No. 22-1248

# In the Supreme Court of the United States

STATE OF MISSOURI, ET AL., PETITIONERS,

*v.*

JOSEPH R. BIDEN, JR., PRESIDENT
OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

President Biden directed an interagency working group to develop interim estimates for the social cost of greenhouse gases, to be used by federal agencies in cost-benefit analyses related to rulemakings. The question presented is whether petitioners have standing to challenge the interim estimates in the abstract, outside the context of any specific regulatory action that affects petitioners' concrete interests.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-49a) is reported at 52 F.4th 362. The opinion of the district court (Pet. App. 1a-32a) is reported at 558 F. Supp. 3d 754.

## JURISDICTION

The judgment of the court of appeals was entered on October 21, 2022. A petition for rehearing was denied on January 27, 2023 (Pet. App. 50a). On April 14, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including June 26, 2023. The petition was filed on June 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Administrative agencies often weigh costs and benefits when deciding whether and how to regulate. See, *e.g.*, *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009). The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, for example, establishes a framework of "reasoned decisionmaking," under which agencies must provide reasoned justifications for their actions. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Unless an applicable statute requires a different approach, an agency may choose to compare costs and benefits as part of its official justification for an action. See, *e.g.*, *Entergy*, 556 U.S. at 226.

Apart from the APA, an Executive Order issued by President Clinton requires agencies to consider costs and benefits before taking certain actions, "unless a statute requires another regulatory approach." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735, § 1(a) (Oct. 4, 1993) (E.O. 12,866). In particular, the order directs federal agencies (other than independent agencies) to assess costs and benefits before proposing "[s]ignificant" regulatory actions. *Id.* §§ 3(f), 6(a)(3). The agency must submit its assessment to the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA) as part of the centralized process that the President has prescribed for reviewing proposed regulations. *Id.* § 3(b).

The APA and the Executive Order differ in important respects. First, the APA does not require an agency to compare costs and benefits in justifying its action; rather, an agency may be permitted (or in some cases required) to perform such a comparison by an applicable statute. See *e.g.*, *Entergy*, 556 U.S. at 226. The

Executive Order, in contrast, does require agencies to compare costs and benefits in specified circumstances.

Second, even when an agency chooses to consider costs and benefits in some way, the APA does not require it to conduct a formal cost-benefit analysis in which it assigns a dollar value to each advantage and disadvantage. See *Michigan* v. *EPA*, 576 U.S. 743, 759 (2015). The Executive Order, in contrast, requires the agency to provide a "quantification" of the costs and benefits of covered actions "to the extent feasible." E.O. 12,866, § 6(a)(3)(C)(ii).

Third, if an agency chooses to compare costs and benefits as part of its official justification for an action, that comparison becomes subject to judicial review under the APA. In contrast, a cost-benefit analysis that an agency submits to OIRA pursuant to the Executive Order, but on which it does not rely as a basis for the action, has no legal effect and is not subject to review under the APA. See *National Truck Equip. Ass'n* v. *NHTSA*, 711 F.3d 662, 670 (6th Cir. 2013).

In 2003, OMB issued a document, Circular A-4, that provides guidance on assessing costs and benefits in accordance with the Executive Order. Circular A-4, like the Executive Order, encourages agencies to monetize costs and benefits "[t]o the extent possible." OMB, *Circular A-4*, at 19 (Sept. 17, 2003), https://perma.cc/CVU2-QUCE. Circular A-4 also sets out guidelines for agencies to follow when conducting that monetization. See, *e.g.*, *id.* at 18-31, 37-38.

