No. 21A ___

In the Supreme Court of the United States

STATE OF LOUISIANA; et al.,
Applicants,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; et al.,
Respondents.

APPLICATION TO VACATE AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT STAYING AN INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA PENDING APPEAL TO THE FIFTH CIRCUIT AND FURTHER PROCEEDINGS IN THIS COURT

To the Honorable Samuel Alito
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Fifth Circuit

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April 27, 2022

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PARTIES TO THE PROCEEDINGS

Applicants here were the plaintiffs in district court and appellees in the court of appeals: the States of Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia, and Wyoming.

Respondents were the defendants in district court and appellants in the court of appeals: Joseph R. Biden, Jr., in his official capacity as President of the United States; Cecilia Rouse, in her official capacity as Chairwoman of the Council of Economic Advisers; Shalanda Young, in her official capacity as Acting Director of the Office of Management and Budget; Kei Koizumi, in his official capacity as Acting Director of the Office of Science and Technology Policy; Janet Yellen, in her official Capacity as Secretary of the Treasury; Deb Haaland, in her official capacity as Secretary of the Interior; Tom Vilsack, in his official capacity as Secretary of Agriculture; Gina Raimondo, in her official capacity as Secretary of Commerce; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Pete Buttigieg, in his official capacity as Secretary of Transportation; Jennifer Granholm, in her official capacity as Secretary of Energy; Brenda Mallory, in her official capacity as Chairwoman of the Council on Environmental Quality; Michael S. Regan, in his official capacity as Administrator of the Environmental Protection Agency; Gina McCarthy, in her official capacity as White House National Climate Advisor; Brian Deese, in his official capacity as Director of the National Economic Council; Jack Danielson, in his official capacity as Executive Director of the National Highway Traffic Safety Administration; the U.S. Environmental

Protection Agency; the U.S. Department of Energy; the U.S. Department of Transportation; the U.S. Department of Agriculture; the U.S. Department of the Interior; the National Highway Traffic Safety Administration; and the Interagency Working Group on Social Cost of Greenhouse Gases.

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

This Court has repeatedly granted stay applications or certiorari petitions to consider how clearly Congress must speak in a specific statutory provision before a federal agency can remake vast but discrete swaths of the American economy.[1] Properly so. But as grave as the agency-authority questions were in those cases, they're featherweights next to what's at stake here. A new agency created by presidential edict—*not* by Congress—has claimed authority from that same edict—not from even *one* statute—to fundamentally alter *every* regulatory undertaking of virtually *every* federal agency.

That new agency is the Interagency Working Group on the Social Cost of Greenhouse Gases. And that alteration consists of a fabricated damages model known as the Social Cost of Greenhouse Gas Estimates. The presidential edict injects those Estimates into every cost/benefit analysis that federal agencies conduct when deciding whether and how

[1] *E.g.*, *Util. Air Reg. Group v. E.P.A.*, 573 U.S. 302 (2014); *West Virginia v. EPA*, 136 S.Ct. 1000 (2016) (No. 15A773); *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485 (2021); *Biden v. Missouri*, 142 S.Ct. 647 (2022); *Nat'l Fed. of Indep. Business v. Dep't of Labor*, 142 S.Ct. 661 (2022); *West Virginia v. EPA*, No. 20-1530 (cert. granted Oct. 29, 2021).

to regulate. The Estimates' stated purpose is to try to approximate global harms to society from greenhouse gas emissions attendant to objects of regulated activities. But the obvious relationship between the Estimates and regulatory power lays bare their intended use: the Estimates "help[] determine the stringency of numerous regulations designed to reduce greenhouse gas emissions," and "a higher number will of course tend to support aggressive regulations." Cass R. Sunstein, *Arbitrariness Review (with special reference to the social cost of carbon)* at 4-5 (2021), https://bit.ly/3rk2hZC. In short, the Estimates are a power grab designed to manipulate America's entire federal regulatory apparatus through speculative costs and benefits so that the Administration can impose its preferred policy outcomes on every sector of the American economy.

