

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, INC., *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States, *et
al.*,

Defendants.

Civil Action No. 1:17-cv-00253
RDM

**MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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CHAD A. READLER
Acting Assistant Attorney General
Civil Division

CHANNING D. PHILLIPS
United States Attorney

BRETT A. SHUMATE
Deputy Assistant Attorney General
Civil Division

ERIC R. WOMACK
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/ Michael Drezner
DANIEL BENSING (D.C. Bar No. 334268)
MICHAEL DREZNER (VA Bar No. 83836)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Telephone: (202) 514-4505
Email: Michael.L.Drezner@usdoj.gov

Counsel for Defendants

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INTRODUCTION

Plaintiffs’ Motion for Summary Judgment (“MSJ”), ECF No. 16, fails to adequately address the numerous jurisdictional deficiencies identified by Defendants in their Motion to Dismiss, and in discussing the merits, highlights the extraordinary nature of their facial challenge to the President’s authority to supervise the Executive Branch. Plaintiffs’ Motion asks this Court to hold that Executive Order 13,771 cannot be implemented by any agency to any extent consistent with applicable law. MSJ at 26-27; *see also* Plaintiffs’ First Amended Complaint (“Am. Compl.”) ¶ 61. Plaintiffs would have this Court ignore an unbroken 40-year history of Executive Orders directing agencies to consider factors, such as cost, unless expressly forbidden by Congress in a governing statute. Both history and precedent confirm that Executive Order 13,771, the latest in this unbroken chain, is a valid exercise of the President’s Article II powers.

Before even reaching the merits, however, Plaintiffs’ Motion fails on the threshold ground that it is premature. Plaintiffs ask the Court to declare the Executive Order, and the Office of Management and Budget’s (“OMB”) implementing guidance, unconstitutional before any agency has taken any action that injures either Plaintiffs or their members. Absent such concrete, final action, Plaintiffs can only speculate about the effect (if any) of the Executive Order and its implementing guidance. Such speculation fails Article III standing requirements.

Even had Plaintiffs alleged a concrete, individualized injury flowing from the Executive Order, Plaintiffs’ Motion nonetheless fails to demonstrate how they have stated a claim. Plaintiffs assert four constitutional (or non-statutory) claims, including that the Executive Order violates the Separation of Powers and the Take Care Clause, and that it will constitute *ultra vires* action when or if implemented. These claims find no support in, and indeed, some are squarely foreclosed by, D.C. Circuit precedent. For example, the D.C. Circuit rejected a Separation of

Powers challenge to an Executive Order that, like Executive Order 13,771, expressly applied only “to the extent permitted by law.” *See Bldg. & Constr. Trades Dep’t v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). Likewise, this Circuit has never recognized a cause of action against the President under the Take Care Clause. And, in any event, the Executive Order does not require agencies to do anything they are forbidden to do by legislative command. *See id.*

Plaintiffs’ *ultra vires* challenge to both OMB and agency compliance with Executive Order 13,771 is equally flawed. To start, it ignores the strict limitations the D.C. Circuit has placed on that cause of action, requiring that Plaintiffs have no other means for reviewing the purported *ultra vires* action. Yet, as revealed by Plaintiffs’ Administrative Procedure Act (“APA”) claim, Plaintiffs purport to have a statutory basis for review. However, that claim, even if proper, is premature until an agency action becomes final. All Plaintiffs point to is OMB’s guidance, which applies only to the internal workings of the Executive Branch. That is far from the final agency action required for a potential claim to accrue.

Even if this Court were to reach the merits of Plaintiffs’ *ultra vires* and APA challenges, those challenges lack merit. OMB and the defendant agencies could not have acted in excess of their statutory authority – an incredibly demanding standard – by acting in compliance with an Executive Order validly issued by the President as an exercise of his explicit constitutional authority. And Plaintiffs point to nothing in the OMB guidance itself that purports to implement the Executive Order in an arbitrary fashion. To the contrary, OMB’s guidance explains how the Executive Order fits within the existing framework established by Executive Order 12,866 to measure the costs of an agency action against its benefits, the many ways that an agency may carry out the Executive Order other than the full repeal of existing rules, and, most importantly, that no action should be taken that is inconsistent with statutory commands.

Plaintiffs also misrepresent crucial factors affecting the operation of Executive Order 13,771. First, the requirements of Executive Order 13,771 only apply “unless prohibited by law,” Executive Order 13,771 at § 2(a), and hence the Order does not purport to authorize unilateral Presidential action to modify statutes. Second, Plaintiffs’ argument ignores the fact that Executive Order 12,866 remains in force, as it has since September of 1993. *See* Guidance, ¶ Q32 (Executive Order 12,866 “remains the primary governing EO regarding regulatory review and planning.”). Under Executive Order 12,866, agencies generally undertake cost-benefit analysis for regulations they plan to issue, which includes regulatory and deregulatory actions under Executive Order 13,771. Third, in taking “deregulatory actions” for purposes of Executive Order 13,771, agencies are not limited to taking the step of complete “repeal” of existing legislative rules, but instead have the flexibility to take a variety of other actions that reduce costs. Guidance, ¶ Q4. These three mistakes about the operation of Executive Order 13,771 render much of Plaintiffs’ summary judgment argument simply irrelevant.

For all of these reasons, the Court should deny Plaintiffs’ Motion for Summary Judgment and grant Defendants’ Motion to Dismiss.

BACKGROUND

I. FACTUAL BACKGROUND¹

The President issued Executive Order 13,771 (“Reducing Regulation and Controlling Regulatory Costs”) pursuant to his authority under the Constitution and laws of the United States. Exec. Order No. 13,771, Preamble. As the Order explains, “[i]t is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both

¹ A more detailed statement of the factual background is contained in Defendants’ Motion to Dismiss Amended Complaint (ECF No. 15) at 3 – 13.

public and private sources.” *Id.*, § 1. The Order seeks to achieve those ends by requiring agencies to identify two prior regulations for elimination or revision for every new regulation issued, and requiring agencies prudentially to manage the cost of planned regulations through an annual regulatory allowance. *Id.*

This regulatory initiative follows successful regulatory reform offset efforts in Australia, the United Kingdom, and Canada. *See* Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 *Admin. L. Rev.* 835, 858-59 (2014). Executive Order 13,771 draws from these models to further advance a longstanding goal, spanning many Presidential Administrations, of seeking to reduce regulatory burdens. Indeed, Executive Order 13,771 builds on similar efforts by prior administrations, including, most significantly, Executive Order 12,866 (“Regulatory Planning and Review”), which President Clinton signed in 1993, and which has remained in effect for over 23 years.

A. Presidents Have Routinely Issued Executive Orders Addressing Regulatory Reform, Including Executive Order 12,866 Issued by President Clinton.

Although Executive Order 12,866 represents the current framework for evaluating costs and benefits of proposed rules, the concept of analyzing regulatory cost as a factor in rulemaking long pre-dated that Executive Order. Executive Order 11,821 (“Inflation Impact Statements”), adopted by President Ford in 1974, required agencies to certify that they had evaluated the inflationary impact of new regulations before issuing them. Executive Order 12,044 (“Improving Government Regulations”), signed by President Carter in 1978, continued this practice by requiring agencies to consider several factors, including costs, before issuing new rules. Executive Order 12,291 (“Federal Regulation”), signed by President Reagan, was even more explicit in mandating the weighing of benefits and costs in the adoption of agency rules.

President Clinton’s Executive Order 12,866, which replaced Executive Order 12,291, continues the policy of assessing the benefits and costs of regulations to the present day. To that end, Executive Order 12,866 adopted fundamental “[r]egulatory [p]hilosophy and [p]rinciples,” which provide that agencies should “select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach.” Exec. Order No. 12,866, § 1(a). The Order elaborates on that philosophy by directing each agency to “design its regulations in the most cost-effective manner to achieve the regulatory objective,” *id.*, § 1(b)(5), and to “adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs,” *id.*, § 1(b)(6).

Under Executive Order 12,866, an economic analysis, or for larger rulemakings a Regulatory Impact Analysis of significant regulatory actions, is the mechanism through which an agency identifies and weighs the benefits and costs of proposed regulatory actions. In doing so, agencies assess the costs and benefits of the regulatory action, and, to the extent permitted by law, describe how it promotes the President’s priorities. *See* Exec. Order No. 12,866, § 6(a)(3)(B)(ii) (requiring agencies to assess the “potential costs and benefits” of significant regulatory actions). Executive Order 12,866 requires OMB to review all Executive Branch agencies’ proposed and final rules that are determined to be “significant regulatory actions” under Section 3(f) of the Order. Exec. Order No. 12,866, § 6(b). OMB has issued extensive guidance on best practices in conducting such regulatory analyses. *See* Circular A-4 (explaining how to evaluate costs and benefits).

B. Executive Order 13,771 (“Reducing Regulation and Controlling Regulatory Costs”)

Consistent with the purposes underlying these earlier Presidential regulatory efforts, the aim of Executive Order 13,771 is “to be prudent and financially responsible in the expenditure of

funds, from both public and private sources.” Exec. Order No. 13,771, § 1. To encourage a comprehensive review of existing rules, the Order imposes, to the extent permitted by law, several requirements on Executive Branch agencies. First, whenever an agency proposes or adopts a new regulation, “it shall identify at least two existing regulations to be repealed,” unless doing so is “prohibited by law.” *Id.*, § 2(a). Second, any new incremental costs from a new regulation “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” *Id.*, § 2(c). The Order further directs that for Fiscal Year 2017, “the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero.” *Id.*, § 2(b).

Section 3 of Executive Order 13,771, titled “Annual Regulatory Cost Submissions to the Office of Management and Budget,” establishes a regulatory allowance permitting OMB to assign the total amount of incremental regulatory costs that agencies can impose annually. During the annual Presidential budget process, the Director of OMB will then “identify to agencies a total amount of incremental costs that will be allowed for each agency” for issuing new regulations in the next fiscal year. *Id.*, § 3(d). Agencies will be required to operate within their allotted regulatory allowance “unless required by law or approved in writing by the Director.” *Id.*

C. OMB Guidance Implementing Section 2 of Executive Order 13,771

On February 2, 2017, Dominic J. Mancini, Acting Administrator of OMB’s Office of Information and Regulatory Affairs (“OIRA”), issued written Interim Guidance implementing Section 2 of the Executive Order. *See* Exhibit B to Am. Compl. On April 5, 2017, OIRA issued additional guidance that “supplements” the Interim Guidance and supersedes it where there is a

conflict. Guidance Implementing Executive Order 13771 (“Guidance”), Exhibit C to First Amended Complaint (“Am. Compl.”) at 1.²

At the outset, the Guidance explains that the offset requirements of Section 2 of the Executive Order will only apply to a subset of “significant regulatory actions” as that phrase is defined in Section 3(f) of Executive Order 12,866, as well as significant guidance documents. Guidance, ¶ Q2. The Guidance explains that under Section 2 of the Order any action that will “repeal or revise” existing rules and will produce verifiable savings may qualify as a deregulatory action and so an offset against new regulatory burdens. Guidance, ¶ Q4.

The Guidance recognizes that OMB can exercise its authority to provide a “full or partial exemption from EO 13771’s requirements” as needed to facilitate its efficient implementation. Guidance, ¶ Q33. The Guidance provides that “regulatory actions addressing emergencies such as critical health, safety, financial, non-exempt national security matters, or for some other compelling reason, may qualify for an exemption from some or all of the requirements of Section 2.” *Id.* The Guidance also expressly recognizes that agencies must comply with “an imminent statutory or judicial deadline” regardless of whether offsetting savings have been identified. *Id.*

II. PROCEDURAL BACKGROUND

Plaintiffs filed this suit on February 8, 2017. Plaintiffs’ Amended Complaint purports to allege five causes of action: (1) a violation of separation of powers on the ground that Executive Order 13,771 “purports to amend . . . statutes,” Am. Compl. ¶ 129; (2) a violation of the “Take Care” clause of Article II, § 3 of the Constitution based on the allegation that “[t]he Executive Order directs agencies to take action contrary to numerous laws passed by Congress,” *id.* ¶ 140;

²Unless otherwise noted, Defendants will cite to the April Guidance as the latest and most comprehensive statement of OIRA’s interpretation of Executive Order 13,771 and refer generally to both documents as “Guidance.”

(3) *ultra vires* action by the agency defendants (other than OMB) by applying the regulatory offset directive of the Executive Order in violation of “the statutes from which they derive their rulemaking authority,” *id.* ¶ 148; (4) *ultra vires* agency action by the Director of OMB in implementing a purportedly unconstitutional Executive Order, *id.* ¶ 155; and (5) a violation of the APA by OMB in issuing guidance to implement the Executive Order, *id.* ¶ 162. Plaintiffs seek declaratory relief that the Executive Order is unconstitutional and that the Guidance is unlawful as well as an order enjoining all of the agency defendants from complying with the Order. *Id.*, p. 48 (Prayer for Relief).

Defendants moved to dismiss the Complaint on April 10, 2017, ECF No. 9, and Plaintiffs responded by amending the Complaint on April 21, 2017, ECF No. 14. On April 25, 2017, this Court ordered that Defendants’ Motion to Dismiss be denied as moot, and required Defendants to answer or otherwise respond to the Amended Complaint by May 12, 2017. Accordingly, on that day Defendants filed a Motion to Dismiss Plaintiffs’ Amended Complaint. ECF No. 15 (“MTD”). Just three days later, on May 15, 2017, Plaintiffs filed a Motion for Summary Judgment. *See* ECF No. 16. Following a scheduling conference on May 23, 2017, the Court established simultaneous briefing schedules on the Motion to Dismiss and the Motion for Summary Judgment.

III. STANDARD OF REVIEW

“Rule 56(a) is clear in saying that a court may only enter summary judgment if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 507 (D.C. Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). Under this standard, a court must “examine the facts in the record and all reasonable inferences derived therefrom in a light most favorable to the nonmoving party.”

Robinson v. Pezzat, 818 F.3d 1, 8 (D.C. Cir. 2016) (citation omitted). “If material facts are at issue, or, though undisputed, are susceptible to divergent inferences, summary judgment is not available.” *Moore v. Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009) (quoting *Kuo–Yun Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994)).

ARGUMENT

Plaintiffs have rushed to file for summary judgment, but they have failed to identify any final agency action taken pursuant to Executive Order 13,771 that affects them or their members. Plaintiffs’ Motion should be denied because Plaintiffs and their members lack standing, their challenges are unripe, and they have failed to state a claim as to any of their five causes of action.

I. Plaintiffs Lack Standing and Their Challenges Are Unripe

“Although ‘general factual allegations of injury resulting from the defendant’s conduct may suffice’ to show standing at the motion to dismiss stage, at summary judgment a court will not ‘presume’ the missing facts’ necessary to establish an element of standing.” *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) (citations omitted). Accordingly, in “reviewing a motion for summary judgment, [the Court] require[s] specific facts, not ‘mere allegations,’ to substantiate each leap necessary for standing.” *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996).