2. The costs and benefits of a regulation include the regulation's effects on the emission of greenhouse gases. See Interagency Working Group on Social Cost of Greenhouse Gases, et al., *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous*

*Oxide Interim Estimates under Executive Order 13990*, at 2 (Feb. 2021), https://go.usa.gov/xzQGg (*Interim Estimates*). The social cost of greenhouse gases is intended to include "the value of all climate change impacts" associated with the emissions, such as "changes in net agricultural productivity, human health effects, property damage from increased flood risk[,] natural disasters, [and] disruption of energy systems." *Ibid.*

At first, different agencies used different approaches to estimate the social cost of greenhouse gases. See *Interim Estimates* 9-10. As a result, different agencies sometimes assigned different dollar values to the same emissions. See *ibid.*

In 2009, OMB convened the Interagency Working Group on Social Cost of Carbon to "harmonize [the] range of different [social cost of greenhouse gas] values being used across multiple Federal agencies." *Interim Estimates* 10. Applying widely accepted, peer-reviewed models, the Working Group developed a standardized set of values for the social cost of three particular greenhouse gases: carbon dioxide, methane, and nitrous oxide. *Ibid.* Federal agencies were not required to use those values, but many chose to do so. See, *e.g.*, *Zero Zone, Inc.* v. *United States Dep't of Energy*, 832 F.3d 654, 677-678 (7th Cir. 2016).

In 2017, President Trump disbanded the Working Group and withdrew its estimates. See Exec. Order No. 13,783, § 5(b), 82 Fed. Reg. 16,093, (Mar. 31, 2017). President Trump's Order nonetheless contemplated that agencies would continue to "monetiz[e] the value of changes in greenhouse gas emissions" as part of the OIRA review process. *Id.* § 5(c). The Order directed agencies to ensure that "any such estimates are

consistent with the guidance contained in OMB Circular A-4." *Ibid.*

3. In January 2021, President Biden issued Executive Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (E.O. 13,990). That Order reestablished the Working Group and directed it to publish revised estimates for the social cost of greenhouse gases. *Id.* § 5(b)(i) and (ii)(B). The Order further directed the Working Group to publish interim estimates within 30 days for use by agencies "until final values are published." *Id.* § 5(b)(ii)(A).

President Biden's Order provides that agencies "shall use" the Working Group's interim estimates, but that directive is subject to several qualifications. E.O. 13,990, § 5(b)(ii)(A). First, the Order does not oblige an agency to monetize costs and benefits; rather, it provides only that, if the agency does so, it generally must use the values provided by the Working Group. *Ibid.* Second, the Order provides that it "is not intended to, and does not, create any right or benefit * * * enforceable at law or in equity by any party against the United States." *Id.* § 8(c). In other words, although the President may require the agency heads under his supervision to follow the Order, a private party may not enforce it by suing in court. Third, the Order makes clear that, if a statute requires an agency to follow a different approach, the agency must do so. See *id.* § 1 (directing agencies to take action "as appropriate and consistent with applicable law"); *id.* § 5(b)(ii) (requiring the Working Group to perform its functions "as appropriate and consistent with applicable law"); *id.* § 8(a)(i) (providing that the Order may not be interpreted to impair "the authority granted by law to an executive department or

agency"); *id.* § 8(b) (requiring agencies to implement the order "in a manner consistent with applicable law").

Consistent with that final caveat, OIRA has issued guidance explaining that agencies' use of the interim estimates remains "subject to applicable law." OIRA, *Social Cost of Greenhouse Gas Emissions: Frequently Asked Questions (FAQs)* 2 (June 3, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Social-Cost-of-Greenhouse-Gas-Emissions.pdf. Specifically, the guidance explains that, while agencies must use the estimates for purposes of cost-benefit analyses under E.O. 12,866, the "applicable statute" and "principles of administrative law" "must control" the process of reasoned decisionmaking required by the APA as the basis for a rule or other action. *Ibid.* The guidance further explains that, when the agency uses the interim estimates as a basis for a rule subject to notice-and-comment rulemaking, the agency must provide the public an opportunity to comment on "the agency's use of the 2021 interim estimates" in the context of that particular rulemaking. *Id.* at 1.

4. Petitioners, a group of States led by Missouri, sued in the U.S. District Court for the Eastern District of Missouri. Pet. App. 1a. Petitioners argued that the interim estimates violated the separation of powers, contravened various statutes, were procedurally defective, and were arbitrary and capricious. *Id.* at 7a.