The U.S. District Court for the Western District of Louisiana saw those efforts for what they are after briefing and oral argument on Applicants' motion for a preliminary injunction. So it issued a preliminary injunction prohibiting the Executive Branch from using the SC-GHG Estimates in regulatory decisionmaking pending full judicial review. It recognized that the Estimates are not authorized by law, conflict with several discrete statutory provisions, are arbitrary, and

were promulgated without required notice and comment. Yet a panel of the U.S. Court of Appeals for the Fifth Circuit stayed the injunction.

If this Court does not vacate the Fifth Circuit's stay order, the Executive Branch will continue using this made-up, nonstatutory metric to arbitrarily tip the scales toward its preferred policy outcome for every activity the federal government touches. In effect, that's everything in modern American life: the SC-GHG Estimates implicate rulemakings about the food chain; construction of roads, bridges, and housing; and all energy-related projects and permitting. So by applying its "monetized" SC-GHG Estimates, the government can justify killing cows (because they emit methane), pipeline projects (because pipeline-related projects might contribute to downstream consumption of oil or gas), road projects (because concrete and traffic contribute to GHGs), family farms (cows again, plus fertilizer), electricity generation (because many plants run on natural gas or coal), manufactured housing (energy costs), and so on. That's the very definition of a regulatory re-ordering of the American economy with enormous political and economic consequences.

And which sentence in the United States Code does the Executive Branch cite as the source of its congressional authority for any of this?

Zilch.

That cannot be right. Nor can it be reconciled with this Court's recent and repeated decisions striving to enforce the constitutionally mandated separation of powers, particularly on matters of major national importance. This case thus requires the Court's immediate intervention even more than those ones did; this might be the most consequential rulemaking in American history, culminating in "'the most important number you've never heard of.'" Sunstein, *supra*, at 4. This Court should grant the application and vacate the Fifth Circuit's stay order.

OPINIONS BELOW

The district court entered a preliminary injunction on February 11, 2022. *Louisiana v. Biden*, No. 2:21-cv-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022). The opinion and order are reproduced as Appendix A. The district court then denied Defendants' Motion For Stay Pending Appeal on March 9, 2022. That order is reproduced as Appendix B.

The Fifth Circuit, in turn, granted the Defendants' Motion For Stay Pending Appeal on March 16, 2022. The opinion is reproduced as Appendix C. The court of appeals then denied Applicants' petition for rehearing and rehearing *en banc* on April 14, 2022. That order is reproduced as Appendix D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and has the authority to grant the Applicants relief under the Administrative Procedure Act, 5 U.S.C. §705, and the All Writs Act, 28 U.S.C. §1651.

STATEMENT

The regulatory harms that Executive Order 13990 and the SC-GHG Estimates inflict on Plaintiff States become apparent when understood in the context of longstanding federal regulatory practice. Applicants thus briefly review that practice before describing EO13990 and the proceedings below.

A. Long-Settled Rules Govern Regulatory Cost/Benefit Analysis.

A now-decades-old bipartisan consensus—spanning at least from President Nixon to President George W. Bush—requires agencies to perform vigorous cost/benefit analysis before regulating. *See* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 Harv. J.L. & Pub. Pol'y 447, 454-57 (2014). Embodying this consensus, President Clinton issued Executive Order 12866, which instructs agencies "deciding whether and how to regulate" to "assess all costs and benefits of available regulatory alternatives, including the

alternative of not regulating." Regulatory Planning and Review, §1(a), 58 Fed. Reg. 51735 (Sept. 30, 1993), https://bit.ly/39g39t3.

To implement EO12866 and ensure agencies use a "standardiz[ed]" way of "measur[ing] and report[ing]" the "benefits and costs of Federal regulatory actions," President George W. Bush's Office of Management and Budget issued Circular A-4 in 2003. Circular A-4, at 1 (Sept. 17, 2003), https://bit.ly/3xRt9F9; *see* Regulatory Analysis, 68 Fed. Reg. 58366 (Oct. 9, 2003). Circular A-4 has become the cornerstone of regulatory analysis in the Executive Branch. It gives "highly detailed guidance to the agencies on the key elements of a 'good regulatory analysis' under" EO12866, "including a clear baseline for comparative purposes, specifically stated assumptions, an assessment of the sensitivity of the analytical results to changes in those assumptions, and attention to ancillary impacts." Mendelson & Wiener, *supra*, at 457-58.