In their Motion for Summary Judgment, the organizational Plaintiffs assert standing on their own behalf and on behalf of their members. *See Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). However neither the Plaintiff organizations nor their members have set forth specific facts to demonstrate injury that is certainly impending, traceable to Executive Order 13,771, or redressable by Plaintiffs’ requested relief.

A. Plaintiffs Have Failed to Establish Associational Standing

1. Plaintiffs' Members Have Not Shown Injury-in-Fact

Associational standing permits an organization to sue on behalf of its members, but requires the organization to demonstrate that “at least one of its members would have standing to sue in his own right[.]” *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). In order to establish an individual’s injury-in-fact “[t]he complainant must allege an injury to himself that is ‘distinct and palpable,’ as opposed to merely ‘[a]bstract,’ and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). Further, because Plaintiffs seek declaratory and injunctive relief for a “predicted future injury” that may never occur, they “bear[] a ‘more rigorous burden’ to establish standing.” *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989)).

In their Motion for Summary Judgment, Plaintiffs assert in conclusory fashion that the Executive Order will cause their members injury because it will “prevent[], delay[], or weaken[] new rules protecting public health, safety, and the environment” MSJ at 13.³ As support for this proposition, Plaintiffs cite their declarations, including nine declarations from individual members or employees, which they invite the Court to sift for evidence supporting a viable

³ Plaintiffs have abandoned their prior assertion that they will be harmed by the future repeal of rules by agencies. *See* MSJ at 13.

theory of injury. *See id.* (“*see generally* Declaration of Denise Abbott” (“Abbott Decl.”), ECF No. 16-5. That approach is consistent with the declarations themselves, which largely base allegations of injury on the circular assumption that the Executive Order might have the impact that they fear. *See, e.g.*, Declaration of David LeGrande (“LeGrande Decl.”), at ¶ 16, ECF No. 16-2 (“CWA and its members will be harmed *if* Executive Order 13771 delays the issuance of standards . . . or repeals existing workplace safety and health standards.”) (emphasis added); Declaration of Robert Weissman (“R. Weissman Decl.”), at ¶ 17, ECF No. 16-3 (“Public Citizen and its members . . . will be harmed *if* Executive Order 13771 delays energy efficiency regulation . . . or repeals existing energy efficiency standards.”) (emphasis added); Declaration of Andrew E. Wetzler (“Wetzler Decl.”), at ¶ 17, ECF No. 16-4 (“NRDC members’ scientific, recreational, aesthetic, and other interests will be adversely affected *if* Atlantic sturgeon critical habitat is not designated or if insufficient critical habitat is designated.”) (emphasis added). “These are just the kind of declarations that [the D.C. Circuit has] previously rejected as insufficient to establish standing.” *Chamber of Commerce v. EPA*, 642 F.3d 192, 202 (D.C. Cir. 2011).

The three purported examples of potential injury highlighted in Plaintiffs’ Motion bear out the purely speculative nature of their allegations: (1) an EPA rulemaking on Effluent Limitations Guidelines and Standards for the Dental Category; (2) the potential that OSHA may issue rules concerning occupational exposure to infectious diseases; and (3) two proposed EPA rules regulating the chemical trichloroethylene under the Toxic Substances Control Act. MSJ at 13-15. However, the dental effluent rule is not cited in the Amended Complaint as a basis for injury to any of Plaintiffs’ members, and any such claim would now be moot as the Final Effluent Rule was published in the Federal Register on June 14, 2017. *See* Effluent Limitations

Guidelines, 82 Fed. Reg. 27,154 (June 14, 2017). Similarly, EPA's rules relating to trichloroethylene are not cited by any individual member declarant as the basis for injury, as would be required to establish standing on summary judgment.⁴

The only action by Defendants that is discussed at any length in Plaintiffs' Motion as a basis for their members' purported injuries is the Occupational Safety and Health Administration's ("OSHA") potential issuance of hypothetical rules relating to infectious disease in the workplace. According to the Motion, the Executive Order "will delay and may force OSHA to weaken or forgo the new standard on exposure to infectious disease" MSJ at 14. Plaintiffs submit two declarations from individual members, Denise Abbott, R.N. and Dr. Jonathan Soverow, who "believe that by delaying, weakening, or prompting OSHA to forgo a new standard for workplace exposure to infectious diseases, [they will] . . . face a higher risk of infectious disease" Declaration of Jonathan Soverow ("Soverow Decl.") at ¶ 5, ECF. No. 16-9.

Such claims are nothing but speculation about unknown future impacts of the Executive Order on a rule that has not yet even been proposed. Neither declarant states that the proposal or promulgation of that rule has been delayed or that they have been harmed as a result. Rather,

⁴ The sole member declaration cited as alleging direct personal injury from these rules—that of Amanda Fleming—actually concerns a different rule. MSJ at 15. In her declaration, Ms. Fleming states that the EPA recently "proposed a rule to regulate certain toxic chemicals in paint removers." Declaration of Amanda Fleming ("Fleming Decl."), at ¶ 6, ECF. No. 16-7. This allegation appears to refer to a proposed EPA rule to phase out use of two chemicals from paint remover products, distinct from the proposed rules concerning trichloroethylene. *Compare* Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a), 82 Fed. Reg. 7464 (proposed Jan. 19, 2017), *with* Trichloroethylene (TCE); Regulation of Use in Vapor Degreasing Under TSCA Section 6(a), 82 Fed. Reg. 7432 (proposed Jan. 19, 2017) *and* Trichloroethylene; Regulation of Certain Uses Under TSCA § 6(a), 81 Fed. Reg. 91,592 (proposed Dec. 16, 2016).

both member declarants merely repeat their “belie[f]” that, in the future, “by delaying, weakening, or prompting OSHA to forgo a new standard for workplace exposure to infectious diseases, Executive Order 13771 will negatively impact [their] ability to avoid such exposure.” Abbott Decl. at ¶ 7.⁵ But that allegation simply assumes, without discussion, that delay will occur and that such delay would cause them harm. The declarants do not discuss *whether* the rule will be issued, *when* the rule would be expected, *how* it would be weakened, *what* the rule would look like in final form, or *why* precisely they would be harmed.

The declarants did not discuss these points because they could not. Plaintiffs’ allegation of injury is based on an agency Request for Information that was published in the Federal Register in 2010 that indicated the agency was considering such a rule.⁶ However, in the ensuing seven years, OSHA did not issue a notice of proposed rulemaking despite the absence of the Executive Order.⁷ Plaintiffs note that “[a]ccording to its most recent regulatory agenda,

⁵ Plaintiffs briefly cite the declaration of David Michaels as support for their allegation of delay. However, the declaration does not actually state that the specific rule discussed in the Motion would be delayed, or even when it would be issued absent the purported delay. And the declarant is forced to speculate even when making more general statements about the delay that would purportedly result from the Executive Order. *See* Declaration of David Michaels (“Michaels Decl.”), at ¶ 36, ECF No. 16-16 (“ . . . perhaps delaying . . .”). Moreover, much of Michaels’ declaration is devoted to the legal conclusion that compliance with the Order is prohibited by the Occupational Safety and Health Act, which, if true, would then require OMB to exempt the agency from compliance, which would entirely eliminate the purported injury. *Id.* at ¶¶ 29 – 40; *see infra* at II.B. The declaration demonstrates precisely why any allegation of injury at this point is an inherently speculative prediction about future effects.

⁶ *See* Office of Information and Regulatory Affairs, *Infectious Diseases*, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AC46>.

⁷ The agency also completed the small business review process required under the Small Business Regulatory Enforcement Fairness Act (SBREFA) and received the Small Business Advocacy Review Panel’s formal recommendations in 2014. *See* Office of Information and Regulatory Affairs, *Infectious Diseases*, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AC46>.

OSHA anticipated issuing a proposed rule in October 2017.” MSJ at 14. But OSHA and other Defendant agencies routinely modify projected publication dates, given the fact that rulemakings can often take years to complete, and numerous factors, including shifting agency priorities, limited agency resources, and OMB review, can all affect the regulatory timeline. Indeed, OSHA previously changed the anticipated date of the Infectious Diseases proposed rule at least twice, from December 2016 to March 2017, and then again to October 2017, all during the prior administration, before Executive Order 13,771 was signed.⁸ And the current Request for Information in the Federal Register suggests that such a rule would, if promulgated, apply to certain employers only (i.e., only certain employees would be protected by such a rule) and would set forth minimum control measures that these employers would be required to follow. Moreover, as is the case in all OSHA rulemakings, at least some of these employers likely already take action to protect their employees from infectious disease hazards. As no rule has yet been proposed by OSHA, neither member declarant alleges (or can state definitively) whether his or her specific employer would be included within the scope of the standard, or whether his or her employer already follows procedures which meet or exceed the hypothetical final standard. Therefore, the declarants give the Court no basis on which to analyze how a hypothetical OSHA standard would reduce their risk of disease transmission, or how the Executive Order could cause them harm.

However, the agency’s engagement in the SBREFA process does not mandate that OSHA must propose a rule.

⁸ Compare Part II Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2016, 81 Fed. Reg. 94,496, 94,602 (Dec. 23, 2016) (predicting publication in October 2017), *with* Department of Labor Semiannual Regulatory Agenda, 81 Fed. Reg. 37,334, 37,338 (Jun. 9, 2016) (predicting publication in March 2017), *and* Department of Labor Semiannual Regulatory Agenda, 80 Fed. Reg. 35,048, 35,052 (Jun. 18, 2015) (predicting publication in December 2016).

The seven other declarations cited by Plaintiffs as purported proof of their members' injury suffer from the same speculative flaws, as all base their allegations on conclusory assumptions or fears about purported future injury that is, at this point, entirely unknowable. *See, e.g.*, Declaration of Gerald Winegrad ("Winegrad Decl."), at ¶¶ 8-18, 19, 24, ECF No. 16-13 (noting harms from climate change to his property caused by actions other than the Executive Order and explaining his "concern" that the Order will "halt or delay" unspecified regulations implicating climate change, as well as certain regulations concerning the Atlantic sturgeon, and energy efficiency standards);⁹ Declaration of Terri Weissman ("T. Weissman Decl."), at ¶¶ 4-5, ECF No. 16-10 (expressing fear that the Order will prevent NHTSA from issuing regulations concerning "vehicle-to-vehicle technology," which will purportedly prevent her from buying a car with such technology in the next "5-7 years," and discussing Public Citizen's petition to non-party Food and Drug Administration ("FDA") about antibiotics in animal feed); Declaration of Eileen Quigley ("Quigley Decl."), at ¶ 9, ECF No. 16-12 (expressing "concern[]" that the Order "will prevent or delay much-needed federal energy efficiency standards" and explaining that "if" such standards are not "timely" issued, it will be "more difficult for NRDC to meet its net-zero energy goal");¹⁰ Declaration of James Coward ("Coward Decl."), at ¶¶ 8-11, ECF No. 16-11 (expressing "worry" that the Order will delay "regulations on crude-by-rail operations," which

⁹ Of note, Declarant Gerald Winegrad avers that a proposed rule concerning the habitat of Atlantic Sturgeon will be delayed by Executive Order 13,771, *see* Winegrad Decl., at ¶ 19, even though this rule is subject to a judicial deadline for finalization, currently July 18, 2017. *Delaware Riverkeeper Network, et al. v. Dep't of Commerce, et al.*, No. 14-cv-434, ECF No. 32 (D.D.C.). Plaintiffs present no evidence or argument that this Atlantic Sturgeon rulemaking will be delayed or affected in any way by Executive Order 13,771.

¹⁰ Eileen Quigley phrases her declaration as alleging organizational injury through possible future delay of energy efficiency regulations. Putting aside the novelty of such a claim, her declaration is addressed here as it suffers from the same deficiencies as the individual member declarations.

he speculates may lead to an “environmental disaster” near him); Declaration of Anthony So (“So Decl.”), ECF No. 16-8 (expressing opinion that Public Citizen’s petition submitted to non-party FDA would benefit him but failing to explain how the Order would cause the petition to be denied); Fleming Decl., at ¶¶ 4-6 (speculating that a proposed rule concerning speed limiting devices would benefit her children without explaining whether or when the rule would be finalized; expressing her “belie[f]” that the Order will prevent her from buying a car with vehicle-to-vehicle technology “in the next 5 years or so”; and expressing concern that she may have to use a paint remover that includes toxic chemicals if she and her husband “buy a fixer-upper in the next year or two”); Declaration of James Bauer, Sr. (“Bauer Decl.”), ECF No. 16-6 (noting that his past concerns about lead exposure have already been remedied by a previously-issued regulation).

Plaintiffs’ declarations do not contain the requisite “specific facts,” *Florida Audubon Soc’y*, 94 F.3d at 666, to establish that their future injuries are “certainly impending.” *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016). Rather, they contain vague and speculative fears, concerns, and beliefs about a variety of rules that may potentially be issued at some unspecified point in the future, and may inure to their benefit. At their core, Plaintiffs’ declarations amount to nothing more than a generalized policy disagreement with the President’s Executive Order. Any citizen who opposes the Order stands in the same position as Plaintiffs’ members, as anyone can express their concern about cars that they have “read about,” the speed at which their child’s school bus should operate, the chemicals in their paint remover, or any other matter that may potentially be regulated by the federal government. *See, e.g.*, Fleming Decl., at ¶ 5. More is required by Article III in order to prevent the federal courts from becoming immersed in such abstract disagreements. *See Valley Forge Christian Coll. v. Americans United for Separation of*

Church & State, Inc., 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”).

2. Plaintiffs Have Not Provided Facts Showing That Their Feared Injuries Will Be Caused by Executive Order 13,771

Even if Plaintiffs’ members were able to show some concrete, imminent injury, Plaintiffs would still lack standing because they cannot show that such injury will be caused by Executive Order 13,771. “It is well established that ‘[c]ausation, or traceability examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff.’” *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012) (quoting *Fla. Audubon Soc’y*, 94 F.3d at 663). “[A]s the Supreme Court has made clear, the mere possibility that causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied.” *Mideast Sys. & China Civil Constr. Saipan Joint Venture, Inc. v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986).

In order for Plaintiffs to have standing, they must show not only that they are faced with a certainly impending injury from the delay or alteration of proposed rules (which they have not done), but that such delay or other action will be caused by Executive Order 13,771. Yet Plaintiffs provide no argument on this point, let alone allege specific facts required to justify this leap.¹¹ As Defendants pointed out in their Motion to Dismiss the Amended Complaint, agencies

¹¹ Plaintiffs’ Motion assumes that the Executive Order will cause delay in the issuance of certain rules, and at various points the Motion cites the declarations of some five former agency employees as support. *See* Declaration of David Hayes (“Hayes Decl.”), ECF No. 16-14; Declaration of James Jones (“Jones Decl.”), ECF No. 16-15; Michaels Decl.; Declaration of Gregory Wagner (“Wagner Decl.”), ECF No. 16-17; Declaration of Dan Reicher (“Reicher Decl.”), ECF No. 16-18. To the extent that Plaintiffs claim that such declarants’ experience gives them unique foresight into the potential future application of Executive Order 13,771, that argument is meritless. *See, e.g., Chamber of Commerce v. EPA*, 642 F.3d 192, 201-02 (D.C. Cir.

maintain broad discretion to delay, revise, or repeal rules or other regulatory requirements for myriad reasons unrelated to the Executive Order, such as changed agency priorities, limited resources, information received in public comments, new technological developments, changes in the marketplace, or new legislation. MTD at 22. Accordingly, even assuming that certain proposed rules might be delayed or modified in the future, as Plaintiffs claim, such regulatory actions could be caused by any number of forces entirely distinct from Executive Order 13,771.

