were not challenged in opening brief); *Frost*, 920 F.3d at 1162 n.1 (rejecting plaintiff's belated redressability argument first raised in reply).

B. Plaintiffs' Brief Fails To Identify Any Basis For Standing.

Plaintiffs have not identified any error in the district court's analysis.

1. Plaintiffs' lead contention is that the district court "persistently overlook[ed] the legally binding nature" of the Interim Estimates. Br. 20. They emphasize that E.O. 13990 states that agencies "shall use" the agencies' Interim Estimates, Br. 18-19, and assert their "predict[ion] that federal agencies will follow [that] Executive Order," Br. 29.

Those contentions are largely unresponsive to the standing analysis. The mere fact that some requirement is binding on an agency—whether that requirement be a statute enacted by Congress, an Executive Order issued by the President, or a regulation promulgated by the agency itself—does not mean that a plaintiff has standing to challenge it. Federal courts do not have "general authority to conduct oversight" of "the elected branches of Government." *California*, 141 S. Ct. at 2116. If the plaintiff "ha[s] [not] suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *TransUnion*, 141 S. Ct. at 2203; *see id.* at 2205 ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.").

Plaintiffs' assertions also mischaracterize E.O. 13990. Its requirements expressly yield to contrary law. *See* OIRA Guidance 2-3 (App. 374-75). Agencies thus will rely on the Interim Estimates only when they would otherwise have discretion to do so—a point that underscores why Plaintiffs' alleged future harms will necessarily be traceable to future agency decisions. Moreover, even when it applies, Section 5 of E.O. 13990 does not affirmatively require agencies to "monetize the social costs of greenhouse

gases," as Plaintiffs assert (Br. 19). Rather, it provides only that if an agency undertakes such monetization, it shall use the Interim Estimates rather than another set of figures. *See* E.O. 13390, § 5(b)(ii)(A) (App. 308) (directing issuance of Interim Estimates for use "*when monetizing* the value of changes in greenhouse gas emissions") (emphasis added).

2. Plaintiffs posit "two forms of injury-in-fact that d[o] not depend on the impact of future regulations": the asserted immediate effect of the Interim Estimates on States' "implementation of cooperative-federalism programs," and "denial of the opportunity to participate in notice-and-comment." Br. 20. But neither injury exists.

Plaintiffs' assertion that E.O. 13990 and the Interim Estimates "directly command[] and commandeer[] the States in their implementation of cooperative-federalism programs," Br. 20, is without foundation. Neither E.O. 13990 nor the Interim Estimates refer to States at all, much less "purport to dictate how state agencies must conduct their duties" (Br. 21). On the contrary, they apply to federal agencies. *See* E.O. 13990, § 1 (providing direction to "executive departments and agencies" of the federal

government). It is unclear why Plaintiffs believe themselves bound by orders not issued to them.[12]

Moreover, E.O. 13990 currently only requires use of the Interim Estimates in the rulemaking context. *Cf.* E.O. 13990, § 5(b)(ii)(C) (requesting "recommendations" for the President on non-rulemaking contexts). States' roles in administering cooperative-federalism programs do not extend to issuing federal regulations. And E.O. 13390 does not require federal agencies (much less States) to use the Interim Estimates in National Environmental Policy Act (NEPA) analyses or Clean Air Act state-implementation plans.[13] If a federal agency nonetheless chooses to consult the Interim Estimates in such contexts, that voluntary reliance would not be prevented by a judicial order declaring the Estimates to be non-binding.

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[12] In its recent opinion preliminarily enjoining reliance on the Interim Estimates, the *Louisiana* district court accepted without analysis the assertion that the Interim Estimates are "mandatory" upon States "when they participate in cooperative federalism programs." *Louisiana*, slip op. 19-20. But courts are "not bound to accept as true a legal conclusion couched as a factual allegation," *Hawse*, 7 F.4th at 691, and neither Plaintiffs here nor the *Louisiana* plaintiffs have offered any factual basis for their assertion that the Interim Estimates direct their activities.