Circular A-4 was issued after an extensive and transparent peer and interagency review, and public notice-and-comment, process. *See* Circular A-4, at 1 ("In developing this Circular, OMB first developed a draft that was subject to public comment, interagency review, and peer review."). As relevant here, that process yielded two cornerstone

cost/benefit instructions. Under Circular A-4, agencies must (1) consider domestic—rather than global—costs and benefits, and (2) use specific discount rates. Consider each briefly.

First, Circular A-4 unambiguously instructs agencies to make domestic effects the basis of their analysis: "Your analysis should focus on benefits and costs that accrue *to citizens and residents of the United States*. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately." Circular A-4, at 15 (emphasis added). Courts have recognized this unmistakable direction to focus on domestic, rather than global, effects. *See, e.g.*, *Wyoming v. U.S. Dep't of the Interior*, 2020 WL 7641067, at *21 (D. Wyo. Oct. 8, 2020) (noting that Circular A-4 mandates a national focus); *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1069 (N.D. Cal. 2018) (Circular A-4 "does not specifically mandate that agencies consider global impacts"). Reflecting this clear directive, "the typical agency practice is, in fact, to leave foreign impacts out of cost-benefit analyses entirely." Arden Rowell, *Foreign Impacts and Climate Change*, 39 Harv. Envtl. L. Rev. 371, 373 (2015).

Second, discount rates matter a great deal in regulatory cost/benefit analysis because "[b]enefits and costs do not always take place in the same time period." Circular A-4, at 31. Because people "plac[e] a higher value on current consumption than on future consumption," agencies should use "a discount factor … to adjust the estimated benefits and costs for differences in timing." *Id.* at 32. "The further in the future the benefits and costs are expected to occur, the more they should be discounted." *Id.*

Given those economic realities, the Executive Branch had long used a 7 percent discount rate because that "approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector." *Id.* at 33. But Circular A-4 also recognizes, based on material accumulated in OMB's extensive internal and public review, that a lower discount rate may be appropriate in certain circumstances. So Circular A-4 instructs agencies to "provide estimates of net benefits using both 3 percent and 7 percent" discount rates. *Id.* at 34.

B. EO13990 Revives an Internal Working Group and Mandates "Promulgation" and Immediate Government-Wide Use of Numerical Estimates for the "Social Costs" of Greenhouse Gases in Regulatory Cost/Benefit Analysis.

On January 20, 2021, President Biden issued Executive Order 13990. EO13990 revives a nonstatutory agency—the Interagency Working Group—and purports to vest it with power to promulgate numerical estimates for the "social costs" of greenhouse gases. Protecting Health & the Environment & Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021), https://bit.ly/37w8egi.

The Biden IWG and SC-GHG Estimates trace their lineage to the Obama Administration. Their impetus was a Ninth Circuit panel's holding, based on one oral-argument concession from one federal attorney, that it was arbitrary and capricious for the National Highway Traffic Safety Administration not to "monetize" the "benefits of greenhouse gas emissions reduction" in a discrete rulemaking about fuel-economy standards for light-duty trucks. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198-1203 (9th Cir. 2008). Seizing on that opinion—and laying groundwork that President Biden would follow: acquiescing in adverse court decisions favoring the administration's policy goals, *see Arizona v. City & Cty. of San Francisco*, No. 20-1775

(S.Ct.)—President Obama used the Ninth Circuit's opinion to establish his own IWG, which published its own SC-GHG Estimates (carbon first; others later) and likewise mandated their use across federal agencies. But then as now, the Executive Branch never cited any statutory authority allowing it to propound the Estimates. Nor did either Administration subject its Estimates to notice and comment. And now, EO13990 expands the Estimates' required use beyond mere cost/benefit analyses in rulemakings into the vague, unbounded domains of "other relevant agency actions." 86 Fed. Reg. at 7040.