In addition, virtually all of the harms alleged by Plaintiffs' members concern the effect of regulations upon third parties, such as manufacturers. Plaintiffs' allegations of harm depend on those third parties taking a range of diverse actions, from auto manufacturers building and selling cars with vehicle-to-vehicle technology at an affordable price point to corporations changing their behavior such that climate change is slowed. *See, e.g.*, Fleming Decl., at ¶ 5; Winegrad Decl. at ¶¶ 8-18. "[I]n a case that turns on third-party conduct," standing is "ordinarily substantially more difficult to establish." *Arpaio*, 797 F.3d at 20 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). For such claims of injury, Plaintiffs must put forward "substantial evidence" as to how the Executive Order will affect future agency regulations, how those altered regulations will affect third party manufacturers, and how the manufacturers' conduct will affect Plaintiffs' members. *Id.* Due to the inherently conjectural nature of their claim, Plaintiffs put forward no such evidence and instead rely on unstated assumptions about possible future third-party behavior, which cannot suffice to establish causation.

2011) (holding that even where business owners averred that their businesses may suffer injury in the future, such allegations were rejected as "insufficient to establish standing"). None of the declarants has experience with implementing the Executive Order and therefore they cannot offer any insight as to how their former agency employers will seek to comply with the Executive Order. As a result, to the extent these declarations allege that the Executive Order may cause delay or otherwise affect future rulemakings, such averments are mere conjecture.

3. Plaintiffs Have Not Shown That Their Injuries Would Be Redressed By Their Prayer For Relief

Plaintiffs' members finally lack standing because their claimed injuries would not be redressed by their requested relief. The redressability inquiry "examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audobon Soc'y*, 94 F.3d at 663-64. As the D.C. Circuit has highlighted, "[t]he key word is 'likely.'" *West v. Lynch*, 845 F.3d 1228, 1235 (D.C. Cir. 2017) (citation omitted).

Plaintiffs again offer no argument or facts supporting this element of the standing inquiry.¹² Instead, Plaintiffs' members appear to assume that invalidation of the Executive Order will resolve their feared injuries, such that their preferred proposed regulations will be speedily promulgated without any disfavored alterations. Of course, absent a statutory mandate, agencies maintain the discretion to decide whether, when, and how to issue proposed rules, and they may revise or withhold such rules for any number of independent reasons. Plaintiffs offer no evidence to suggest that, absent the Order, the hypothetical rules they cite would be issued more quickly, if at all, and whether those rules would be issued in the form that would be necessary to remedy their purported injuries. "When conjecture is necessary, redressability is lacking." *Id.* at 1237; *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 942 (D.C. Cir. 2004), *abrogated in part on other grounds by Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017) (the "possibility" that there may be "better odds" of obtaining the desired relief upon a favorable outcome was "far short of the mark" required to show redressability). Plaintiffs

¹² Plaintiffs briefly argue that a declaration and injunction "are appropriate remedies for the unlawful action." MSJ at 18. It is not clear whether this discussion is intended to support Plaintiffs' need to show redressability, but, in any event, Plaintiffs fail to elucidate any facts as to why such remedies would alleviate the specific injuries allegedly suffered by their members.

cannot establish facts sufficient to demonstrate that invalidation of Executive Order 13,771 will likely remedy the claimed injuries to their members, and accordingly lack standing to sue on their behalf.

B. Plaintiffs Have Not Established Organizational Injury

Having thus failed to establish standing to sue on behalf of their members, Plaintiffs must demonstrate injury to themselves as organizations. To succeed, organizations, “like an individual plaintiff,” must show “actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (citation omitted).

Plaintiffs’ Motion for Summary Judgment devotes a scant two sentences to their theory of organizational standing. Plaintiffs briefly contend that Executive Order 13,771 “forc[es] plaintiffs to make an untenable choice between urging agencies to adopt new regulations . . . or refraining from advocating for new public protections to avoid triggering the need to repeal existing ones.” MSJ at 12. In support, Plaintiffs cite two cases, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Virginia v. American Booksellers Ass’n*, 484 U.S. 383 (1988). *Id.* Both decisions concern First Amendment claims and generally reiterate “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Bennett*, 564 U.S. at 739 (citation omitted).

Of course, Plaintiffs assert no First Amendment claim or injury in this case because the Executive Order does not restrict or even purport to regulate the ability of Plaintiffs or any other entity to comment, lobby or otherwise advocate for desired regulations or deregulatory efforts. Accordingly, any reluctance to advocate on the part of Plaintiffs is a product of their own

making. *See Food & Water Watch*, 808 F.3d at 919 (plaintiffs’ “subjective fear . . . does not give rise to standing”) (quoting *Clapper*, 133 S. Ct. 1152-53).

Thus, Plaintiffs’ asserted organizational injury is reduced to the claim that their advocacy is negatively affected by the Executive Order because they have to take the Order into account when advocating for the issuance of a rule. MSJ at 12. That injury, however, is foreclosed by longstanding D.C. Circuit precedent holding that mere harm to an organization’s advocacy or lobbying goals cannot constitute Article III injury. *See Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (holding that where an organization alleges “only impairment of its advocacy this will not suffice”); *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005) (holding that an organization is not injured where the “service impaired is pure issue-advocacy”).

Even more directly on point, the D.C. Circuit has held that “Article III standing requires more than the possibility of potentially adverse regulation. . . . Nor is Article III standing established by an inability to comment effectively or fully.” *Def. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324-25 (D.C. Cir. 2013). Yet the possibility of adverse regulation and its effect on the ability to comment and advocate is precisely the organizational “injury” Plaintiffs allege here.¹³ *See* LeGrande Decl., at ¶ 15 (claiming that the Executive Order “chills advocacy activity

¹³ In one of Plaintiffs’ declarations, Plaintiff Communication Workers of America’s (“CWA”) Occupational Safety and Health Director claims that CWA must “expend its own resources” where a “standard is not set by the federal rulemaking process.” LeGrande Decl., at ¶ 16. To the extent Plaintiffs assert that this allegation supports organizational standing, such an argument would lack merit. Plaintiff CWA puts forward no specific facts establishing that they will imminently suffer injury, but rather the declaration vaguely alleges that “CWA and its members will be harmed *if* Executive Order 13771 delays the issuance of standards” *Id.* (emphasis added). By the declarant’s own admission, such a claim of injury is inherently uncertain, and the speculation that CWA may suffer harm if the Executive Order were to somehow alter unspecified “standards” cannot support a finding of injury-in-fact. *See, e.g., Ctr. for Biological Diversity v. Dep’t of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

that we undertake”); Wetzler Decl., at ¶ 19 (claiming that Plaintiff NRDC will “have to think twice, and even more carefully” before engaging in litigation). Failing to show any cognizable injury, Plaintiff organizations lack standing to bring suit on their own behalf.

C. Plaintiffs’ Challenges Are Not Ripe

Intertwined with the requirement under Article III that an injury-in-fact be certainly impending, the doctrine of ripeness concerns “when a federal court can or should decide a case.” *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). 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) (citation omitted). Although the constitutional component of ripeness is coextensive with the injury-in-fact requirement of standing, *Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996), the doctrine of ripeness also includes prudential considerations. For the same reasons that Plaintiffs lack standing, the prudential considerations of ripeness counsel against permitting the instant challenges to go forward.

“In assessing the prudential ripeness of a case, [courts] focus on two aspects: the ‘fitness of the issues for judicial decision’ and the extent to which withholding a decision will cause ‘hardship to the parties.’” *Am. Petroleum Inst.*, 683 F.3d at 387 (citation omitted). The “fitness” factor depends “on whether the issues are purely legal, whether consideration of the issues would benefit from a more concrete setting, and whether the agency’s actions are sufficiently final.” *In re Aiken Cty.*, 645 F.3d 428, 434 (D.C. Cir. 2011).

In their Motion for Summary Judgment, Plaintiffs argue that this case is sufficiently ripe for review now. MSJ at 16. But the cases upon which they rely demonstrate exactly the opposite. For instance, in *Chamber of Commerce v. Reich*, 57 F.3d 1099 (D.C. Cir. 1995)

(“*Reich I*”), the D.C. Circuit held ripe a challenge to an Executive Order that “authorize[d] the Secretary of Labor to disqualify from certain federal contracts employers who hire permanent replacement workers during a lawful strike.” *Id.* at 1100. The court was able to overcome the presumption that “review is inappropriate when the challenged policy is not sufficiently fleshed out to allow the court to see the concrete effects and implications of its decision,” *Reich I*, 57 F.3d at 1100 (citations omitted), because the policy had been fleshed out through final regulations promulgated by the Secretary of Labor. In addition, the court noted that the plaintiffs were presently suffering hardship because the Executive Order “creat[ed] a disincentive for employers to hire replacement workers” and altered the collective bargaining process to the detriment of employers. *Id.*

The present case could not be more different. Unlike the Executive Order at issue in *Reich I*, which directly regulated the plaintiffs and presented them with a choice “between taking immediate action to their detriment and risking substantial future penalties for non-compliance,” *id.* at 1101, the present Executive Order regulates the internal workings of the Executive Branch and imposes no direct requirements on Plaintiffs. Indeed, Plaintiffs here point to no final regulatory action that has been taken pursuant to Executive Order 13,771, and their allegations of hardship and injury to their members are entirely future-oriented.¹⁴

¹⁴ The other cases cited by Plaintiffs are equally distinguishable. For example, in *American Historical Ass’n v. Nat’l Archives & Records Admin.*, 516 F. Supp. 2d 90, 106, 107-08 (D.D.C. 2007), the district court held that plaintiffs’ informational injury was already occurring through delay in providing requested documents. Plaintiffs cite other district court cases such as *County of Santa Clara v. Trump*, Nos. 17-CV-00485-WHO, 2017 WL 1459081, (N.D. Cal. Apr. 25, 2017). The court in *Santa Clara* similarly concluded that plaintiffs there were “currently” suffering injury due to difficulty in budgeting, provision of services and planning for the potential loss of federal funds. *Id.* at *20. Here, Plaintiffs cannot show that any similar injury is currently affecting them.

As such, this case presents “the classic institutional reason to postpone review,” namely the “need to wait for a rule to be applied [to see] what its effect will be.” *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003) (quoting *La. Env'tl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996)). The D.C. Circuit has made clear that “[c]ourts decline to review tentative agency positions because doing so severely compromises the interests the ripeness doctrine protects” *Am. Petroleum Inst.*, 683 F.3d at 387 (citation omitted). In this case, the Court does not even have the benefit of a *tentative* agency position, because Plaintiffs have identified no final action taken pursuant to the Order. Given the inherent unpredictability of how Executive Order 13,771 may be applied, there can be little doubt that “further factual development would ‘significantly advance [the Court’s] ability to deal with the legal issues presented.’” *See Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003) (quoting *Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)). Accordingly, this Court should find the instant challenge unripe.

II. Plaintiffs Cannot Demonstrate a Separation of Powers Violation

A. Plaintiffs’ Facial Challenge Ignores the President’s Constitutional Authority to Oversee the Executive Branch

Even assuming Plaintiffs could overcome these justiciability problems (which they cannot), their claims lack merit. Plaintiffs’ extraordinary challenge to Executive Order 13,771 asserts that the Order is unconstitutional in every application, no matter the statute or agency action (or inaction) in question. Plaintiffs make this point clear in their Motion for Summary Judgment, arguing that the Executive Order “impos[es] rulemaking requirements beyond and in conflict with . . . the statutes from which the federal agencies derive their rulemaking authority” MSJ at 2.

This type of expansive facial challenge, contesting the President’s inherent authority to guide Executive Branch agencies, is “disfavored for several reasons.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). “Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’” *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Further, “[f]acial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). “Exercising judicial restraint in a facial challenge ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.’” *Id.* (citation omitted).

Such restraint is never more appropriate than in the present context, where Plaintiffs contest an inherent power entrusted to the President by the Constitution. Presidents enjoy broad authority under Article II of the Constitution to manage and guide Executive Branch agencies. As the D.C. Circuit has recognized, “[t]he authority of the President to control and supervise executive policymaking is derived from the Constitution Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.” *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). Put another way, “by virtue of the general grant to him of the executive power . . . [the President] may properly supervise and guide” officials in the Executive Branch in their “construction of the statutes under which they act” *Myers v. United States*, 272 U.S. 52,

135 (1926). As a consequence, agencies “under the direction of the executive branch . . . *must* implement the President’s policy directives to the extent permitted by law.” *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (emphasis added); *see also Bldg. & Const. Trades Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d at 32 (holding that Executive Branch “officers are duty-bound to give effect to the policies embodied in the President’s direction, to the extent allowed by the law”).

Plaintiffs’ argument in support of their claim is entirely silent on this black letter law. Instead, Plaintiffs rely on Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in arguing that Executive Order 13,771 “directs agencies to act in ways that contradict . . . congressional delegations and violate the agencies’ authorizing statutes.” MSJ at 24. Applying Justice Jackson’s tripartite framework, Plaintiffs argue that Executive Order 13,771 falls into the third described category of Presidential actions, those which are “incompatible with the expressed or implied will of Congress” such that they can be “sustained only if permitted as an exercise of the President’s own ‘exclusive’ and ‘preclusive’ power.” MSJ at 37 (citations omitted).

To succeed on this claim, Plaintiffs must prove that in every regulatory statute delegating authority to the Executive, and in every conceivable regulatory action taken pursuant to those statutes, Congress demonstrated a clear “will” to preclude the type of considerations set forth in Executive Order 13,771. That is, Plaintiffs contend that for every rulemaking statute, not only does the Executive Order “lack[] express authorization but conflicts directly with Congress’s exercise of its legislative powers” *Id.* at 24. To this end, Plaintiffs pluck two statutes from the sea of agency regulatory authority, the Motor Vehicle Safety Act and the Occupational Safety and Health Act, to argue that because these statutes address the consideration of cost,

Congress was not “quiescent” or “indifferen[t]” to the role of cost in rulemakings under these statutes, and therefore the Executive Order violates the separation of powers. *Id.* at 28-29.

Plaintiffs conclude with the remarkable assertion that “[t]hese examples are representative of regulatory statutes as a whole” in an apparent attempt to extrapolate from these two examples to encompass the entirety of the regulatory state. *Id.* at 30.