The district court dismissed the complaint. Pet. App. 1a-31a. The court first determined that petitioners lacked Article III standing. *Id.* at 14a-24a. It concluded that petitioners had failed to establish concrete injury, but had instead speculated that they might be injured in the future by "regulation[s] possibly derived from these Estimates." *Id.* at 19a; see *id.* at 17a-19a. It

added that petitioners had also failed to establish causation and redressability, because "it is unknowable in advance whether [any] harm caused by possible future regulations would have any causal connection to * * * the Interim Estimates." *Id.* at 19a; see *id.* at 19a-22a. The court then held, in the alternative, that petitioners' claims were not ripe. *Id.* at 24a-31a.

5. The Eighth Circuit affirmed. Pet. App. 34a-49a. The Eighth Circuit concluded that petitioners lacked Article III standing and accordingly did not reach the district court's alternative holding that their claims were not ripe. *Id.* at 37a.

The court of appeals observed that the interim estimates, on their own, "do not injure" petitioners. Pet. App. 43a (citation omitted). It explained that petitioners' theory of injury instead rested on a "highly attenuated" chain: "*if* agencies propose future regulations, *if* they conduct cost-benefit analyses for those regulations, and *if* they choose to monetize [greenhouse gas] emissions in those analyses, then the agencies must use the [interim estimates]." *Ibid.* The court found that theory too speculative to establish that petitioners had suffered an injury in fact, see *id.* at 42a, or to show that any such injury was fairly traceable to the estimates, see *id.* at 43a.

The court of appeals denied petitioners' requests for panel rehearing and rehearing en banc. Pet. App. 50a.

## ARGUMENT

Petitioners contend (Pet. 19-44) that they have Article III standing to challenge the interim estimates in the abstract, outside the context of any final rule or other concrete final agency action that causes them a judicially cognizable injury. The court of appeals correctly rejected that contention, and its decision does not

conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. Article III of the Constitution empowers federal courts to hear only "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. To satisfy that requirement, a plaintiff must show that it has standing—that is, that it has suffered a concrete, particularized, and judicially cognizable injury that was likely caused by the challenged action of the defendant and that likely would be redressed by judicial relief. See *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021).

This Court's decision in *Trump* v. *New York*, 141 S. Ct. 530 (2020) (per curiam), illustrates the application of those principles to a suit challenging a presidential directive to an executive agency. In that case, the President had announced a policy of excluding noncitizens without lawful status from the census figures used for congressional apportionment, but the Secretary of Commerce had not yet taken any concrete action based on that policy. *Id.* at 534. A group of States and other plaintiffs challenged the President's policy, but this Court held that they lacked standing. *Id.* at 534-537. The Court explained that "the source of any injury to the plaintiffs [wa]s the action that the Secretary or President *might* take in the future," "not the policy itself 'in the abstract.'" *Id.* at 536 (citation omitted).

Just as the States in *New York* lacked standing to challenge the President's instructions to the Secretary of Commerce, so too the States in this case lack standing to challenge the President's instructions to federal agencies. To begin, as the court of appeals correctly recognized, petitioners have failed to establish Article III injury. See Pet. App. 41a-42a. The interim

estimates, on their own, do nothing to petitioners. The estimates speak to federal agencies, not to petitioners or indeed to anyone outside the federal government. The estimates themselves do not "require [petitioners] 'to do anything or to refrain from doing anything.'" *New York*, 141 S. Ct. at 536 (citation omitted).

Petitioners' theory of standing instead rests on the "increased regulatory burdens," Pet. 30, that *may* result if and when a federal agency adopts a regulation or takes other final agency action based on the interim estimates. Pet. App. 42a. In other words, "the source of any injury to the plaintiffs is the action that the [federal government] *might* take" based on the estimates, "not the [estimates] themselves 'in the abstract.'" *New York*, 141 S. Ct. at 536 (citation omitted). That claimed injury does not satisfy Article III because it is conjecture whether a particular federal agency will ultimately use the interim estimates as a basis for a particular rule that results in a cognizable injury to petitioners. The agency could choose not to regulate at all. If it decides to regulate, it could conclude that the applicable statute requires it to regulate without regard to effects on greenhouse gases. If it decides to consider such effects, it could choose to do so only for purposes of a regulatory impact analysis under E.O. 12,866 and not as a basis for the rule for purposes of the APA. If it finds such effects relevant as a basis for the rule, it could decide to consider them without assigning dollar values to costs and benefits. If it monetizes costs and benefits, it could conclude that the applicable statute or concerns raised by commenters in agency proceedings warrant the use of values that differ from those published by the Working Group. See E.O. 13,990, § 8(b) (requiring agencies to implement the order "in a manner consistent with