The Biden IWG released its SC-GHG Estimates just over a month after President Biden signed EO13990. *See* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide, Interim Estimates Under Executive Order 13990 (Feb. 26, 2021), https://bit.ly/3HUKUVr. The Biden IWG did not solicit or receive comments—or any public input or peer review—despite EO13990's directive to "solicit public comment; engage with the public and stakeholders; [and] seek the advice of ethics experts." 86 Fed. Reg. at 7041. Instead, it merely re-adopted the Obama IWG's numbers, adjusted for inflation. TSD, *supra*, at 5 n.3.

As a result, the Estimates repeat the Obama IWG's errors by upending *decades* of settled practice in Circular A-4's way for calculating regulatory costs in two critical ways. First, they expressly "tak[e] global damages into account" (instead of limiting the analysis to domestic impacts) based on the IWG's view "that a global perspective is essential for SC-GHG estimates because climate impacts occurring outside U.S. borders can directly and indirectly affect the welfare of U.S. citizens and residents." TSD, *supra*, at 3. So much for Congress's directions, *e.g.*, that agencies must set federal energy conservation standards based on "national" needs, 42 U.S.C. §6295(o)(2)(B)(i)(VI), or set CAFE standards for motor vehicle emissions based in part on "the need of *the United States* to conserve energy," 49 U.S.C. §32902(f) (emphasis added).

Second, the Estimates employ artificially low discount rates for GHG emissions, below the 3 percent specified in Circular A-4. To take just one example, they expressly use a discount rate of 2.5 percent instead of 3 percent—a change that increases the IWG's estimated social cost of one metric ton of carbon emissions by 49 percent (from $51 to $76), of one metric ton of methane emissions by 33 percent (from $1500 to $2000),

and one metric ton of nitrous oxide emissions by 50 percent (from $18000 to $27000); and that's just for emissions year 2020. TSD, *supra*, at 5-6.

Although EO13990 requires that virtually every agency apply these numbers in virtually *every* decision, the government has yet to identify a single statute authorizing either the IWG or the SC-GHG Estimates.

C. When Defending the SC-GHG Estimates in District Court, the Government Denied Using Them, or Denied any Material Impact from their Use.

A coalition of States—Applicants here—challenged EO13990 and the SC-GHG Estimates in the United States District Court for the Western District of Louisiana. The government defended itself below principally by *denying it was using* the Estimates—and, by hedging that *if* they were using them, the Estimates had no material impact on any regulatory process. In effect, the government claimed the Estimates were for purely informational purposes, regardless of EO13990's use directive.

The States, however, showed that the government in fact had deployed the Estimates in a *host* of costly regulatory actions. As the district court documented, the Estimates are in use across all climate-related Executive Branch decisionmaking. App. A at 16-20. The government is using them in rulemakings. *E.g.,* App. A at 17 (citing EPA,

Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74434 (Dec. 30, 2021)). Individual agencies are using them in decisions about energy projects, including oil and gas. *E.g.*, App. A at 18 (citing DOI, Secretarial Order No. 3399, Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decisions-Making Process (April 16, 2021)). And agencies are incorporating them in NEPA evaluations. *E.g.*, App. A at 19 (citing Dep't of Transportation, Maritime Admin., Bluewater Texas Terminal Deepwater Port Project Draft Environmental Impact Statement (Oct. 2021)). All told, the district court found that government was using the SC-GHG Estimates in dozens of regulatory actions with the potential to impose tens of billions of dollars in costs across all sectors of the American economy. App. A at 15-20, 31.