Regardless of Plaintiffs’ claims as to their two cited statutory examples, Plaintiffs themselves concede that Congress has repeatedly empowered agencies to consider a wide range of factors that may not be explicitly prescribed in statute. As Plaintiffs recognize in their Motion for Summary Judgment, even when Congress does not expressly authorize the consideration of a particular factor, such as costs, many “statutes . . . impliedly allow consideration of the costs of a proposed rule” *Id.* at 8. Indeed, the D.C. Circuit has consistently stated its “usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute.” *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623–24 (D.C. Cir. 1998); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009); *Nat’l Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007); *Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (“Since we cannot discern clear congressional intent to preclude consideration of cost and technological feasibility . . . we necessarily find that the Administrator may consider these factors.”); *Int’l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1529 (D.C. Cir. 1984). Furthermore, as to the consideration of cost specifically, the Supreme Court recently held that the EPA acted unreasonably in ignoring cost in its decision to regulate power plants even though this factor was never explicitly mentioned in the relevant statutory text. *See Michigan v. EPA*, 135 S. Ct. 2699 (2015). Finally, it is simply untenable to conclude that agencies can only consider factors

expressly identified by statute because many grants of rulemaking power to agencies are not constrained by the consideration of specific factors. As just one example, the Family and Medical Leave Act states only that the Secretary of Labor “shall prescribe such regulations as are necessary to carry out” the Act. 29 U.S.C. § 2654.¹⁵ Certainly this statute does not prohibit the consideration of costs or offsets by the agency as outlined in Executive Order 13,771.¹⁶

Plaintiffs’ attempt to constrain the rulemaking authority of the Executive Branch and the President’s power as Chief Executive would have enormous consequences. Every President since Gerald Ford has utilized Executive Orders to manage and guide agency regulatory activities. MTD at 4-6. As noted in the Background section above, Presidents have for decades issued Executive Orders specifically to prescribe agency decision-making with regard to the weighing of costs and benefits in rulemaking. *See, e.g.*, Exec. Order No. 12,044, § 1(e); Exec. Order No. 12,291, § 2(b); Exec. Order No. 12,866, §§ 1(b)(5)-(6). In addition, Presidents have regularly issued Executive Orders requiring agencies to consider specific issues and factors that are not expressly set forth in every statute. *See, e.g.*, Exec. Order No. 13,132 (“Federalism”); Exec. Order No. 13,175 (“Consultation and Coordination with Indian Tribal Governments”);

¹⁵ It is for just this reason that courts routinely defer to agency interpretations of their statutory authority when the agency has been granted the power to issue rules and the statutory language is ambiguous. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (noting that a court “is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable”); *see also Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (noting that judicial review is unavailable where action is “committed to agency discretion by law,” including where “statutes are drawn in such broad terms that in a given case there is no law to apply”) (internal citations and quotations omitted).

¹⁶ As Plaintiffs’ own declarant recognizes, even when Congress prohibits consideration of a particular factor, such as cost, agencies can and should still comply with Presidential management directives, such as Executive Orders setting government-wide regulatory policy, to the extent permitted by law. *See Michaels Declaration*, ¶ 27 (“Thus, while OSHA estimates the costs and benefits of its proposed and final rules, these calculations do not form the basis for the Agency’s regulatory decisions.”).

Exec. Order No. 13,211 (“Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use”). Plaintiffs’ argument would similarly invalidate these orders absent express authorization by Congress to consider such factors.

B. D.C. Circuit Precedent in *Allbaugh* Forecloses Plaintiffs’ Argument

In light of the broad authority granted to the President by the Constitution to oversee the operations of the Executive Branch, and the discretion granted to agencies by various statutes, it is unclear what basis Plaintiffs have to assert that the Executive Order is in conflict with legislative will in every application. The Executive Order expressly states that it applies only “to the extent permitted by law,” and OMB has explained that “if a statute prohibits consideration of cost in taking a particular regulatory action, EO 13771 does not change the agency’s obligations under that statute. . . . Because each agency’s obligations will differ depending on the particular statutory language at issue, these issues must be addressed on a case-by-case basis.” Guidance, ¶ Q18. Consequently, if Plaintiffs are correct that there are statutes which preclude considerations contained in the Executive Order, then the Executive Order defers to such congressional command.

Plaintiffs nevertheless argue that the “extent permitted by law” language “cannot overcome the facts that [the Order] . . . direct[s] agencies to violate the law.” MSJ at 37. But the D.C. Circuit has expressly rejected that reasoning. *See Allbaugh*, 295 F.3d at 30. The district court in *Allbaugh* had found a similarly limited Executive Order unlawful and held that the Government “place[d] far too much weight on the words ‘to the extent permitted by law’ than those words can bear.” *Building & Construction Trades Dep’t v. Allbaugh*, 172 F. Supp. 2d 138, 159 (D.D.C. 2001). But the Court of Appeals held that the executive order at issue was consistent with the President’s robust authority under Article II to manage and guide the

Executive Branch. *See Allbaugh*, 295 F.3d at 30.¹⁷ As the court explained, “if an executive agency, such as the FEMA, may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law.” *Id.*¹⁸

The D.C. Circuit rejected plaintiffs’ attempt to invoke *Youngstown* as a basis for a contrary result. As the court noted, “had President Truman merely instructed the Secretary of Commerce to secure the Government’s access to steel ‘[t]o the extent permitted by law,’ *Youngstown* would have been a rather mundane dispute over whether the Secretary had statutory authority to act as he did.” *Id.* Notably, the court also rejected the plaintiffs’ attempt to go beyond the plain language of the Order based on speculation that “a particular agency may try to give effect to the Executive Order when to do so is inconsistent with the relevant funding statute.” *Id.* Instead, the court held that “[t]he mere possibility that some agency might make a legally suspect decision to award a contract or to deny funding for a project does not justify an injunction against enforcement of a policy that, so far as the present record reveals, is above suspicion in the ordinary course of administration.” *Id.*

¹⁷ Plaintiffs repeatedly cite *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979), in an apparent attempt to suggest that the President cannot issue an Executive Order that provides considerations for agencies not expressly set forth in statute. But the Supreme Court’s decision in *Chrysler* is inapposite. There the Supreme Court held that a substantive rule must be issued pursuant to a grant of legislative authority to be effective. Executive Order 13,771 does not purport to grant agencies rulemaking authority.

¹⁸ In support of their argument, Plaintiffs quote at length *Center for Science in the Public Interest v. Dep’t of the Treasury*, 573 F. Supp. 1168, 1171 (D.D.C. 1983), *vacated in part sub nom. Center for Science in the Public Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984). That decision held that Executive Order 12,291 was improperly applied in one regulatory action, but noted that plaintiffs had not brought a facial challenge, given that “[t]he Executive Order directs the departments to consider costs and benefits ‘to the extent permitted by law.’” *Id.* at 1174 n.5.

Plaintiffs mention the *Allbaugh* decision in passing but otherwise ignore this binding precedent. All Plaintiffs argue, once again, is that Executive Order 13,771 cannot be implemented “consistent with applicable law” because “no such statutes exist” where the Executive Order could legitimately apply. MSJ at 35. As noted above, Plaintiffs cannot make such a showing, and *Allbaugh* prevents Plaintiffs from broadly asserting a facial constitutional challenge to Executive Order 13,771 based on *Youngstown*.

III. Plaintiffs Cannot Show a Violation of the Take Care Clause

“The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed,’ Art. II, § 3, personally and through officers whom he appoints. . . .” *Printz v. United States*, 521 U.S. 898, 922 (1997). In conjunction with other provisions of Article II, the Take Care Clause establishes in the President the power to carry into execution the laws enacted by Congress. *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 201 (1928). It creates and vests in the President the authority to supervise officers of the Executive Branch in the performance of their duties. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495-96 (2010). And it ensures that the President is principally responsible for the actions of the Executive Branch and directly accountable to the people through the political process. *Id.*; *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988); *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring).

The grant of power to the President and its corresponding requirement of political accountability is not, however, judicially enforceable. The courts lack jurisdiction over a claim where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department” or “a lack of judicially discoverable and manageable standards for resolving it.” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S.

186, 217 (1962)); *see also Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Courts accordingly have no authority to second-guess “discretion[ary]” acts taken by the President “in the performance of his official duties.” *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part).

The Supreme Court therefore has held that “the duty of the President in the exercise of the power to see that the laws are faithfully executed” is not judicially enforceable, adding that any attempt by the judiciary to oversee the President’s Take Care authority “might be justly characterized . . . as ‘an absurd and excessive extravagance.’” *Mississippi*, 71 U.S. at 499. And the Court has repeatedly refused to second-guess the legality of the President’s discretionary decisions. *See, e.g., Dalton v. Specter*, 511 U.S. 462, 474-75 (1994); *Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948); *Mississippi*, 71 U.S. at 499.

Of course, “[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.” *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part); *see, e.g., Youngstown*, 343 U.S. 579. But the Take Care Clause, which speaks to the President alone, provides no means for courts to review the actions of subordinate Executive officials. A subordinate Executive officer cannot violate the President’s duty to faithfully execute the laws, and a court cannot direct the actions of subordinate officers on the basis of the Take Care Clause without exercising authority that the Clause commits to the President himself rather than to courts.

The few cases cited by Plaintiffs concerning the Take Care Clause provide no authority for the proposition that the Take Care Clause provides an independent cause of action against the President or the Defendant agencies. *See* MSJ at 22 (citing *Youngstown*, which rejected the use of the Take Care Clause as a justification to override statutes; an order from the Supreme Court

asking parties to brief whether the Take Care Clause had been violated; and an out-of-circuit holding which found no violation of the Take Care Clause).

However, even if Plaintiffs were somehow able to properly assert this type of claim, they would be unsuccessful. Plaintiffs concede that their Take Care claim is entirely coextensive with their general Separation of Powers claim. *See id.* (arguing that “because the Executive Order requires agencies to act contrary to statutory directives, it also violates” the Take Care Clause). Accordingly, any Take Care claim would fail for the same reasons that the Separation of Powers claim should be rejected.

IV. Plaintiffs’ Third and Fourth Causes Of Action Fail To State A Claim Because None Of The Defendant Agencies Acted *Ultra Vires*

Plaintiffs’ Motion also alleges that the regulatory agency defendants¹⁹ will act *ultra vires* if they comply with the offset requirements of Section 2 of Executive Order 13,771, MSJ at 38-39, and that OMB is acting *ultra vires* in assisting the President in implementing Executive Order 13,771, *id.* at 39. Plaintiffs’ have not carried their substantial burden of establishing any type of *ultra vires* conduct in connection with either of these causes of action. *See* MSJ at 11-12. Most critically, Plaintiffs’ Motion provides only the most cursory analysis of the requirements for *ultra vires* review and totally fails to discuss or even recognize the crucial three-part test for the application of the *ultra vires* doctrine in this Circuit. *See Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). As Plaintiffs cannot satisfy this test for either the Third or Fourth Causes of Action, the Court should deny Plaintiffs’ Motion for Summary Judgment on both claims.

¹⁹ For purposes of this section, “regulatory agency defendants” means all agency defendants other than OMB.

A. *Ultra Vires* Review is Unavailable Because Plaintiffs Have a Meaningful and Adequate Means of Challenging the Statutory Violations Alleged in their Third and Fourth Causes of Action Through the APA

It is undisputed that “federal courts *may in some circumstances* grant injunctive relief against . . . violations of federal law by federal officials.” MSJ at 11 (quoting *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015) (emphasis added)). But Plaintiffs’ Motion ignores the test in this Circuit that determines when the specific *circumstances* authorizing an *ultra vires* cause of action are present.²⁰

As the Supreme Court acknowledged in *Leedom v. Kyne*, 358 U.S. 184 (1958), courts have jurisdiction to review agency action, despite an implied provision in a statute precluding judicial review, where it is alleged that the agency acted “in excess of its delegated powers and contrary to a specific prohibition” in the statute. *Id.* at 188. But Plaintiffs’ Motion fails to recognize that this is an exceedingly narrow exception to the general principle of sovereign immunity. “The *Leedom v. Kyne* exception applies, . . . only where (i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts ‘in excess of its delegated powers and contrary to a specific prohibition in the’ statute that is ‘clear and mandatory.’” *Nyunt*, 589 F.3d at 449 (quoting *Leedom*, 358 U.S. at 188). An agency’s actions must “be ‘so extreme that one may view it as jurisdictional or nearly so.’” *Id.* (quoting *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988)). As a result, “a *Leedom v. Kyne* claim is essentially a Hail Mary pass – and in court as in football, the attempt rarely succeeds.” *Id.*

²⁰ This failure is especially telling since Defendants’ Motion to Dismiss, filed weeks ago, identified Defendants’ argument for how this Circuit’s three part test for identifying those “circumstances” applied to Plaintiffs’ claims. MTD, at 37-38 (citing *Nyunt*, 589 F.3d at 449.).

Here, of course, there is no statute that precludes judicial review, thus rendering it doubtful that the *Leedom* exception applies at all. Indeed, *Leedom* requires a plaintiff to show that “there is no alternative procedure for review of the statutory claim.” *Nyunt*, 589 F.3d at 449; *see also Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (noting that “central to our decision in *Kyne* was the fact that the Board’s interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights”). That threshold showing cannot be met here because Plaintiffs do not argue that they lack an avenue for redress against defendant agencies under the APA; to the contrary, they attempt to pursue that remedy in this very case. Am. Compl. ¶¶ 159-65. To be sure, Plaintiffs’ APA claim is premature and without merit, *see supra* Argument V., but Plaintiffs cannot assert that future agency actions taken consistent with the Executive Order will never be subject to challenge when final.

Instead of asserting that review under the APA is precluded, Plaintiffs argue that it is not an adequate remedy because Executive Order 13,771’s “requirements . . . infect the rulemaking process itself,” leading to various types of alleged injury that, according to Plaintiffs, cannot be remedied by a later APA action. MSJ at 12, n.3. But the test for *ultra vires* action does not depend on whether the remedy under the APA is adequate, but instead whether such review is impliedly precluded. The APA may or may not be “adequate” in Plaintiffs’ estimation, but that fact is a product of the conditions placed on the waiver of sovereign immunity under the APA by Congress.²¹ Indeed, under Plaintiffs’ theory, those carefully-crafted limitations, and indeed the

²¹ When appropriate, the APA provides a cause of action to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). However, an action under that provision requires the plaintiff to “identify a legally-required, discrete act that the [agency] has failed to perform.” *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009). *See also, Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004).

APA as a whole, would be rendered meaningless, because an *ultra vires* action would be available anytime anyone is aggrieved by agency action or inaction.