[13] Moreover, NEPA itself does not require an agency to conduct any cost-benefit analysis, and federal agencies frequently do not do so. *See* 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1502.22.

All of Plaintiffs' arguments concerning cooperative-federalism programs thus clearly fail for lack of redressability (at a minimum).

Second, and for multiple reasons, Plaintiffs have not sustained any cognizable procedural injury. As an initial matter, Plaintiffs are quite wrong to suggest that "deprivation of the right to participate in notice-and-comment rulemaking" is an independently sufficient Article III injury. Br. 24. When "violation of a procedural right" is claimed, the "ultimate basis of [the plaintiff's] standing" is not that procedural violation; rather, it is the "threatened concrete interest" at issue in the proceeding. *Iowa League of Cities v. EPA*, 711 F.3d 844, 870-71 (8th Cir. 2013) (quoting *Lujan*, 504 U.S. at 573 n.8); *see Spokeo*, 578 U.S. at 341 (reaffirming that "a bare procedural violation, divorced from any concrete harm," is not enough for standing); *Summers*, 555 U.S. at 496 (being "denied the ability to file comments" is "insufficient to create Article III standing"). Thus, for Plaintiffs to have standing to challenge the Interim Estimates on procedural grounds, they must show that the Estimates' issuance directly impaired some concrete interest aside from mere lack of procedural participation.[14]

[14] In *Iowa League of Cities*, standing existed on the procedural claim because the challenged agency letters imposed "new regulatory

Plaintiffs have failed to do so. As discussed, any regulatory burdens on Plaintiffs would be imposed by future regulations, not by the Interim Estimates. As the district court recognized, all that Plaintiffs currently can assert is the kind of "procedural right *in vacuo*" that the Supreme Court has expressly found insufficient. *Summers*, 555 U.S. at 496; *see* Op. 20 (App. 519).

Plaintiffs mistakenly contend that the district court's application of these settled principles "effectively deprives Plaintiffs of any meaningful opportunity to comment on the Interim Values before a federal agency" (Br. 27). On the contrary, if agencies rely on the Interim Estimates when issuing binding rules, they must permit comment on those Estimates. The OIRA Guidance confirms as much: "[W]here required by [the APA], the agency must make its benefit-cost analysis (including any use of the 2021 interim estimates and methodological choices made with respect to the 2021 interim estimates, as well the agency's rationale for those choices) available for public notice and comment." OIRA Guidance 2 (App. 374).[15]

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requirements" on municipal sewer systems. 711 F.3d at 854. Here, by contrast, the Interim Estimates do not impose obligations on Plaintiffs.

[15] The *Louisiana* court, in suggesting that the plaintiffs had been "deprived of the right to submit comments" about the Interim Estimates

Plaintiffs are wrong to suggest (Br. 27-28) that such comments would be meaningless. E.O. 13990's provision that agencies "shall use" the Interim Estimates expressly yields to any contrary statutory authority, including the APA. *Cf.* E.O. 13990, § 5(b)(ii) (providing for issuance of Interim Estimates only to the extent "appropriate and consistent with applicable law"). If a commenter identifies a reason why an agency's reliance on the Interim Estimates would be unlawful or unreasonable, the APA itself may require an agency to decline to rely upon them. And if an agency misapplies E.O. 13990 and the OIRA Guidance by disregarding public comments on important matters, its rule can be set aside on that basis.

3. Having failed to identify any currently existing injury, Plaintiffs go on to express disagreement with some—though not all—of the reasons why the district court found their fear of future regulation to be insufficient for standing. Plaintiffs renew their prediction that any future regulations relying on the Interim Estimates would "inevitably expand the federal regulatory burdens on the States and their citizens," Br. 30, and state that

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(*Louisiana* slip op. 21), entirely overlooked that the Estimates will be the subject of public comment as part of any rulemaking that relies upon them.

rulemaking processes "are already occurring" in which agencies are consulting the Interim Estimates, Br. 16.