D. The District Court Issues an Injunction with Detailed Findings of Fact.

After extensive briefing, evidentiary submissions, and oral argument, the district court issued a preliminary injunction on February 11, 2022, with detailed findings. App. A. The court first held it had jurisdiction to adjudicate the States' claims. *Id.* at 11-27. The court then held that EO13990 and the Estimates likely exceed the Executive

Branch's authority because they are not authorized by *any* grant of statutory power. *Id.* at 29-34. The Estimates are also likely unlawful under the Administrative Procedure Act, it reasoned, because they were not promulgated after notice-and-comment procedures, are arbitrary and capricious, and violated several statutory provisions. *Id.* at 34-38. The court next found that EO13990 and the Estimates irreparably harm the States by reducing their tax revenues, harming their citizens' economic welfare, imposing additional duties on the States and State agencies in cooperative federalism programs, and divesting the States' procedural rights under the APA. *Id.* at 40-43. Finally, the court determined the balance of harms and public interest "weigh heavily in favor of granting a preliminary injunction." *Id.* at 44.

E. The Fifth Circuit Stays the Injunction After the Government Changes Position.

After the district court issued its injunction, the Government did a shocking about-face. It asked the Fifth Circuit to stay the injunction, now complaining—despite arguing otherwise in district court for months—that the SC-GHG Estimates were being used in dozens of federal actions and that federal government operations would essentially freeze if agencies could not *continue* using the Estimates. App. C at 6. The court

of appeals accepted those arguments and stayed the injunction to allow the government's "continued use of" the SC-GHG Estimates. *Id.* at 7.

On that score, however, the court of appeals' order irreconcilably conflicts with itself. According to the court of appeals, the government was likely to succeed on appeal because Plaintiff States lacked standing—a conclusion flowing from the court of appeals' view that the increased regulatory burden the SC-GHG Estimates will impose on the States "is, at this point, merely [a] hypothetical" "injury." *Id.* at 5. That is, the States supposedly lack standing because the federal government *is not using* the SC-GHG Estimates. But at the same time, it thought the injunction preventing the Estimates' "continued use" (*Id.* at 7) must be stayed to prevent irreparable harm to the federal government. *Both statements cannot be simultaneously true*: by definition, an order preventing the government from doing something it isn't doing works no harm, irreparable or otherwise. In all events, the court of appeals never mentioned the district court's findings about the scores of current federal regulatory actions using the Estimates or the hundreds of billions of dollars in regulatory costs they will impose on States and other persons.

REASONS FOR GRANTING THE APPLICATION

This Court may grant a stay of a lower court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017); *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427-29 (2009); *West Virginia v. EPA*, 577 U.S. 1126 (2016). Applicants satisfy those standards here.

I. THIS CASE RAISES QUESTIONS OF SURPASSING NATIONAL IMPORTANCE THAT WARRANT CERTIORARI REVIEW AND JUDGMENT IN APPLICANTS' FAVOR.

The Fifth Circuit's stay order allows an agency created out of whole cloth to issue what might be the most significant rule in American history without (1) any statutory authority, (2) following notice-and-comment procedures, or (3) pre-enforcement judicial review. Compounding those problems, the Fifth Circuit's stay order concludes that the States—whose interests are subject to rulemakings that self-evidently use the SG-GHG

Estimates—lack standing to challenge them. Given the nature of these issues and identity of the parties, the court of appeals' conclusions work so much mischief to this Court's settled precedent that it is *at least* reasonably probable that the Court will grant certiorari and reverse.

A. Whether an agency created by Executive Order can issue perhaps the most sweeping regulation in history without a pretense of statutory authority, or public notice and comment, is a question of indisputable importance.

This case both resembles and differs from this Court's other recent agency-power cases, *see supra* n.1, and those similarities and differences all confirm why this Court is almost certain to grant plenary review. Like those cases, this one implicates the bedrock administrative-law principle that, as "creatures of statute," agencies "possess only the authority that Congress has provided." *NFIB v. Dep't of Labor*, 142 S.Ct. 661, 665 (2022). Unlike the agencies in those cases, however, the IWG here was created by executive order—and thus exercises powers that, by definition, Congress *did not* provide.

Even benign consequences flowing from this free-radical approach to exercising executive power should warrant an exercise of this Court's power to "resolv[e] disputes about which authorities possess the power to

make the laws that govern us under the Constitution and the laws of the land." *Id.* at 667 (Gorsuch, J., concurring). But the SC-GHG Estimates are no "everyday exercise of federal power." *Id.* at 665. Rather, they are among the most significant regulatory actions *in the Nation's history*.