Plaintiffs heavily rely on *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (“*Reich II*”) for the proposition that courts can use the doctrine of non-statutory review to challenge the legality of the Executive Order. MSJ at 11. But, in finding an *ultra vires* cause of action, the court in *Reich II* relied on the fact that plaintiffs had failed to amend their complaint to include an APA claim, which placed the court in the “anomalous situation” of “not [being] able to base judicial review on what appears . . . to be an available statutory cause of action.” 74 F.3d at 1327. The Court therefore proceeded “to the issue of whether appellants are entitled to bring a non-statutory cause of action.” *Id.* As to that question, the Court held it “untenable to conclude that there are no judicially enforceable limitations on presidential actions.” *Id.* at 1332. That is, of course, not the present situation, as the government is not arguing that the Plaintiffs lack statutory remedies should an agency violate the dictates of a statute on an as-applied basis.

B. The Consideration of Costs by Regulatory Agency Defendants Is Not *Ultra Vires*

The only argument advanced in support of Plaintiffs’ Third Cause of Action, alleging that the regulatory agency defendants’ implementation of Executive Order 13,771 is *ultra vires*, is that “[b]ecause Executive Order 13771 is *ultra vires* and unconstitutional, agency action implementing the Order is as well.” MSJ at 39.²² Plaintiffs’ Motion makes no effort to explain why agency consideration of costs and priorities in taking regulatory actions could possibly

²² Plaintiffs’ citation of *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013), MSJ at 38, is misleading in this context since that case arose under the APA, not under the *Leedom* doctrine. *City of Arlington*, 133 S. Ct. at 1867.

constitute a clear, facial violation of a clear and mandatory duty so as to constitute *ultra vires* action.

Even if Plaintiffs could demonstrate that they lack a “meaningful and adequate” means of challenging the alleged statutory violations by defendant agencies, they must still demonstrate that those agencies’ actions were “plainly acts ‘in excess of its delegated powers and contrary to a specific prohibition in the’ statute that is ‘clear and mandatory.’” *Nyunt*, 589 F.3d at 449 (quoting *Leedom*, 358 U.S. at 188). As the *Griffith* Court stressed, “[g]arden-variety errors of law or fact are not enough.” 842 F.2d at 493. Instead, the error must be “so extreme . . . as [to be] jurisdictional or nearly so.” *Id.* Plaintiffs fail to satisfy this demanding standard for establishing *ultra vires* conduct by defendant agencies.

Plaintiffs’ suggestion that defendant agencies will act *ultra vires* in the future should they choose to comply with EO 13,771 by weighing the costs of existing rules against the costs of potential new rules misunderstands the statutory question and misrepresents the nature of cost considerations in drafting new regulatory actions. The inquiry in such a rulemaking would be not whether the agency’s enabling statutes or the APA “authorizes [the agency] to” consider costs or other factors in their decision-making process. Am. Compl. ¶ 147 (emphasis added). The question the agency would evaluate would be instead whether its statute prohibited it from considering such factors. *Griffith*, 842 F.2d at 493. If an agency correctly concludes that consideration is not prohibited, it certainly cannot be *ultra vires* for the agency to take costs or other factors into consideration, particularly when the consideration of such factors is directed by Executive Order.

Far from *ultra vires*, consideration of the costs of a rulemaking is frequently a relevant factor in regulatory decisions. As the Supreme Court noted recently, “[c]onsideration of cost

reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan*, 135 S. Ct. at 2707. To the extent that a statute does prohibit consideration of cost, agencies may nonetheless analyze costs for other purposes (*e.g.*, compliance with the Regulatory Flexibility Act or as a matter of policy pursuant to long-standing Executive Orders, such as Executive Order 12,866).²³ Indeed, the management of regulatory costs as a component of an agency’s overall priorities is distinct from an agency’s consideration of costs during a particular rulemaking and instead reflects the long-standing executive branch policy to prudently manage and control regulatory costs. *See* Exec. Order No. 13,563, § 1; Exec. Order No. 12,866, § 1; Exec. Order No. 12,291, § 2; Exec. Order No. 12,044, § 2(e). And, should there be a statute that prohibits an agency from considering cost for any purpose, the Executive Order by its own terms would recede pursuant to its “to the extent permitted by law” proviso.

C. OMB’s Action to Assist the President in the Implementation of Executive Order 13,771 Does Not Constitute *Ultra Vires* Action

As with their Third Cause of Action, Plaintiffs’ Fourth Cause of Action asserts that because Executive Order 13,771 is unconstitutional, actions by OMB to implement and administer the Order are therefore *ultra vires*. MSJ at 39.²⁴ OMB is certainly authorized to administer a valid Executive Order, and Plaintiffs do not even attempt to argue that OMB lacks statutory authority to carry out a Presidential directive in an Executive Order to oversee the

²³ *See, e.g.*, EPA, *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground Level Ozone*, at 1-2, July 2007 available at https://www3.epa.gov/ttnecas1/docs/ria/naaqs-o3_ria_proposal_2007-07.pdf (“This RIA is intended to inform the public about the potential costs and benefits that may result when a new ozone standard is implemented, but is not relevant to establishing the standards themselves.”).

²⁴ Plaintiffs’ MSJ conflates their *ultra vires* claim against OMB (Fourth Cause of Action) and their APA claim against OMB (Fifth Cause of Action). MSJ at 39. Defendants will address each separately. *See supra* Arguments IV.C and IV.D.

regulatory process, including the consideration of the costs of that process. OMB has broad statutory authority to assist the President in managing the Executive Branch. *See* Budget and Accounting Act of 1921, 31 U.S.C. § 1101, *et seq.*; Reorganization Plan No. 2 of 1970, Message of the President, 5 U.S.C. App., *reprinted in* 1970 U.S.C.C.A.N.6315, 6316. And, as the D.C. Circuit has recognized, OMB is permitted to assist the President in implementing Executive Orders that are issued pursuant to his constitutional authority to oversee the Executive Branch. *See Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993) (OMB’s duties “include aiding the President in managing the entire executive branch”); *Sherley*, 689 F.3d at 784 (agencies “must implement the President’s policy directives to the extent permitted by law”).

Indeed, for decades OMB has overseen the rulemaking of federal agencies on behalf of the President, coordinating review of agencies’ significant regulatory actions with other federal agencies, non-governmental stakeholders, and the public. *See, e.g.*, Exec. Order No. 12,866, § 6(a)(3)(B), 6(b); *see also, e.g.*, OMB Circular A-4 (providing guidance to agencies on “key concepts needed to estimate benefits and costs” in making regulatory decisions). And those types of actions have been recognized to be within the scope of OMB’s authority. *Swann v. Walters*, 620 F. Supp. 741, 744 (D.D.C. 1984); *see also New York v. Shalala*, 959 F. Supp. 614, 618 (S.D.N.Y. 1997) (OMB Circular A-87, which sets forth cost principles for federal grants to State and local governments, is within OMB’s “management and budgetary role.”); *Dep’t of HHS v. FLRA*, 844 F.2d 1087, 1096 (4th Cir. 1988) (OMB Circular A-76 was properly “issued pursuant to the executive branch’s budget and management authority.”).

V. Plaintiffs Have Failed to State a Cause of Action Under the APA

In Plaintiffs’ Fifth Cause of Action they claim that OMB’s Guidance on the operation of Executive Order 13,771 is arbitrary and capricious agency action in excess of statutory authority,

5 U.S.C. § 706(2)(A), (C), and hence unlawful under the APA. Am. Compl. ¶ 162. This claim fails for two independent reasons.

A. OMB’s Guidance Does Not Constitute Final Agency Action

Plaintiffs’ Motion acknowledges the two-part test for final agency action established by *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), MSJ at 40, but fails to make any attempt to explain how the Guidance determines any person’s legal rights or obligations. Consequently, Plaintiffs’ APA claim fails at the outset, because guidance from OMB to Executive Branch agencies regarding Executive Order 13,771 does not constitute final agency action reviewable under the APA, 5 U.S.C. § 704.

An agency action is considered final for purposes of APA review only if two elements are met. First, the action must “mark the ‘consummation’ of the agency’s decisionmaking process” and, thus, cannot be tentative or interlocutory, and second, “the action must be one by which ‘rights or obligations have been determined,’” or from which “legal consequences will flow.” *Spear*, 520 U.S. at 177-78 (citations omitted). Plaintiffs’ APA challenge to the Guidance fails at the second step of the test for final agency action, in that it does not decide any “rights or obligations” or impose “legal consequences” on the regulated public. *Spear*, 520 U.S. at 177-78; *see FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980) (agency issuance of complaint, which triggered further administrative proceedings, was not itself final agency action; judicial review of such a preliminary step would “lead[] to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary”).

The Guidance provides information to agencies regarding how OMB intends to exercise its discretion in reviewing agency regulatory actions under Executive Order 13,771. As such, it does not directly seek to regulate any party outside of the Government. The Guidance is

therefore one step removed from any possible final agency action that may affect rights and obligations and will therefore only be relevant when it is relied upon by an agency that seeks to regulate a private entity.

Indeed, the failure of the Guidance to determine rights and obligations of the public is emphasized by its language. For example, it repeatedly answers questions beginning with the caveat that the response will apply “in general,” or “generally.” Guidance, ¶¶ Q10, Q15, Q18, Q19, Q21. In other areas, the Guidance states that particular questions and matters will “be addressed on a case-by-case basis,” *id.*, ¶¶ Q16, Q19, Q28, or advises agencies to confer with OIRA, *id.*, ¶¶ Q4, Q6, Q14, Q17, Q21, Q33. Finally, the Guidance states that OIRA may grant a “full or partial exemption from EO 13771’s requirements” in several categories of cases, including in cases addressing “critical health, safety, financial, non-exempt national security matters, or for some other compelling reason.” *Id.*, ¶ Q33. *See Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 24 (D.C. Cir. 2009) (document announcing a rebuttable presumption preserves the agency’s discretion and hence does not constitute a legislative rule).

Plaintiffs make no effort to address the second prong of *Bennett*. *See Spear*, 520 U.S. at 177-78 (citations omitted). Plaintiffs’ allegations that “agencies are complying with” and implementing the Executive Order, MSJ at 42, are wholly insufficient to satisfy this mandatory element. OMB’s Guidance does not dictate the outcome of any specific regulatory actions. Agency regulatory (or deregulatory) actions are the product of many factors, including the scope of the agency’s statutory authority, the information available to the agency through public proceedings or otherwise, the agency’s established policies and legal interpretations, as well as guidance and suggestions received from OMB or other components of the Executive Branch. For these reasons, Plaintiffs could not articulate any possible way that the Guidance, standing

alone, determines legal rights or obligations. *See, e.g., Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (explaining that “the agency has not yet made any determination or issued any order imposing any obligation *on Reliable*, denying any right *of Reliable*, or fixing any legal relationship.”) (emphasis added); *Vill. of Bald Head Island v. Army Corps of Eng'rs*, 714 F.3d 186, 195 (4th Cir. 2013) (“project implementation” is not final agency action); *Nat'l Wildlife Fed'n v. EPA*, 945 F. Supp. 2d 39, 46 (D.D.C. 2013) (practical consequences of preliminary agency action are not legally binding).²⁵

B. Even if Reviewable, OMB's Guidance Is Not Arbitrary or Capricious or in Excess of Statutory Authority

Under the “arbitrary and capricious” standard as applied in the typical APA action, the reviewing court should reverse agency action only “if the agency has relied on factors which Congress has not intended it to consider, [has] entirely failed to consider an important aspect of the problem, [or has] offered an explanation for [that] decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Review under the arbitrary and capricious standard is searching and careful, but narrow. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). “The ‘arbitrary and capricious’ standard deems the agency action presumptively valid provided the action meets a

²⁵ Even if the Court were to conclude that the Guidance was final agency action, Plaintiffs would not have standing to challenge it outside of the context of its application in a concrete agency action. An order invalidating the Guidance will not provide Plaintiffs with redress for their alleged harms since, even without the benefit of the Guidance, agencies would still comply with the directives of the Executive Order in implementing regulatory actions. Thus, an order invalidating the Guidance is a classic instance of “[r]elief that does not remedy the injury,” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), and hence Plaintiffs would lack standing to pursue their Fifth Cause of Action.

minimum rationality standard.” *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004) (citation omitted). OMB’s Guidance easily satisfies this deferential standard.²⁶

Executive Order 13,771 provides an institutional mechanism to incentivize agencies to identify and remove unnecessary, ineffective or outdated regulatory requirements within the existing framework of Executive Order 12,866, the primary guide to regulatory review and planning. Exec. Order No. 13,771 establishes “the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources.” Exec. Order No. 13,771, § 1. To achieve that goal, Executive Order 13,771, in conjunction with Executive Order 12,866, requires agencies to take a holistic approach to regulatory activities looking not just at particular new rules or other regulatory initiatives, but rather to the entire range of existing and planned agency activities to evaluate overall impact on the economy, and particular segments of the economy.

The Guidance promotes the implementation of Executive Order 13,771 in the most economically-efficient manner by providing general direction on questions such as how to measure and account for the benefits and costs of various regulatory action. *E.g.* Guidance, ¶¶ Q21, Q24, Q25. But it also encourages agency flexibility in the implementation of the Executive Order by, *inter alia*, repeatedly recognizing the need for a “case-by-case” application, *id.*, ¶¶ Q16, Q19, Q28, and frequently noting that it only provides “general” advice, *id.*, ¶¶ Q10, Q15,

²⁶ Moreover, courts have consistently recognized that an agency has “broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities,” *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). That discretion certainly applies to agency decisions, as guided by OMB, to holistically balance all of its existing regulatory activities and its proposed regulatory actions. An “agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way.” *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). *See also*, *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014); *Env’tl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 47 (D.D.C. 2015).

Q18, subject always to OMB review to ensure consistent application across the government. In particular, the Guidance includes a procedure for agencies to seek a full or partial exemption from the requirements of Executive Order 13,771 in a wide variety of circumstances. Guidance, ¶ Q33 (criteria for exemption include where “statutorily or judicially required,” where necessary to address “emergencies such as critical health, safety, financial, non-exempt national security matters, or for some other compelling reason”). Thus, the exemption procedure will promote the economically efficient implementation of the Executive Order.²⁷

Plaintiffs’ APA challenge to OMB’s Guidance is based on three misunderstandings about the operation of Executive Order 13,771. First, contrary to Plaintiffs’ assertion, MSJ at 42, OMB’s Guidance explains that Executive Order 12,866 remains in effect and will operate in tandem with Executive Order 13,771. *See* Guidance, ¶ Q32 (Executive Order 12,866 “remains the primary governing EO regarding regulatory review and planning.”). Consequently, all significant regulatory and deregulatory actions taken pursuant to Executive Order 13,771 must adhere to the cost-benefit provisions of Executive Order 12,866, including those in section 1(b). Second, Plaintiffs incorrectly assert that the Order, as implemented by OMB, directs regulators to “disregard . . . the statutory criteria that govern agency rulemaking.” MSJ at 42. To the contrary, the Order states, no less than eight times, that its requirements apply “unless prohibited by law.” *See* Argument II.A, *supra*. Third, Plaintiffs’ repeated assertion that only the “repeal”

²⁷ The presence of a flexible procedure for providing exemptions from the offset requirements of the Executive Order strongly reinforces its reasonableness. The D.C. Circuit has recognized that “[t]he agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). “[P]rovision for waiver may have a pivotal importance in sustaining the system of administration by general rule.” *Id.* at 1158. *See also KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1200 (D.C. Cir. 1983) (Scalia, J., dissenting) (“a rule *which otherwise might be impermissibly broad* can be saved by the ‘safety valve’ of a waiver or exemption procedures” (emphasis in original)).”).

of a rule (and hence the presumed loss of significant benefits) can satisfy the offset requirements of section 2 of Executive Order 13,771 is incorrect. MSJ at 3, 42. OMB's Guidance provides agencies with a range of options in identifying acceptable offsets. *See* Guidance, ¶ Q4 (defining "deregulatory action" to include modification of guidance documents, information collection requests and other actions, including action to "revise" as well as "repeal" regulations).²⁸

Plaintiffs' specific arguments in opposition to OMB's Guidance, MSJ at 42-44, fail to articulate any fundamental critique of the Guidance – other than the argument that Executive Order 13,771 is unconstitutional and hence any guidance implementing the Order is invalid. Instead of an assertion that the Guidance does not properly implement the Executive Order, or does not "consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, Plaintiffs' Motion merely tosses out a handful of unrelated complaints about the Guidance, none of which, either alone or in conjunction, is sufficient to demonstrate arbitrary and capricious agency action. MSJ at 42 – 44.