Those assertions do not address the core problems with this suit. It does not suffice that Plaintiffs believe that the Interim Estimates are likely at some point in some context to make a difference in some rulemaking. Again, any future harms to Plaintiffs would be traceable to the specific future regulations in which the Interim Estimates are used. And their assertion that future regulatory burdens are, viewed holistically, "not 'speculative'" (Br. 31) offers no response at all to the district court's conclusions about redressability: rendering the Interim Estimates non-binding would not likely prevent those future burdens from arising.[16]

Plaintiffs' extensive discussion of *Bennett v. Spear*, 520 U.S. 154 (1997), likewise underscores how far they fall short. Unlike this case, *Bennett* involved an existing, concrete, real-world dispute: a specific agency (the Bureau of Reclamation) operated a specific project (the Klamath Irrigation

[16] Again, in its recent decision, the *Louisiana* court improperly credited the plaintiffs' conclusory assertions that the Interim Estimates "directly harm" certain regulatory interests. *Louisiana*, slip op. 15. It also mistakenly relied upon *parens patriae* theories of standing that are legally unavailable in suits against the federal government. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179-83 (D.C. Cir. 2019).

Project), and another agency (the Fish and Wildlife Service) issued a biological opinion effectively mandating that the Bureau take certain measures if it wished to continue the project. Those measures would protect endangered species, but interfere with the plaintiffs' competing water uses. The Bureau then gave notice "that it intended to operate the project in compliance with the Biological Opinion." *Id.* at 159. In that concrete context—involving an identifiable agency, a prescribed regulatory course of action, a decision to proceed with that course, and a resulting burden on the plaintiffs—the Supreme Court concluded that there was a sufficiently direct causal connection to permit suit against the Fish and Wildlife Service. Here, by contrast, neither E.O. 13990 nor the Interim Estimates propose—much less "virtually determin[e]" (*id.* at 170)—that any federal agency follow any real-world course of action.

Finally, Plaintiffs cannot evade these fundamental problems by appealing to the "special solicitude" (Br. 28) sometimes afforded States when evaluating particular concrete injuries. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). As the district court explained, the requirements of Article III are "irreducible constitutional minim[a]," *Lujan*, 504 U.S. at 560, that cannot be excused "merely because a state sues in its sovereign capacity."

Op. 21 (App. 520); *see* Op. 21-22 & n.13 (App. 520-21). States, like other plaintiffs, must identify a concrete injury directly traceable to the conduct they challenge and that would be redressed by the relief they seek. *See, e.g.*, *California*, 141 S. Ct. at 2120.

II. PLAINTIFFS' CLAIMS ARE NOT RIPE

The district court also correctly determined that, even if Plaintiffs could allege some basis for Article III standing sufficient to survive Rule 12(b)(1) review, their claims must nonetheless be dismissed as unripe.

A. The Time For Judicial Review Of The Interim Estimates Is If And When They Are Used To Justify Agency Action.

1. "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). The doctrine, which draws "both from Article III limitations on judicial power and from prudential reasons," generally postpones judicial review "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 807-08.

"The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention." *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014) (quotation marks omitted). A court considers both "(1) the fitness of the issues for judicial decision" in their current posture and (2) "the hardship to the parties of withholding court consideration" until (if ever) the dispute reaches some concrete form. *National Park*, 538 U.S. at 808.

Ripeness doctrine bears particular relevance for attempted facial challenges to agency regulations. Unless it "requires the plaintiff to adjust his conduct immediately," "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [APA] 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 the claimant's situation in a fashion that harms or threatens to harm him." *National Park*, 538 U.S. at 808 (quoting *Lujan*, 497 U.S. at 891). 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 "irremediably adverse consequences would flow" from delay, does a case generally qualify as ripe. *Id.* at 810 (brackets and quotation marks omitted). By contrast, "[a]

claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted).