By design, the SC-GHG Estimates drive up the cost side of every regulatory action even touching greenhouse gas emissions. Such regulations implicate almost every aspect of modern American life—"from Frisbees to flatulence." *Massachusetts v. E.P.A.*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting). They are used to determine the shape of stoves and refrigerators under EPCA's appliance-efficiency program, 42 U.S.C. §6295; the size and shape of cars under the CAFE standards program, 49 U.S.C. §32902; the design of lightbulbs and air conditioners under EPCA, 42 U.S.C. §6295; the design of manufactured housing, *id.* §17071; whether a power plant can be built or modified, *id.* §7411; and whether the production of concrete to build and repair roads and bridges is too emissions-heavy, *id.* §4331. As a result, the Estimates impose crippling new hidden costs across all sectors of the American economy. App. A at 31 ("The total cost of these 83 regulatory actions [using the SC-

GHG Estimates] is estimated to be between $447 billion and $561 billion.”).

In a sentence, then, the SC-GHG Estimates embody a contested public policy choice of “deep economic and political significance.” *King v. Burwell*, 576 U.S. 473, 486 (2015). And Congress must “speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.” *Ala. Ass’n of Realtors*, 141 S.Ct. at 2489 (quoting *UARG*, 573 U.S. at 324) (applying Major Questions Doctrine to CDC regulation resulting in a $50 billion economic impact). Here, however, Congress has not spoken on this issue *at all*.

The SC-GHG Estimates’ crushing economic impact is not the only reason to apply (and invalidate the Estimates under) the Major Questions Doctrine. As the district court expressly found, the government is using the SC-GHG Estimates to alter the nature of federal-state relations in cooperative federalism programs. *See* App. A at 19-20. But Congress will “not be deemed to have significantly changed the federal-state balance” unless it “conveys its purpose clearly.” *United States v. Bass*, 404 U.S. 336, 349 (1971). And it’s hard to conclude that Congress conveyed its purpose clearly when it didn’t convey its purpose at all.

Third, the SC-GHG Estimates' novelty also demonstrates the importance of this Court's resolving their legality. Agency edicts "discover[ing] in a long-extant statute an unheralded power to regulate a significant portion of the American economy" deserve a healthy "measure of skepticism." *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted). Quite so. Congress lacks authority to delegate "virtually unlimited power" over the American economy to an executive agency. *BST Holdings*, 17 F.4th at 617. The notion that the Executive Branch could properly claim for itself that same power—as it has tried to do here—cannot reasonably escape judicial review. But that's exactly what the Fifth Circuit's stay order allows.

In sum, and as the district court correctly recognized, the Executive Branch bears the burden to identify clear congressional authorization for the SC-GHG Estimates given their transformative effect on virtually every sector of America's economy, infringement on legislative power, and usurpation of traditional State powers. *See NFIB*, 142 S.Ct. at 665. Despite having numerous chances, the government has yet to point to *even one* sentence in the United States Code authorizing the Executive Branch to promulgate or implement the Estimates. App. A at 29-34

(collecting cases). And while the States keep waiting for that cite, the Fifth Circuit's stay order permits the Executive Branch's "continued use" of the Estimates (App. C at 7) across scores of rulemakings in ways that render it difficult—if not impossible—to justify anything but the most stringent energy regulations. Those problems would amply warrant this Court's plenary review and judgment in Applicants' favor.

B. Whether the SC-GHG Estimates constitute a rule subject to the APA and to preenforcement judicial review are separate questions of national importance.

Besides improperly precluding judicial review of the SC-GHG Estimates' statutory validity, the Fifth Circuit's stay order effectively precludes APA challenges to them. That outcome does violence to established APA precedent and creates perverse incentives for future administrations that this Court should and would review and correct.