First, Plaintiffs argue that, in the absence of specific statutory authorization to offset costs of new regulatory actions against deregulatory actions, the offset requirements of the Executive Order require agencies to make regulatory decisions based on a factor (the need for offsets) that Congress did not intend agencies to consider. MSJ at 41-42, 32 (quoting *State Farm*, 463 U.S. at 43). But, this Circuit has consistently recognized that there is no such blanket rule against agencies considering factors not enumerated in statute when making regulatory decisions. *See*

²⁸ The declarations of former agency officials submitted with Plaintiffs' Motion for Summary Judgment (ECF 16-14 through 16-18) consist largely of improper speculation and legal conclusions about the operation of Executive Order 13,771 that should not be considered by the Court. *See, e.g., Austin Inv. Fund, LLC v. United States*, No. 11-2300, 2015 WL 7303514, *10 (D.D.C. Nov. 19, 2015) (precluding reliance on declaration in summary judgment where "the declaration primarily consists of legal argument and legal conclusions, which are outside of the scope of even expert testimony").

Vill. of Palestine v. ICC, 936 F.2d 1335, 1344 (D.C. Cir. 1991) (“it would be astonishingly inappropriate for us to say or even imply that the Commission could not have considered other factors if it wished”); *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 78 (D.C. Cir. 2000) (“Nothing in section 183(e) suggests that Congress intended to limit EPA’s consideration to the five factors specified in the statute’). *See also* Argument § II.1, *supra*.

In *Sherley v. Sebelius*, 689 F.3d 776, the Court of Appeals considered and rejected a nearly identical challenge to agency compliance with the directives of an Executive Order. Plaintiffs objected to an Order that authorized embryonic stem cell (“ESC”) research and submitted comments on proposed regulations recommending that HHS ignore the President’s Order and instead ban all ESC research. When HHS rejected those comments, which were “diametrically opposed” to the direction of the Order, *id.* at 784, plaintiffs challenged that action, alleging that the failure to adopt their comments constituted the failure to consider a relevant factor. *Id.* The Court of Appeals summarily rejected that argument, noting that Executive Branch agencies “must implement the President’s policy directives to the extent permitted by law,” *id.*, and the failure to do so “did not demonstrate a failure to consider relevant factors,” *id.* at 785.

Second, Plaintiffs object to the trading of offsets, both within agencies and between agencies, without specific statutory authorization. *See* MSJ at 42 (“Unrelated costs (and public protections), potentially borne by unrelated industries (and segments of the public) may be traded off for one another.”). But, as noted previously, there is no need for specific statutory *authorization*, and Plaintiffs offer no other reason for why the option to authorize, but not require the trading of regulatory cost reductions to focus agencies on the most easily-achievable cost

savings, could possibly be arbitrary or capricious.²⁹ *See, e.g., Allied Local & Reg'l*, 215 F.3d at 78 (agency exercises “regulatory common sense” to focus rulemaking on matters that are most easily and efficiently addressed). By permitting additional flexibility in the allocation of offsets, the Guidance will ultimately promote economic efficiency and the maximization of net benefits across many regulatory programs, precisely the outcome Plaintiffs favor.

Finally, in the absence of any viable legal argument, Plaintiffs fall back on policy arguments touting the benefits of regulation. MSJ at 43-44. But Executive Order 13,771 and OMB’s Guidance continue to adhere to the cost-benefit provisions of Executive Order 12,866 that help ensure that benefits will continue to justify the costs of future regulatory actions, including deregulatory actions. The fact that benefits often outweigh costs does not mean that it is impossible to identify outdated and unnecessary regulatory requirements, or requirements that impose costs in excess of benefits resulting in significant net burdens and harms on the public. Brief for *Chamber of Commerce, et al. as Amicus Curiae*, ECF No. 37. In any event, it cannot be deemed arbitrary or capricious for OMB to adopt guidance to implement the policy adopted by the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)); Argument § II.A, *supra*.³⁰

²⁹ Alternatively, agencies can “bank” deregulatory actions and the associated cost savings for use as an offset against future regulatory actions. *See* Guidance, ¶ Q29.

³⁰ Finally, the Court cannot grant Plaintiffs’ Motion for Summary Judgment in the absence of the administrative record of OMB’s Guidance, which is not before the Court. In an APA action, courts evaluate agency action upon “the whole record or those parts of it cited by a party,” 5 U.S.C. § 706. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (Judicial review is based upon the “full administrative record that was before [the agency] at the time [it] made [its] decision.”).

Executive Order 13,771 adopts a reasonable approach, based on similar efforts in prior administrations, to encourage agencies to identify and remove unnecessary requirements while still protecting the benefits of sensible regulation.³¹ Consequently, Plaintiffs have not carried their heavy burden to demonstrate that any portion of the OMB Guidance is arbitrary, capricious, or an abuse of discretion.

CONCLUSION

The Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion to Dismiss.

DATED: June 26, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

CHANNING D. PHILLIPS
United States Attorney

BRETT A. SHUMATE
Deputy Assistant Attorney General
Civil Division

ERIC R. WOMACK
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/ Michael Drezner
DANIEL BENSING (D.C. Bar No. 334268)
MICHAEL DREZNER (VA Bar No. 83836)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW

³¹ Over the past thirty years, regulatory policy executive orders have consistently directed agencies to review existing regulatory requirements to identify outdated or unnecessary rules. *See* Exec. Order No. 12,044, § 4; Exec. Order No. 12,291, § 3(i); Exec. Order No. 12,866, § 5.

Washington, DC 20530
Telephone: (202) 514-4505
Email: Michael.L.Drezner@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United
States, *et al.*,

Defendants.

Case No. 1:17-cv-00253 (RDM)

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
STATEMENT OF MATERIAL FACTS IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

Defendants object to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ("Statement"), filed in support of its Motion for Summary Judgment (ECF No. 16) to the extent that it fails to identify "facts" that are "material" to their motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining that a fact is "material" only if it "might affect the outcome of the suit under the governing law"). Rather than providing material facts, Plaintiffs offer, in part, general background information. Defendants further object to Plaintiffs' Statement of Material Facts to the extent that the assertions do not constitute facts at all, but rather argument, speculation, characterizations, or conclusions of law, and are immaterial, or irrelevant, and accordingly are disputed.

Indeed, much of Plaintiffs' statements constitute speculation about potential future events or impacts of possible actions that lack any evidentiary foundation. *See Fed. R. Evid. 602.* Defendants object to these statements based on the lack of foundation and the lack of materiality, as such statements cannot provide a legal basis for standing. *Turlock Irrigation Dist. v. FERC*,

786 F.3d 18, 25 (D.C. Cir. 2015). Moreover, because Plaintiffs have moved for summary judgment at the outset of the case, prior to any discovery on jurisdictional questions, Defendants have not had any opportunity to question the factual basis for such statements, should this Court deem them material. *See* Declaration of Daniel Bensing, attached hereto.

Subject to those objections, pursuant to Rule 7(h)(1) of the Rules of the United States District Court for the District of Columbia, Defendants, by undersigned counsel, respectfully submit the following response to Plaintiffs' Statement.

1. On January 30, 2017, President Trump signed Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs." 82 Fed. Reg. 9339 (2017).

Response: Undisputed.

2. Executive Order 13771 directs that, "[u]nless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." Executive Order 13771, Sec. 2(a).

Response: This paragraph constitutes a characterization of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order 13,771 for a complete and accurate statement of its contents.

3. Executive Order 13771 directs that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." *Id.* Sec. 2(c).

Response: This paragraph constitutes a characterization of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order

13,771 for a complete and accurate statement of its contents.

4. Executive Order 13771 directs that, for the current fiscal year, “the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of [OMB].” *Id.* Sec. 2(b).

Response: This paragraph constitutes a characterization of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order 13,771 for a complete and accurate statement of its contents.

5. Executive Order 13771 directs that, for fiscal year 2018 and subsequent years, “the head of each agency shall identify, for each regulation that increases incremental cost,” the required offsetting regulations and “provide the agency’s best approximation of the total costs or savings associated with each new regulation or repealed regulation.” *Id.* Sec. 3(a).

Response: This paragraph constitutes a characterization of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order 13,771 for a complete and accurate statement of its contents.

6. Executive Order 13771 directs that, “[d]uring the Presidential budget process, the Director [of OMB] shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency’s total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.” *Id.* Sec. 3(d).

Response: This paragraph constitutes a characterization of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order 13,771 for a complete and accurate statement of its contents.

7. On February 2, 2017, OMB issued “Interim Guidance Implementing Section 2 of the Executive Order,” which addresses regulations to be issued in fiscal year 2017. *See* <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> (hereafter Interim Guidance).

Response: It is undisputed that OMB issued the referenced guidance on February 2, 2017. The remainder of this paragraph constitutes a characterization of the Office of Management and Budget’s Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB’s Interim Guidance for a complete and accurate statement of its contents.

8. The OMB Interim Guidance states that the Executive Order applies “only to those significant regulatory actions,” as defined in Executive Order 12866, issued after noon on January 20, 2017, including final regulations for which a proposed rule was issued before that date. Interim Guidance at 2.

Response: This paragraph constitutes a characterization of the Office of Management and Budget’s Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB’s Interim Guidance for a complete and accurate statement of its contents.

9. Executive Order 12866 defines “significant regulatory actions” to mean, among other things, regulatory actions that have an annual effect on the economy of \$100 million or

more or adversely affect in a material way the economy, jobs, the environment, public health or safety, or State, local, or tribal governments or communities, or that raise novel legal or policy issues. 58 Fed. Reg. 51735 (1993).

Response: This paragraph constitutes a characterization of Executive Order 12,866, rather than a statement of material fact. Defendants respectfully refer the Court to the text of Executive Order 12,866 for a complete and accurate statement of its contents.

10. The OMB Interim Guidance states that “[p]urely deregulatory actions that confer only savings to all affected parties generally will not trigger” the Executive Order’s requirement that the agency identify two existing rules for repeal, but that “if such deregulatory actions impose costs on individuals or entities, agencies will need to offset those costs.” Interim Guidance at 4.

Response: This paragraph constitutes a characterization of the Office of Management and Budget’s Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB’s Interim Guidance for a complete and accurate statement of its contents.

11. The Interim Guidance does not allow an agency to treat consumer cost savings or other benefits of new or repealed rules as offsets to costs incurred by regulated entities. *Id.* at 4.

Response: This paragraph constitutes a characterization of the Office of Management and Budget’s Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB’s Interim Guidance for a complete and accurate statement of its contents.

12. The Interim Guidance states that agencies cannot base the estimated cost savings

of repealing an existing rule on the regulatory impact analysis produced when the rule was issued; instead, the agencies must undertake new cost analyses for each existing rule considered for elimination. *Id.* at 4.

Response: This paragraph constitutes a characterization of the Office of Management and Budget's Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB's Interim Guidance for a complete and accurate statement of its contents.

13. The Interim Guidance states that, in calculating the cost savings from eliminating existing rules, agencies should not count the "sunk" (or already incurred) costs of repealed rules, but must instead count only those costs that would be incurred after the effective date of the repeal. *Id.* at 5.

Response: This paragraph constitutes a characterization of the Office of Management and Budget's Interim Guidance Implementing Section 2 of Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB's Interim Guidance for a complete and accurate statement of its contents.

14. On April 5, 2017, OMB issued "Guidance Implementing Section 2 of Executive Order 13771," which "supplements" the Interim Guidance. *See* <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation> (hereafter Guidance).

Response: It is undisputed that OMB issued the referenced guidance on April 5, 2017. The remainder of this paragraph constitutes a characterization of OMB's April 5, 2017 Guidance Implementing Executive Order 13,771, rather than a statement of material fact. Defendants

respectfully refer the Court to the text of OMB's April Guidance for a complete and accurate statement of its contents.

15. The Guidance reiterates the points of the Interim Guidance set forth in paragraphs 10-13, above, and provides additional information about requirements for complying with Executive Order 13771. *See* Guidance at 1, Q2, Q3, Q21, Q30.

Response: This paragraph constitutes a characterization of OMB's April 5, 2017 Guidance Implementing Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB's April Guidance for a complete and accurate statement of its contents.

16. The Guidance confirms that the Executive Order generally requires agencies to "comply with [its] requirements by issuing two EO 13771 deregulatory actions ... for each EO 13371 regulatory action," and that "[t]he incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions." *Id.* at 2.

Response: This paragraph constitutes a characterization of OMB's April 5, 2017 Guidance Implementing Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB's April Guidance for a complete and accurate statement of its contents.

17. The Guidance provides that even when "a statute prohibits consideration of cost in taking a particular regulatory action," an agency will "be required to offset the costs of such regulatory actions through other deregulatory actions." *Id.* at Q18.

Response: This paragraph constitutes a characterization of OMB's April 5, 2017 Guidance Implementing Executive Order 13,771, rather than a statement of material fact. Defendants

respectfully refer the Court to the text of OMB's April Guidance for a complete and accurate statement of its contents.

18. The Guidance requires agencies not to count benefits of regulatory actions, or the loss of benefits from deregulatory actions, as offsets to the costs of new rules. *Id.* at Q21.

Response: This paragraph constitutes a characterization of OMB's April 5, 2017 Guidance Implementing Executive Order 13,771, rather than a statement of material fact. Defendants respectfully refer the Court to the text of OMB's April Guidance for a complete and accurate statement of its contents.

19. Executive Order 13771 and OMB's Interim Guidance and Guidance (collectively, OMB Guidances) adversely affect plaintiffs' ability to advocate on behalf of their members by forcing plaintiffs to make an untenable choice between urging agencies to adopt new regulations, which would trigger the requirement to repeal existing regulatory safeguards, or refraining from advocating for new public protections to avoid triggering the need to repeal existing ones. LeGrande Decl. ¶ 15, 17; R. Weissman Decl. ¶ 8, 10; Wetzler Decl. ¶ 11.