The Supreme Court's unanimous decision in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998), is illustrative. There, the plaintiff challenged the lawfulness of an agency plan that allegedly authorized excessive logging in a national forest. The Court found the suit unripe because, although the plan "set[] logging goals," identified "areas of the forest that [were] suited to timber protection," and stated "which 'probable methods of timber harvest' [were] appropriate," *id.* at 729, the plan nonetheless did not "itself authorize the cutting of any trees," "give anyone a legal right to cut trees," or "abolish anyone's legal authority to object to trees being cut," *id.* at 729, 733. The Court explained that the plaintiff would "have ample opportunity later to bring its legal challenge" to the plan in the context of a specific logging project, "at a time when harm is more imminent and more certain." *Id.* at 734.[17] Other Supreme Court decisions follow much the

[17] Plaintiffs only underscore *Ohio Forestry Association*'s relevance (Br. 42) in observing that the Court, as an additional ripeness consideration, contemplated that the agency might "refine its policies" through "revision of the Plan" or "application of the Plan in practice." 523 U.S. at 735. Parallel

same logic. *See, e.g.*, *National Park*, 538 U.S. at 812 (challenge to agency regulation governing concession contracts was not ripe, 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, 59-61 (1993) (challenge to lawfulness of a procedural regulation was not ripe unless and until it was applied to plaintiffs).

2. These principles require dismissal. As the district court observed, Plaintiffs' objection to the Interim Estimates is untethered from any particular regulatory action, and Plaintiffs have not shown an "immediate[]" impact upon "their day-to-day affairs" from the Estimates' mere existence. Op. 24 (App. 523) (quoting *National Park*, 538 U.S. at 810). Instead, Plaintiffs offer the kind of "abstract disagreement[] over administrative policies" for which ripeness doctrine was designed to defer review. Op. 23 (App. 522) (quoting *National Park*, 538 U.S. at 807).

Indeed, the district court's conclusion follows *a fortiori* from *National Park Hospitality Association* and *Ohio Forestry Association*, in which the

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considerations apply here. The Interim Estimates are temporary and will shortly be "refine[d]" (indeed, replaced). And an agency's "application of [the Interim Estimates] in practice" must be responsive to applicable statutory requirements and public comments in future rulemakings. *Id.*

respective suits were held unripe even though the plaintiffs had targeted a specific agency regulation or plan. The Court recognized that, absent a special statutory provision authorizing preenforcement review, "[a] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review" until an agency has taken "some concrete action applying the regulation to the claimant's situation." *National Park*, 538 U.S. at 808 (quotation marks omitted). Here, by contrast, Plaintiffs' amended complaint does not even challenge a "regulation" by any agency; it instead challenges a tool of cost-benefit analysis that is, at most, one input into future regulatory decisionmaking.

The lack of ripeness is underscored by the sweeping nature of Plaintiffs' claims, the large number of defendants, and the "innumerable" regulatory contexts that Plaintiffs seek to influence. R.Doc. 6, ¶ 129 (App. 36). Every agency with rulemaking authority is subject to its own statutory requirements, which can vary significantly across programs. For example, some statutes require cost-benefit analysis; others forbid it; and others leave it to agency discretion.[18] As the district court explained, Plaintiffs'

[18] *Compare, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001) ("The text of § 109(b) … unambiguously bars cost considerations

arguments cannot be addressed "*en masse*, divorced from the context of particular agencies operating under specific statutory delegations of authority." Op. 28 (App. 527). Rather, "[a] court's 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." *Id.*; *accord, e.g.*, *Lujan*, 497 U.S. at 891 (plaintiff suing under the APA cannot seek "programmatic improvements" in "*wholesale*" fashion, but rather, "must direct its attack against some particular 'agency action' that causes it harm"); *Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1338 (8th Cir. 1997) ("A federal court is neither required nor empowered to wade through a quagmire of what-ifs like the one the State placed before the District Court in this case.").

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 reviewing particular

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from the NAAQS-setting process. . . ."), *with, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[I]t was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden.").

agency actions have determined that the relevant agency was required to consider SC-GHG estimates, and in several cases reached fact-based conclusions about whether the agency employed an appropriate methodology.[19] Other courts have recognized, in view of the statutes at issue, that agencies may have a range of options in terms of whether to quantify the social costs of greenhouse gases and what methodologies to use.[20] Such varied outcomes confirm why it is both impractical and unwise to adjudicate the legality of the Interim Estimates in advance, in a single lawsuit, in blanket fashion.