1. The SG-GHG Estimates are agency action subject to preenforcement APA review. The district court recognized that "the SC-GHG Estimates are a legislative rule that dictate[] specific numerical values for use across all decisionmaking affecting private parties." App. A at 33. That reasoning is correct; because they direct agencies to employ *specific numerical values* in rulemakings, regulatory review, cooperative

federalism programs, and NEPA analysis, the Estimates necessarily constitute a legislative rule. As Judge Friendly put it, "when an agency wants to state a principle 'in numerical terms,' terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting Henry J. Friendly, *Watchman, What of the Night?*, BENCHMARKS 144-45 (1967); *see also United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) (action dictating a "specific numeric amount" is a legislative rule) (collecting cases).

Because the Estimates are a legislative rule, IWG could have adopted them (if at all) only through "notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996). But no notice-and-comment rulemaking occurred here. Whether that failure, and the corresponding deprivation of Applicants' procedural APA rights to notice and comment, warrants vacating the Estimates is a critical question warranting this Court's plenary review.

The Fifth Circuit's order allowing "the continued use" (App. C at 7) of the SC-GHG Estimates despite the lack of notice and comment

compounds the problem by undermining the decades-old system of preenforcement judicial review of agency actions. Regulated parties have long challenged legislative rules under the APA before the government imposes those rules upon them. *See, e.g.*, *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 685-86 (2d Cir. 1966), *aff'd sub nom.* 387 U.S. 158 (1967), *and aff'd*, 387 U.S. 167 (1967) (Friendly, J.) (regulations are "immediately reviewable" when they "operate[] 'to control the business affairs' of the plaintiff and ma[k]e it impossible to 'cogently plan its present or future operations' so long as their validity remained undetermined ... even though review might have been obtained by provoking an adverse administrative order").

As regulated parties, the States need not wait for the Executive to "'drop the hammer' in order to have their day in court." *Id.* Rather, a rule is reviewable when its "very promulgation demands conformity and poses, for the plaintiff or others with whom he must deal, the alternatives of compliance or severe penalties of forfeiture of disruption of business operations." *Toilet Goods Ass'n*, 360 F.2d at 685. Just so here. As the States documented below, their State agencies feel pressure *right now* to conform their practices to the Estimates in cooperative federalism

programs. App. A at 19-20. And regulated private parties must do the same. Yet under the Fifth Circuit's rationale, even legislative rules of immense national importance may go into immediate effect without the opportunity for judicial review.

The Fifth Circuit's answer to this problem was no answer at all. It incorrectly reasoned (App. C at 7) that the SC-GHG Estimates represent the "status quo" in federal regulatory process. Not so. Bipartisan regulatory review has occurred for decades under EO12866's *neutral* cost-benefit scale, which was adopted after a thorough and transparent process involving peer review. EO12866 mandates a neutral *system* directing agencies to follow a particular *process* of weighing costs and benefits of regulations. In contrast, the Estimates set out a specific *number* that agencies must use in EO12866 cost/benefit analysis and other agency actions. EO13990 and the Estimates thus undermine EO12866 by placing a weight so heavy on that cost scale that it collapses.

2. The troubling consequences of insulating a legislative rule from APA challenge, as the Fifth Circuit's order does, would further justify this Court's plenary review. The panel's order allows legislative rules to take immediate effect as long as they are issued by a presidentially

created, nonstatutory agency. That is, the Executive can circumvent the APA by creating an agency by edict and then vesting it with authority to issue binding legislative rules—all without notice and comment or preenforcement review. *See* App. A at 34-35. With that path open to a president, why bother asking Congress to create and empower an agency whose actions a court could scrutinize?

And where presidents gain, regulated parties and Congress lose. Here, for example, the States were subjected to the Estimates' harms for months across scores of rulemakings. *See* App. A at 16-20. Congress, in turn, is stripped of its prerogative to create agencies and empower them to issue legislative rules. *See, e.g.*, *NFIB*, 142 S. Ct. at 665 ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); U.S. Dep't of Justice, Office of Legal Counsel, *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. OLC 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President."). Whether those incentives accord with our constitutional design is a question this Court should answer.

C. Whether the Fifth Circuit's order denying the States standing to challenge the SC-GHG Estimates accords with this Court's precedent is a federalism question of utmost importance.