applicable law"). In short, "there is 'considerable legal distance' between the adoption of the Interim Estimates and the moment—if one occurs—when a harmful regulation is issued." Pet. App. 26a (citation omitted). And if such a regulation is issued, petitioners could seek to challenge it at that time.

The court of appeals also correctly determined that petitioners failed to meet their "burden to show the requisite causation." Pet. App. 43a. "[I]t is unknowable in advance whether [any] harm caused by possible future regulations would have any causal connection to * * * the Interim Estimates." *Id.* at 19a. Neither E.O. 13,990 nor the estimates "mandate agencies [to] issue the particular regulations that [petitioners] fear will harm them." *Id.* at 20a. The Order and the estimates instead address "one of innumerable other factors in the cost-benefit analysis"—which is itself just one of many factors in agencies' ultimate regulatory decisions. *Ibid.* Petitioners cannot base standing on speculation that a particular agency action that may injure them in the future will be issued because of the agency's use of the interim estimates.

2. Petitioners' contrary arguments lack merit. Petitioners rely (Pet. 19-24) on *Bennett* v. *Spear*, 520 U.S. 154 (1997), a case in which this Court held that ranchers could challenge the Fish and Wildlife Service's issuance of a biological opinion that would allegedly cause the Bureau of Reclamation to reduce the amount of water provided to the ranchers. See *id.* at 167-171. As the court of appeals explained, however, the biological opinion in *Bennett* differs markedly from the interim estimates at issue here. See Pet. App. 45a-46a. The biological opinion in *Bennett* had a "virtually determinative effect" on a concrete (and injurious) agency action: It

effectively "coerc[ed]" the Bureau of Reclamation to reduce the amount of water provided to the ranchers. 520 U.S. at 169-170. The interim estimates, in contrast, have no such determinative effect; rather, "*if* agencies propose future regulations, *if* they conduct cost-benefit analyses for those regulations, and *if* they choose to monetize [greenhouse gas] emissions in those analyses, then the agencies must use the * * * estimates." Pet. App. 43a (citation omitted). And even then, the estimates are only "one of innumerable other factors in the cost-benefit analysis conducted by a wide range of agencies in an even wider range of regulatory contexts." *Id.* at 46a (citation omitted).

Petitioners similarly rely (Pet. 30) on *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), in which this Court accepted a theory of standing that relied "on the predictable effect of Government action on the decisions of third parties." *Id.* at 2566. As explained above, however, the effect of the interim estimates on agency action is anything but predictable. And in any event, *Department of Commerce* involved predictions about the effects of government actions on private parties. In cases in which plaintiffs have sought to predict the effects of government actions on other governmental actors, this Court has recognized that government agencies have "broad and legitimate discretion" to make policy judgments and that "courts cannot presume either to control or to predict" how that discretion will be exercised. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted).

Petitioners separately contend (Pet. 24-27) that they have suffered a deprivation of a procedural right because the Working Group adopted the interim estimates without notice-and-comment rulemaking. But this

Court has "never held [that] a litigant who asserts [a procedural right] is excused from demonstrating that it has a 'concrete interest that is affected by the deprivation' of the claimed right." *Department of Education* v. *Brown*, 143 S. Ct. 2343, 2351 (2023) (citation omitted); see, *e.g.*, *TransUnion*, 141 S. Ct. at 2214 (holding that "'bare procedural violations, divorced from any concrete harm,'" do "not suffice for Article III standing") (brackets and citation omitted); *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009) (holding that "a procedural right *in vacuo*" is "insufficient to create Article III standing"). For the reasons given above, petitioners have failed to show that the interim estimates cause them concrete harm.