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[19] *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) (agency's failure to quantify "the costs of greenhouse gas emissions" in reviewing mining plan 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) (agency's selection 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) (agency's use of "interim domestic measure" for social cost of methane, rather than Working Group's prior figures, was arbitrary and capricious).

[20] *See, e.g.*, *Zero Zone*, 832 F.3d at 677 ("Congress intended that [the agency] have the authority … to consider the reduction in SCC."); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (rejecting argument that agency was obligated to consider social cost of carbon).

The lack of ripeness is also underscored by the fact that the Interim Estimates are intended to serve an expressly temporary purpose. These Estimates (which are nothing more than the inflation-adjusted 2016 estimates) are a stopgap until the Working Group is able to issue new, revised estimates that reflect the most updated science. Once the Interim Estimates are superseded, agencies will no longer rely upon them. Thus, the "contingent future events" that Plaintiffs fear—agency reliance on the Interim Estimates to issue burdensome regulations affecting Plaintiffs—"may not occur at all." *Texas*, 523 U.S. at 300 (quotation marks omitted).

Finally, as the district court correctly explained, awaiting a concrete dispute (if any) affecting Plaintiffs and arising from use of the Interim Estimates would not impose "significant hardship" or "irremediably adverse consequences" on Plaintiffs. Op. 24-25 (App. 523-24) (quoting *National Park*, 538 U.S. at 810). Plaintiffs "will have ample opportunity to bring legal challenges to particular regulations if those regulations pose imminent, concrete, and particularized injury" by pursuing "the normal review process under the APA." Op. 25-26 (App. 524-25). And as *Ohio Forestry Association* explains, though it may well be "easier, and certainly cheaper, to mount one legal challenge" now, "the [Supreme] Court has not considered this kind of

litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe." 523 U.S. at 734-35.

Thus, as the district court concluded, mere uncertainty about the content of future regulations, or any "time or expense" associated with commenting in future rulemakings or bringing future lawsuits, do not constitute hardship warranting immediate review. Op. 25 (App. 524); *see also, e.g.*, *National Park*, 538 U.S. at 811 ("mere uncertainty as to the validity of a legal rule" does not constitute hardship for ripeness purposes); *Texas*, 523 U.S. at 302 (asserted "threat to federalism" embodied by federal agency's statement of legal views did not constitute hardship where "primary conduct" was not yet affected); *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (Kavanaugh, J.) (fact that "prudent organizations and individuals may alter their behavior (and thereby incur costs)" based on predicted future regulations "has never been a justification for allowing courts to review proposed agency rules" rather than awaiting "final rule[s]").

B. Plaintiffs Fail To Justify Immediate Review Of The Interim Estimates In The Abstract.

As with standing, though Plaintiffs claim to take issue with the district court's analysis, their arguments are not responsive to precedent. Plaintiffs still have not shown that the Interim Estimates' mere existence has forced

any change in "their day-to-day affairs." *National Park*, 538 U.S. at 810. And they do not deny that they seek to challenge the Interim Estimates in the abstract rather than as applied "in a concrete way." *Id.* at 807-08.

Plaintiffs' principal argument is that their challenges to the Interim Estimates implicate "purely legal" questions. Although the legal character of a claim is relevant to the fitness inquiry, it is not dispositive. *See, e.g.*, *Iowa League of Cities*, 711 F.3d at 867 (recognizing that "purely legal questions are *more likely* to be fit for judicial review") (emphasis added). That a question is legal in nature does not suffice to render it appropriate for immediate resolution, particularly where (as here) Plaintiffs seek to litigate constitutional and statutory questions entirely apart from any particular agency, regulatory context, legal requirement, or claimed harm. Federal courts do not provide "advisory opinions on abstract questions of law." *Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012).