Response: The allegations in this paragraph are immaterial to any issue before the Court. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

20. Executive Order 13771 and the OMB Guidances will delay, deter, or weaken new rules protecting public health and safety, workers, and the environment, to the detriment of plaintiffs and their members. *See* LeGrande Decl. ¶ 18; R. Weissman Decl. ¶ 18; Wetzler Decl. ¶¶ 11–12; Jones Decl. ¶ 16; Michaels Decl. ¶¶ 36, 39; Reicher Decl. ¶¶ 14, 18.

Response: This paragraph constitutes speculation about future events without sufficient evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed.

See Declaration of Daniel Bensing.

21. Public Citizen, Inc., is a national, non-profit consumer advocacy organization with members and supporters nationwide. R. Weissman Decl. ¶ 2.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

22. Public Citizen engages in research, advocacy, media activity, and litigation related to advancing health and safety, consumer protection, and the environment. R. Weissman Decl. ¶ 3.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

23. Public Citizens' members are the beneficiaries of consumer protection, public health, environmental, and other statutes that Congress enacted to serve the public interest and protect the public. R. Weissman Decl. ¶ 4.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

24. On behalf of its members, and in furtherance of its mission and the interests of its members, Public Citizen submits citizen petitions requesting that federal agencies issue rules to improve health, safety, and other consumer protections, comments on proposed regulations issued by federal agencies, publishes reports, and writes op-eds in furtherance of its members' interests in health and safety, consumer protection, and environmental regulation. R. Weissman Decl. ¶¶ 5–7.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

Defendants further lack information as to the truth or falsity of this paragraph.

25. Public Citizen is currently developing citizen petitions for rulemaking and comments on agency rulemakings, and wishes to continue to engage in such advocacy unburdened by the threat that issuance of a new rule requires offsetting deregulatory action. R. Weissman Decl. ¶¶ 7–8.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

26. Public Citizen’s members rely on Public Citizen to represent their interests with respect to product safety, in particular auto, drug, and medical device safety, as well as worker protections, clean energy, and climate issues. Fleming Decl. ¶ 2; So Decl. ¶ 2; Soverow Decl. ¶ 2; T. Weissman Decl. ¶ 3; R. Weissman Decl. ¶¶ 4, 9.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

27. Public Citizen has members who count on Public Citizen to monitor federal agencies’ proposed regulations on their behalf and to submit comments on regulatory proposals or take other action representing their interests with respect to health and safety regulation. Fleming Decl. ¶ 2; So Decl. ¶ 2; Soverow Decl. ¶ 2; T. Weissman Decl. ¶ 3; R. Weissman Decl. ¶ 4.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

28. Natural Resources Defense Council, Inc. (NRDC) is a non-profit advocacy organization with hundreds of thousands of members throughout the United States. Wetzler

Decl. ¶¶ 4, 6.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

29. NRDC's work encompasses efforts to implement and enforce a wide range of health and environmental statutes, including, among others, the Clean Air Act; Clean Water Act; Endangered Species Act; Energy Policy and Conservation Act; Food, Drug, and Cosmetic Act; Federal Insecticide, Fungicide, and Rodenticides Act; Federal Land, Policy, and Management Act; Food Quality Protection Act; Marine Mammal Protection Act; National Environmental Protection Act; Resource Conservation and Recovery Act; Reclamation Act; Safe Drinking Water Act; and Toxic Substances Control Act. Wetzler Decl. ¶ 7.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

30. NRDC advocates for new and improved environmental protections and in opposition to efforts to weaken such protections, including through citizen petitions, regulatory comments, and litigation. Wetzler Decl. ¶¶ 7–9.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

31. NRDC has submitted citizen petitions requesting new rules and comments in support of strong agency rules to protect health and the environment under such federal statutes as the Federal Insecticide, Fungicide, and Fungicide Act; Toxic Substances Control Act; Clean Water Act; Safe Drinking Water Act; Clean Air Act; Resources Conservation and Recovery Act; Endangered Species Act; Food, Drug, and Cosmetic Act; and Surface Mining and Reclamation

Act. Wetzler Decl. ¶¶ 8–10.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

32. NRDC's members rely on NRDC to represent their interests in advocating for health and environmental protections. Wetzler Decl. ¶ 6; Coward Decl. ¶¶ 1, 6, 11; Winegrad Decl. ¶¶ 1, 7.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

33. NRDC is currently developing citizen petitions for rulemaking and comments on agency rulemakings, and wishes to continue to engage in such advocacy unburdened by the threat that issuance of a new rule requires offsetting deregulatory action. Wetzler Decl. ¶ 10.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

34. Communications Workers of America (CWA) is an international labor union representing 700,000 workers in the telecommunications, media, manufacturing, airline, and health care industries and in a wide variety of public sector positions in the United States, Canada, and Puerto Rico. LeGrande Decl. ¶ 2.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

35. CWA works to advance workers' interests by advocating for the enactment of laws beneficial to workers and engaging in the federal agency rulemaking process to advocate for rules that improve workers' wages, hours, and working conditions. LeGrande Decl. ¶¶ 3–5, 7.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

36. Members of CWA rely on CWA to represent their interests in workplace rights and protections, including by monitoring agencies' proposed regulations that may affect members' safety and health at work and by engaging in the rulemaking process on behalf of their members. Abbott Decl. ¶ 3; Bauer Decl. ¶ 3; LeGrande Decl. ¶¶ 3, 6.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

37. Executive Order 13771 and the OMB Guidances adversely affect CWA's ability to advocate on its members' behalf by forcing CWA to choose between advocating for new regulations at the cost of losing other beneficial regulations, and refraining from advocating for necessary new workplace protections. LeGrande Decl. ¶¶ 15, 17.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

38. Conditioning issuance by the Occupational Health and Safety Administration (OSHA) of a new workplace health or safety standard on repeal of two or more existing rules to offset costs will force delays that will impede OSHA from fulfilling the task assigned to it by Congress. Michaels Decl. ¶ 36.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

39. Executive Order 13771 and the OMB Guidances will prevent, delay, or weaken a new OSHA standard for workplace exposure to infectious diseases. LeGrande Decl. ¶ 18; R. Weissman Decl. ¶ 18; Michaels Decl. ¶¶ 36, 39.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

40. By preventing, delaying, or weakening a new OSHA standard for workplace exposure to infectious diseases, Executive Order 13771 and the OMB Guidances will negatively impact the ability of healthcare workers to avoid such exposure and, as a result, they will face a higher risk of contracting an infectious disease than if OSHA were not required to repeal two rules as a condition of issuing one new one. Abbott Decl. ¶ 7; LeGrande Decl. ¶¶ 13-14; Soverow Decl. ¶ 5.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

41. The proposed regulation of the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA) requiring certain vehicles, including school buses, to be equipped with speed limiting devices would directly benefit Public Citizen members whose children bus to school by ensuring that their commutes to and from school are at safe speeds. Fleming Decl. ¶ 4; R. Weissman ¶ 14.

Response: To the extent this paragraph characterizes the proposed regulation of NHTSA and FMCSA, Defendants respectfully refer the Court to the text of 81 Fed. Reg. 61,942 (Sept. 7, 2016)

for a complete and accurate statement of its contents. Defendants lack knowledge or information as to the truth or falsity of the remainder. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

42. Executive Order 13771 and the OMB Guidances are likely to decrease motor vehicle safety by causing NHTSA and FMCSA to delay, weaken, or forgo the speed-limiting-device regulation and, if they finalize it, by causing the Department of Transportation to repeal two existing safety regulations to offset the regulatory costs. R. Weissman ¶ 14.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

43. NHTSA has stated that vehicle-to-vehicle (V2V) technology will prevent car accidents and save lives and that, without a federal standard, manufacturers will not install this technology in many cars for many years, if ever. 82 Fed. Reg. 3854, 3855 (2017).

Response: This paragraph constitutes a characterization of a Proposed Rulemaking by the National Highway Traffic Safety Administration (NHTSA) and Department of Transportation (DOT), rather than a statement of material fact. Defendants respectfully refer the Court to the text of 82 Fed. Reg. 3,854 (Jan. 12, 2017) for a complete and accurate statement of its contents.

44. Executive Order 13771 and the OMB Guidances will negatively affect the ability of Public Citizen members to purchase a new car with V2V technology by causing NHTSA to delay, weaken, or forgo a new automobile safety standard addressing V2V technology. Fleming Decl. ¶ 3; R. Weissman Decl. ¶ 16; T. Weissman Decl. ¶ 4; D. Friedman, *Two for One: A Very Bad Deal for Our Nation*, Appendix 4–5, Union of Concerned Scientists Blog, Apr. 10, 2017, at

<http://blog.ucsusa.org/guest-commentary/two-for-one-a-very-bad-deal-for-our-nation>.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

45. The Department of Transportation has indicated that Executive Order 13771 is affecting the timing of ongoing rulemakings. Dep't of Transp., Report on DOT Significant Rulemakings, <https://www.transportation.gov/regulations/report-on-significant-rulemakings> (visited Mar. 23, 2017).

Response: This paragraph constitutes a characterization of a Report on DOT Signification Rulemakings by the Department of Transportation, rather than a statement of material fact. Defendants respectfully refer the Court to the report for a complete and accurate statement of its contents. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

46. In January 2017, the Environmental Protection Agency (EPA) proposed a rule to regulate certain toxic chemicals in paint removers by either prohibiting those chemicals for consumer paint removal or imposing a series of restrictions, such as limitations on the amount of the substances in paint removal products and a requirement of warning labels for consumers. 82 Fed. Reg. 7464 (2017).

Response: This paragraph constitutes a characterization of a Proposed Rule by the EPA, rather than a statement of material fact. Defendants respectfully refer the Court to the text of 82 Fed. Reg. 7,464 (Jan. 19, 2017) for a complete and accurate statement of its contents. Defendants lack knowledge or information as to the truth or falsity of the remainder. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

47. Public Citizen members would directly benefit from the proposed EPA rule on certain toxic chemicals in paint removers by helping them to avoid exposure to dangerous chemicals. Fleming Decl. ¶ 6.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. Defendants lack knowledge or information as to the truth or falsity of this paragraph. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

48. Because Executive Order 13771 and the OMB Guidances will likely force the EPA to delay, weaken, or forgo the new rule on certain toxic chemicals in paint removers, Public Citizen members are likely to lose the protections proposed or have them delayed, and be subjected to a higher risk of harm than if the EPA were not required to repeal two rules as a condition of issuing one new standard. Fleming Decl. ¶ 6.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

49. In December 2016 and January 2017, EPA proposed two rules that would phase out certain uses of trichloroethylene (TCE) when it is used as an aerosol or vapor degreaser and a spot removal agent in dry cleaning, and in January 2017, EPA proposed a rule to regulate methylene chloride and N-Methylpyrrolidone (NMP) in consumer and most commercial paint removers. 81 Fed. Reg. 91592 (2016); 82 Fed. Reg. 7432 (2017); 82 Fed. Reg. 7464 (2017).

Response: This paragraph constitutes a characterization of Proposed Rules by the Environmental Protection Agency (EPA), rather than a statement of material fact. Defendants respectfully refer

the Court to the text of 81 Fed. Reg. 91,592 (Dec. 16, 2016) and 82 Fed. Reg. 7,432 (Jan. 19, 2017) for a complete and accurate statement of its contents.

50. Delay in finalizing the three Toxic Substances Control Act rules proposed in December 2016 and January 2017 would subject workers, consumers, and bystanders to serious risks of life-threatening illnesses and toxicity. Jones Decl. ¶ 14.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. Defendants lack knowledge or information as to the truth or falsity of this paragraph. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

51. The result of conditioning EPA's issuance of a new TSCA rule on repeal of two or more rules and requiring that the costs of the new rule be offset by the costs of the repealed rules will be delay and harm to human health, including the health of plaintiffs' members. Jones Decl. ¶ 16; LeGrande Decl. ¶¶ 9-10; Fleming Decl. ¶ 6.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

52. The Mine Safety and Health Administration (MSHA) would not have been able to achieve the benefits of the incombustible dust standard or the respirable dust standard if MSHA had been required to offset the costs by rescinding regulations by other agencies. Wagner Decl. ¶ 20.

Response: This paragraph constitutes speculation without any evidentiary foundation. *See* Fed. R. Evid. 602. Furthermore, the allegations in this paragraph are immaterial to any issue before the

Court.

53. Imposing a requirement that the cost of a new standard has to be offset by repealing two or more existing standards will likely frustrate the achievement of the benefits of MSHA's pending proximity detection rule, as well as other MSHA standards that are under study, including potential rules to protect miners against diesel exhaust emissions and silicosis. Wagner Decl. ¶ 20.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. Furthermore, the allegations in this paragraph are immaterial to any issue before the Court. To the extent a response is required, disputed. *See* Declaration of Daniel Bensing.

54. NRDC has advocated for a Clean Water Act rule to control mercury pollution from disposal of dental amalgam. Wetzler Decl. ¶ 13.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

55. An EPA rule, entitled "Effluent Limitations Guidelines and Standards for the Dental Category," would prevent dental offices from discharging into the environment 5.1 tons of mercury and 5.3 tons of other toxic metals each year. Wetzler Decl. ¶ 13.

Response: This paragraph constitutes a characterization of an EPA rule, rather than a statement of material fact. Defendants respectfully refer the Court to the text of 82 Fed. Reg. 27,154 (June 14, 2017) for a complete and accurate statement of its contents. In any event, the allegations in this paragraph are immaterial to any issue before the Court.

56. The EPA Administrator signed the final Effluent Limitations Guidelines rule on

December 15, 2016. Wetzler Decl. ¶ 13.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

57. The Office of the Federal Register posted the final Effluent Limitations Guidelines rule for public inspection on or before Thursday, January 19, 2017, and scheduled it for publication in the Federal Register. Wetzler Decl. ¶ 13.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

58. Before the final Effluent Limitations Guidelines rule had been published in the Federal Register, the EPA withdrew the rule from the Office of the Federal Register. Wetzler Decl. ¶ 13.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

59. Executive Order 13771 is a cause of delay in publication of the final Effluent Limitations Guidelines rule. *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017) (Exhibit A to Wetzler Decl.).

Response: The allegations in this paragraph are immaterial to any issue before the Court. Moreover, the final Effluent Limitations Guideline rule was published on June 14, 2017.