Petitioners next assert (Pet. 23, 28) that agencies have already relied on the interim estimates in "some rulemakings" and that "[s]everal [more] rulemakings" that rely on those estimates "are already ongoing." But they identify (Pet. 23) only a single example of an agency action that purportedly relied on the interim estimates—an Environmental Protection Agency rule regarding emissions standards for light-duty vehicles—and even that example does not support their argument. Although the agency referred to the interim estimates in its notice of proposed rulemaking, see 86 Fed. Reg. 43,726, 43,789 (Aug. 10, 2021), it explained in its final rule that "analysis of monetized [greenhouse gas] benefits was not material to the choice of th[e] standard," 86 Fed. Reg. 74,434, 74,498 (Dec. 30, 2021). In any event, if petitioners are correct that agencies have issued rules in reliance on the interim estimates, and if those rules injure petitioners, petitioners could simply challenge those rules. They may not, however, challenge the interim estimates in the abstract.

Finally, petitioners argue (Pet. 32-35) that, under *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), they are entitled to "special solicitude" in the Court's Article III analysis. But this Court has rejected that reading of *Massachusetts* and has made clear that "bedrock Article III constraints" apply even in "cases brought by States against an executive agency or officer." *United States* v. *Texas*, 143 S. Ct. 1964, 1972 n.3 (2023); see *id.* at 1975 n.6; *id.* at 1977 (Gorsuch, J., concurring in the judgment). For the reasons discussed above, those constraints preclude this suit.

3. The Eighth Circuit's decision does not warrant further review. It does not conflict with the decision of any other court of appeals, and petitioners do not claim otherwise. One other court of appeals, the Fifth Circuit, has considered whether States have standing to challenge the interim estimates in the abstract, outside the context of any concrete agency action that injures a plaintiff State. See *Louisiana* v. *Biden*, 64 F.4th 674 (2023). The Fifth Circuit reached the same conclusion as the Eighth Circuit did in this case: Because the States "contemplate[d] harms that are several steps removed from—and are not guaranteed by—the challenged Executive Order or the Interim Estimates," they had "not established standing." *Id.* at 684; see *id.* at 683 ("[W]e find no reason to depart from the Eighth Circuit's parallel ruling.").*

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* At an earlier stage of the *Louisiana* litigation, the Fifth Circuit stayed a preliminary injunction that had been issued by the district court, reasoning that the States in that case lacked Article III standing. See *Louisiana* v. *Biden*, No. 22-30087, 2022 WL 866282 (Mar. 16, 2022). The States filed an application asking this Court to vacate the stay, but the Court denied the application. See *Louisiana* v. *Biden*, 142 S. Ct. 2750 (2022).

Petitioners suggest (Pet. 43) that the validity of the interim estimates is an issue of "critical importance." See Pet. 22 ("extremely important"); Pet. 40 ("enormous policy importance"); Pet. 42 ("important question of legislative policy"). But petitioners "will have ample opportunity to bring legal challenges to particular regulations" that rely on the interim estimates, if those regulations cause petitioners concrete and cognizable injury. Pet. App. 27a. And if petitioners bring such a challenge, this Court could determine at that time whether the validity of the interim estimates raises a sufficiently important issue to justify granting review.

4. Petitioners discuss a host of issues apart from standing—including whether a challenge to the interim estimates is ripe (Pet. 36-40), whether the estimates constitute final agency action (Pet. 42), and whether the estimates are subject to notice-and-comment procedures (Pet. 42-43). But the court of appeals held simply that petitioners lack Article III standing; it did not address ripeness or other threshold obstacles to petitioners' claims. See Pet. App. 48a-49a. The question presented in the petition for a writ of certiorari, moreover, refers only to Article III standing; it says nothing about other threshold issues. See Pet. i. Because this Court usually does not address issues that were not reached by the court of appeals, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and because "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a), this Court has no occasion to consider petitioners' other arguments.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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