Plaintiffs' claim of hardship from assertedly not yet having had sufficient opportunity to provide comment on the Interim Estimates (Br. 45) both overlooks subsequent events and, ultimately, cuts against their own argument. The Working Group has since invited and received public comment on the Interim Estimates (including from Plaintiffs), *see* 86 Fed.

Reg. at 24,669; *supra* p. 14 n.9, and has been using those comments to assist in formulating updated estimates. And the OIRA Guidance makes clear that agencies must accept public comment on the Interim Estimates if and when they are used to justify specific regulations. Defendants agree that the Interim Estimates cannot be "insulated" from the "rigors of notice-and-comment rulemaking and judicial review," Br. 17. But no such insulation has occurred. And although Plaintiffs offer no basis to assume that agencies will disregard comments about the Interim Estimates in the future, even if some agency failed to do so, Plaintiffs could seek relief for that alleged procedural violation at that time. *See Building & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (declining to entertain immediate challenge to executive order, noting that an "aggrieved party may seek redress" if an agency "tr[ies] to give effect to the Executive Order when to do so is inconsistent with the relevant … statute").

Plaintiffs' allusions to ongoing rulemaking efforts at "agencies like the EPA, DOT, and FERC" (Br. 14-15, 48) only confirm the soundness of these principles. If Plaintiffs are correct that the Interim Estimates will be used to justify final agency actions by any of those agencies, they may seek judicial review of those actions at that time, consistent with applicable law.

III. If Jurisdiction Exists, There Is No Sound Basis For Adjudicating The Merits For The First Time On Appeal

Plaintiffs urge this Court not only to reverse the district court's jurisdictional rulings, but also to order entry of a preliminary injunction. That invitation should be denied. This Court is "a court of appellate review, not of first view," and "remand is ordinarily the appropriate course of action when it would be beneficial for the district court to consider an … argument in the first instance." *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1021 (8th Cir. 2020) (quotation marks omitted). The district court has not yet addressed the merits of Plaintiffs' claims; the only issues it addressed were standing and ripeness. Indeed, the court did not even reach the government's other arguments for dismissal—issues that necessarily must be decided before it would be appropriate to award any relief on Plaintiffs' claims. Moreover, because "[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 grant or denial of such an injunction is reviewed for abuse of discretion, *see Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020); the district court has not had an opportunity to exercise that discretion.

Assuming this Court nonetheless found it appropriate to consider Plaintiffs' request in the first instance, it should be denied. "A plaintiff seeking a preliminary injunction 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." *Winter*, 555 U.S. at 20; *see Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Plaintiffs cannot meet any—much less all—of those requirements.

First, Plaintiffs have not come close to showing they face "irreparable" harm, meaning harm for which there is "no adequate remedy at law" and which could not be redressed at final judgment or in future litigation. *Management Registry, Inc. v. A.W. Cos., Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019); *cf. Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (lack of showing of irreparable harm is "an independently sufficient ground upon which to deny a preliminary injunction"). As discussed above, Plaintiffs have not even alleged injury sufficient to invoke Article III. But even assuming one or more *allegations* were sufficient to survive a motion to dismiss, Plaintiffs have not tendered any affirmative *evidence* of harm that is "irreparable," "certain," and "of such imminence that there is a clear and

present need for equitable relief." *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996).[21] As discussed, the Interim Estimates do not themselves require Plaintiffs to do anything, and if Plaintiffs are correct that an agency's reliance on the Interim Estimates would be unlawful, they may obtain full relief on that claim in future litigation.

Second, Plaintiffs cannot show any likelihood of success on either of the claims for which they seek preliminary relief. At the outset, Plaintiffs' claims are not actionable under the APA. The Working Group is not an "agency," but rather a collection of advisers that lacks "substantial independent authority." *Meyer v. Bush*, 981 F.2d 1288, 1297-98 (D.C. Cir. 1993); *see also Armstrong v. Executive Office of the President*, 90 F.3d 553, 565 (D.C. Cir. 1996). Plaintiffs' assertion that the Working Group is an "agency" because it "issue[s] legally binding directives to other federal agencies," Br. 50, overlooks that the President—not the Working Group—directed use of the Interim Estimates.[22] The Interim Estimates also do not constitute "final

[21] Indeed, Plaintiffs' brief offers no evidence of harm at all, instead only cross-referencing discussion of their standing allegations (Br. 54).