60. NRDC has members who live, work, and recreate near crude oil rail lines and rail terminals. Coward Decl. ¶ 7.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

61. NRDC has members who are concerned about the public safety and environmental

dangers associated with nearby crude oil terminals and rail lines, including risks of fire and oil spills. Coward Decl. ¶¶ 7–8.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

62. NRDC has members who support new regulations to require stronger safety requirements for tank cars, and better planning and responses to crude-by-rail oil spills. Coward Decl. ¶ 10.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

63. NRDC recently commented to the Pipeline Hazardous Materials Safety Administration (PHMSA) on its Advance Notice of Proposed Revision to the Hazardous Materials Regulations, 82 Fed. Reg. 5499 (Jan. 18, 2017), regarding the volatility of crude oil transported by rail (“crude by rail”). Wetzler Decl. ¶ 15.

Response: To the extent that this paragraph constitutes a characterization of the NRDC’s comments on the Advance Notice of Proposed Revision to the Hazardous Materials Regulations, no response is required. Defendants respectfully refer the Court to those comments for a complete and accurate statement of their contents. Furthermore, the allegations in this paragraph are immaterial to any issue before the Court.

64. On behalf of its members, NRDC advocates for stronger crude-by-rail regulations. Wetzler Decl. ¶ 15.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Defendants further lack information as to the truth or falsity of this paragraph.

65. Because Executive Order 13771 and the OMB Guidances condition PHMSA's issuance of a new, significant crude-by-rail rule on the repeal of two or more existing rules with combined costs equal to or higher than the new rule, compliance with the Executive Order will halt or slow the issuance of final rail-safety rules, to the detriment of NRDC and its members who live, work, or recreate near crude-by-rail lines. Wetzler Decl. ¶ 15; Coward Decl. ¶ 11.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

66. Energy efficiency standards adopted under the Energy Policy and Conservation Act have reduced energy use, cut pollution, and saved consumers money. Reicher Decl. ¶ 7.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

67. In early 2017, the Department of Energy (DOE) projected that national energy efficiency standards completed through 2016 would, by 2030, save more energy than the entire United States uses in a year and would save consumers \$2 trillion on their utility bills during that time. Reicher Decl. ¶ 7 & Exh. A.

Response: This paragraph constitutes a characterization of the Department of Energy's Appliance and Equipment Standards (Exhibit A to Reicher Declaration, ECF No. 16-18) rather than a statement of material fact. Defendants respectfully refer the Court to Exhibit A for a complete and accurate statement of its contents. In any event, the allegations in this paragraph are immaterial to any issue before the Court.

68. EPCA achieves energy and cost savings by requiring that any new or amended energy conservation standard prescribed by DOE "be designed to achieve the maximum

improvement in energy efficiency ... which the Secretary determines is technologically feasible and economically justified.” 42 U.S.C. § 6295(o)(2)(A); Reicher Decl. ¶ 8.

Response: This paragraph constitutes a characterization of 42 U.S.C. § 6295(o)(2)(A), rather than a statement of material fact. Defendants respectfully refer the Court to the statute for a complete and accurate statement of its contents.

69. The \$2 trillion dollars in consumer utility bill savings benefits that DOE has projected will be achieved under existing energy efficiency standards by 2030 would not be possible if the Department had been required to offset the costs of each new or amended energy efficiency standard by rescinding its own rules or somehow persuading other agencies to rescind their rules. Reicher Decl. ¶ 18.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. Furthermore, the allegations in this paragraph are immaterial to any issue before the Court. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

70. Strong energy efficiency standards issued by DOE enable NRDC to reduce its electricity costs and enhance NRDC’s ability to meet its energy-use reduction target. Quigley Decl. ¶¶ 4–6, 10–11.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

71. Strong energy efficiency standards issued by DOE help NRDC, Public Citizen, and their members to lower their utility bills and reduce their environmental impacts. R. Weissman Decl. ¶ 17; Wetzler Decl. ¶ 16; Winegrad Decl. ¶ 25.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

72. On behalf of itself and its members, NRDC advocates for DOE to issue strong energy efficiency standards. Wetzler Decl. ¶¶ 7, 16.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

73. NRDC and some of its members own relatively inefficient appliances that they plan to replace with newer, more efficient models. Quigley Decl. ¶ 10; Winegrad Decl. ¶ 24.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

74. By requiring DOE to identify deregulatory actions to offset the incremental costs of new energy efficiency standards, Executive Order 13771 and the OMB Guidances erect practical barriers to prompt issuance by DOE of new, more stringent standards. Wetzler Decl. ¶ 6; Reicher ¶ 14.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

75. A halt or delay in issuance of more stringent energy efficiency standards will impair the ability of NRDC, Public Citizen, and their members to upgrade their existing appliances with more energy efficient appliances. Quigley Decl. ¶¶ 9–11; R. Weissman Decl. ¶17; Winegrad Decl. ¶ 25; Wetzler Decl. ¶¶ 14, 16; Reicher Decl. ¶¶ 14–17.

Response: This paragraph constitutes speculation about future events without any evidentiary

foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

76. On behalf of its members, NRDC advocates for strong protections for endangered and threatened species, and for the designation of critical habitat for these species. Wetzler Decl. ¶¶ 7, 9, 17–18.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

77. NRDC has long advocated for the designation of critical habitat for the Atlantic sturgeon. Wetzler Decl. ¶¶ 9, 17–18; Winegrad Decl. ¶¶ 21–22.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

78. NRDC members who have an aesthetic and educational interest in the Atlantic sturgeon’s recovery would, if the species were to recover, benefit from viewing the rare fish in its natural habitat. Winegrad Decl. ¶¶ 19–20, 22–23.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

79. Executive Order 13771 and the OMB Guidances threaten to delay or prevent protections for endangered and threatened species, to NRDC’s and NRDC’s members’ detriment. Wetzler Decl. ¶ 17; Winegrad Decl. ¶¶ 19-21.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

80. Executive Order 13771 and the OMB Guidances effectively transforms NRDC's advocacy *for* robust protections for endangered species into a call for action that would trigger other deregulatory action that may harm NRDC's members. Wetzler Decl. ¶ 17.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

81. NRDC has members who have an interest in strong regulations to reduce or mitigate climate change. Winegrad Decl. ¶¶ 8, 18.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

82. Climate change poses a significant threat to the wellbeing of humans, wildlife, and the natural environment. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); 74 Fed. Reg. 66496, 66497–99 (2009); Winegrad Decl. ¶¶ 8, 18.

Response: This paragraph constitutes a characterization of an EPA rule and *Massachusetts v. EPA*, rather than a statement of material fact. Defendants respectfully refer the Court to the text of 74 Fed. Reg. 66,496 (Dec. 15, 2009) and 549 U.S. 497 (2007) for a complete and accurate statement of its contents. In any event, the allegations in this paragraph are immaterial to any issue before the Court.

83. NRDC has members who live in low-lying coastal areas and are faced with increasing threats of flooding due to sea-level rise associated with climate change. Winegrad Decl. ¶¶ 8–17.

Response: The allegations in this paragraph are immaterial to any issue before the Court.

Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

84. Increased flooding causes some NRDC members financial, aesthetic, educational, or recreational harm. Winegrad ¶¶ 7–17.

Response: The allegations in this paragraph are immaterial to any issue before the Court. Furthermore, Defendants lack information as to the truth or falsity of this paragraph.

85. Conditioning issuance of a new regulation on repeal of two or more existing regulations, to offset the costs of the new regulation, will halt or delay regulation of greenhouse gas emissions. Wetzler Decl. ¶ 14; Winegrad Decl. ¶¶ 7, 18.

Response: This paragraph constitutes speculation about future events without any evidentiary foundation. *See* Fed. R. Evid. 602. To the extent that a response is required, disputed. *See* Declaration of Daniel Bensing.

86. The benefits of federal regulations often outweigh the costs. *See, e.g.*, 2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act at 2, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf (last visited Apr. 7, 2017); Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 1, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf (last visited Apr. 7, 2017).

Response: This paragraph constitutes a characterization of various reports, rather than a statement of material fact. Defendants respectfully refer the Court to the reports identified in ¶ 86 for a complete and accurate statement of its contents.

87. Federal agencies have begun to implement the Executive Order and OMB Guidances. *See* Dep't of Labor, 82 Fed. Reg. 16902, 16915 (2017) (stating that OMB has determined that a new rule delaying implementation of Department of Labor's fiduciary rule does not trigger the repeal and offset requirements of Executive Order 13771 because it provides cost savings); Dep't of Transp., 82 Fed. Reg. 15785 (2017) (notice of Aviation Rulemaking Advisory Committee meeting to discuss existing regulations to repeal or modify in light of Executive Orders 13771 and 13777); Dep't of Labor, 82 Fed. Reg. 12319, 12323 (2017) (addressing "requirements" of Executive Order 13771 but stating that proposed rule extending applicability date of previously issued final rule was not a "significant regulatory action" that triggered those requirements); Dep't of Transp., Report on DOT Significant Rulemakings, <https://www.transportation.gov/regulations/report-on-significant-rulemakings> (visited Apr. 6, 2017) (stating that "DOT rulemakings are being evaluated in accordance with Executive Order[] 13771"); *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Apr. 6, 2017); Taxnotes, *No Substantive IRS Guidance Coming for a While, Official Says*, Feb. 14, 2017, <http://www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says> (reporting statements of IRS official about implementation of the Executive Order and OMB guidance).

Response: This paragraph constitutes a characterization of Federal Register notices and media reports, rather than a statement of material fact. Defendants respectfully refer the court to those notices and media reports for a complete and accurate statement of their contents.

Respectfully Submitted,

DATED: June 26, 2017

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

CHANNING D. PHILLIPS
United States Attorney

BRETT A. SHUMATE
Deputy Assistant Attorney General
Civil Division

ERIC R. WOMACK
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/ Michael Drezner
DANIEL BENSING (D.C. Bar No. 334268)
MICHAEL DREZNER (VA Bar No. 83836)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave, NW
Washington, DC 20530
Telephone: (202) 514-4505
Email: Michael.L.Drezner@usdoj.gov

Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, INC., *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States, *et
al.*,

Defendants.

Civil Action No. 1:17-cv-00253
RDM

DECLARATION OF DANIEL BENSING

I, Daniel Bensing, hereby declare as follows:

1. I am a Senior Trial Counsel at the U.S. Department of Justice, Civil Division, Federal Programs Branch and counsel for Defendants in the above-captioned case.
2. I am providing this declaration pursuant to Fed. R. Civil P. 56(d) in support of Defendants' Response to Plaintiffs' Statement of Material Facts. The declaration explains why Defendants cannot present facts essential to support their opposition to Plaintiffs' Motion for Summary Judgment, in the event the Court determines that this case cannot be resolved on the threshold legal issues raised in Defendants' Motion to Dismiss. The declaration sets forth topics on which Defendants would take discovery if permitted by the Court, why those topics would be material in resolving Plaintiffs' Motion for Summary Judgment if the Court agrees with Plaintiffs' legal theory of their claims, and how any information Defendants obtain through discovery might be expected to create an issue of material fact (or warrant summary judgment in Defendants' favor).

3. I make the statements herein based on my personal knowledge, as well as on information that I acquired while performing my official duties.

4. Defendants filed their Motion to Dismiss the Amended Complaint on May 12, 2017. ECF No. 15. Plaintiffs then filed a Motion for Summary Judgment on May 15, 2017. ECF No. 16. Defendants moved to stay proceedings on Plaintiffs' Motion for Summary Judgment while the Motion to Dismiss was pending. ECF No. 21. This Court denied Defendants' Motion to Stay and ordered Defendants to file their opposition to Plaintiffs' Motion for Summary Judgment on or before June 26, 2017. ECF No. 22.

5. Defendants have argued in their Motion to Dismiss that the Court can and should reject Plaintiffs' claims as a matter of law. If the Court agrees with Defendants' legal positions asserted in their Motion to Dismiss, then there will be no need for discovery and the Court can dismiss the case under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) and deny Plaintiffs' Motion for Summary Judgment as moot.

6. If the Court instead denies Defendants' Motion to Dismiss, and determines that facts concerning Plaintiffs' standing are material, then Defendants cannot present facts essential to dispute those material allegations without first being provided with an opportunity to take discovery to elicit facts relevant to Plaintiffs' allegations of standing.

7. Plaintiffs' Motion for Summary Judgment is accompanied by seventeen declarations, including nine declarations which purport to allege direct harm to a member or component of Plaintiff organizations, thereby arguably supporting Plaintiffs' claims of standing. ECF Nos. 16-5 through 16-13. These declarations broadly assert that Executive Order 13,771 will cause the delay or alteration of certain regulatory activities, resulting in harm to the declarants.

8. Defendants cannot present facts essential to dispute these assertions without an opportunity to investigate and take discovery on Plaintiffs' conclusory claims that the Executive Order will affect a particular regulatory activity and thereby cause injury to the organizational Plaintiffs or their members. Accordingly, Defendants would need to inquire into the accuracy and completeness of the factual assertions made in Plaintiffs' declarations, if the Court finds facts in those declarations material.

9. For example, if given the opportunity, Defendants may seek discovery about the circumstances underlying Denise Abbott's claim that, "by delaying, weakening, or prompting OSHA to forgo a new standard for workplace exposure to infectious diseases, Executive Order 13771 will negatively impact [her] ability to avoid such exposure." ECF No 16-5 at ¶ 7. Ms. Abbot provides no details about the particular injury that she fears. Accordingly, through discovery Defendants would seek information regarding, among other things, when such harm would occur, exactly how she would be at risk for infectious diseases, what procedures her workplace currently follows, the nature of the OSHA regulation that she believes would prevent her injury and the basis for her claim that the Executive Order will cause OSHA to delay, weaken or forgo issuing a new standard.

10. Similarly, if given the opportunity, Defendants may seek discovery about the circumstances underlying Amanda Fleming's claims, including that the Executive Order will cause her to be "subjected to a higher risk of harm" from chemicals in paint removers. ECF No. 16-7 at ¶¶ 6. Again, Ms. Fleming provides virtually no support for her claim that she would be harmed by a delay in the EPA's proposed rule concerning chemicals in paint removers. Through discovery Defendants would seek information regarding which types of paint remover Ms. Fleming uses or plans on using, whether they contain chemicals proposed to be regulated,

whether alternative methods of paint removal are available, the nature of the EPA regulation that she believes would prevent her injury, and the basis for her assertion that the Executive Order will cause delay or weakening of the EPA's proposed rule.

11. Each of the topics identified above, and indeed any of the allegations of injury that might be identified as material by the court, would be relevant and material to Plaintiffs' facial challenge, if the Court rejects Defendants' position that the claims can be resolved as a matter of law.

12. Although it is difficult to predict before the discovery process has even begun, Defendants will attempt to obtain sufficient information on these topics by serving written discovery on those declarants who aver facts identified as material by the court, and potentially deposing those declarants.

13. The topics of discovery discussed above are illustrative, not exhaustive. Defendants reserve the right to take discovery on additional topics, including topics Defendants may become aware of in the course of discovery.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: 6/26/17



DANIEL BENSING

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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[PROPOSED] ORDER

UPON CONSIDERATION of Plaintiffs' Motion for Summary Judgment, Defendants' Opposition thereto and the whole record herein, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is denied.

Date: _____

UNITED STATES DISTRICT JUDGE