[22] The President "is not an agency," so his actions cannot be reviewed under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Plaintiffs also cannot escape the APA's requirements by seeking to proceed under a different, implied cause of action for violation of the separation of

agency action" reviewable under the APA, because they do not determine Plaintiffs' rights or obligations or impose "legal consequences" upon them. *Bennett*, 520 U.S. at 177-178. And Plaintiffs, in this lawsuit, do not seek to challenge any alleged final agency action by any federal regulatory agency.

Plaintiffs' separation-of-powers claim is without merit. Article II of the Constitution provides ample authority for the President to instruct agencies in the exercise of their statutory discretion, and indeed mandates the possibility of such control in many instances. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197, 2203 (2020) (invalidating removal protection because Executive Branch officials must "remain[] subject to the ongoing supervision and control of the elected President," to whom "[t]he entire 'executive Power' belongs"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (same, because President must have "general administrative control of those executing the laws"); *Allbaugh*, 295 F.3d at 32 (President's "faithful execution of the laws enacted by the Congress … ordinarily allows and frequently requires the President to

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powers. The APA already provides a comprehensive scheme for judicial review of allegedly unconstitutional agency action, and courts should not imply an additional cause of action "where Congress has not provided one." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001).

provide guidance and supervision to his subordinates."). It is thus no surprise that every President since President Nixon has exercised some formal supervision over agency rulemaking, including by requiring cost-benefit analyses for significant rules. *See supra* pp. 3-6. And E.O. 13990 does nothing to trench upon Congress's authority: it is only when agencies possess statutory discretion that the President has directed them to use of the Interim Estimates.

Plaintiffs' procedural claim likewise is without merit. The Interim Estimates are not, in themselves, legislative rules requiring notice-and-comment because they do not impose "new rights or duties" on regulated parties. *Northwest Nat'l Bank v. U.S. Dep't of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990).[23] To the extent any agencies rely on the Interim Estimates in promulgating legislative rules, their use of the Estimates will be subject to notice-and-comment as part of that proceeding. *See* OIRA Guidance 2 (App. 374). In any event, even assuming the Interim Estimates required notice-and-comment before their February 2021 publication,

[23] If the Working Group were subject to the APA, the Interim Estimates would at most constitute "general statements of policy." 5 U.S.C. § 553(b)(A); *see Gonnella v. U.S. SEC*, 954 F.3d 536, 546 (2d Cir. 2020) (general statements of policy "impact agency behavior rather than change the existing rights of others outside the agency").

Plaintiffs' claims would fail under the APA's harmless-error rule. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). The Interim Estimates are nothing more than the inflation-adjusted estimates that already underwent multiple rounds of notice-and-comment, including on the very methodological points (such as selection of discount rates) of special concern to Plaintiffs.

Finally, the public interest weighs heavily against an injunction. The President's leadership on policy matters is an essential source of democratic accountability within our system of government. *See Seila Law*, 140 S. Ct. at 2197. It will rarely be in the public interest for a court—especially in preliminary proceedings—to prevent the President from guiding agency action according to his assessment of the public interest, particularly when the Executive Branch's actions can readily be subjected to judicial review once it has actually imposed some regulatory burden.

It also would be contrary to the public interest to prevent the Executive Branch from pursuing a standardized approach to assessing the social costs of GHG estimates. A court-ordered halt to reliance on the Interim Estimates would frustrate agencies' ability to rely upon the most robust and up-to-date scientific methodology available. Particularly at a time

when "the United States and the world face a climate crisis," E.O. 13990, § 6(d), the federal courts should not prevent the Executive Branch from pursuing a coordinated response based on the best available science.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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FEBRUARY 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,997 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 14-point CenturyExpd BT, a proportionally spaced typeface.

Under Circuit Rule 28A(h)(2), I further certify that this brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2022, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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