The court of appeals held that the federal government made a "strong showing" that it is "likely to succeed on the merits because the Plaintiff States lack standing." App. C at 5. This erroneous holding would merit this Court's review because it contradicts or ignores the district court's contrary findings and contravenes settled State standing precedent.

1. The Panel incorrectly states that the States suffered only one potential injury—"increased regulatory burdens." App. C at 5. This faulty conclusion overlooks the government's failure to challenge the district court's independent findings on at least three separate bases for the Plaintiff States' standing unrelated to increased regulatory burdens.

First, the district court found the "SC-GHG Estimates artificially increase the cost estimates of [Mineral Leasing Act oil-and-gas] lease sales, which in effect, reduces the number of parcels being leased, resulting in the States receiving less in bonus bids, ground rents, and production royalties." App. A at 20. Relatedly, the district court also held that the Administration's use of the Estimates in NEPA reviews "directly

causes harm to the Plaintiff States' statutorily vested rights to proceeds from MLA oil and gas leases." *Id.*

Second, the panel did not address the district court's holding and jurisdictional finding—entitled to clear-error deference—that the Bureau of Land Management is using the SC-GHG Estimates in lease-sale analyses, and the district court's holding that doing so directly harms specific revenue sources for the States.[2]

Third, the court of appeals ignored the district court's holding that the States suffered a procedural injury in fact based on the Executive's failure to submit the SC-GHG Estimates to notice-and-comment rulemaking. *See* App. A at 43-44 ("In addition, the implementation of SC-GHG Estimates without complying with the APA and the notice and comment period have divested Plaintiff States of their procedural rights."). States have standing to protect those rights when their concrete sovereign interests are at stake. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007); *see also Texas v. United States*, 809 F.3d 134, 161 (5th

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[2] As the district court found, App. A at 13, 19 n.46, 20-21, 26, 37, 41, 43, the States easily satisfied their burden of identifying "specific tax revenues" directly harmed by the Estimates. *El Paso Cty., Tex. v. Trump*, 982 F.3d 332, 340 (5th Cir. 2020).

Cir. 2015) ("Enjoining DAPA based on the procedural APA claim could prompt DHS to reconsider the program, which is all a plaintiff must show when asserting a procedural right.").

Each of those independent grounds for State standing is supported by factual findings made upon full briefing and oral argument. And each should have been fatal to the panel's standing holding because the States need only one basis for standing for the case to reach the merits. *See, e.g.*, *Massachusetts*, 549 U.S. at 518. But the panel failed to consider even one of them.

2. Even on the panel's (fatally flawed) view that "increased regulatory burdens" (App. C at 5) is the only basis for State standing, the panel still misread the record to bar the States' claims. The States *did* establish that they suffered immediate harm from increased regulatory burdens, as the district court's exhaustive jurisdictional findings confirm.

The district court found that: (1) "mandatory implementation of the SC-GHG Estimates imposes new obligations on the states and increases regulatory burdens when they participate in cooperative federalism programs," App. A at 19-20; (2) executive agencies have "already employed the SC-GHG Estimates, such as the EPA in disapproving state

implementation plans under the NAAQS good neighbor provisions and imposing federal implementation plans on several Plaintiff States including Louisiana, Kentucky, and Texas," *id.* at 20; and (3) the Estimates put the States to "a forced choice: either they employ the Estimates in developing their state implementation plan, or the EPA subjects them to a federal plan based on the SC-GHG Estimates," *id.*

Thus the panel's assertion (App. C at 6) that the Estimates "do nothing to the Plaintiff States" is false. The Estimates apply coercive pressure to the States to change their approach to greenhouse gas regulation *now*. *See, e.g.*, App. A at 21 ("Plaintiff States have clearly established that: (1) the SC-GHG Estimates create a new cost measure the Plaintiff States must use when running cooperative federalism programs or risk serious consequences."). By itself, this pressure constitutes an injury to the States' "sovereign power[s]," whether States actually change their policies or not. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). And that continuing harm cannot be erased or remedied by after-the-fact relief. Beyond that, the harm to the oil-and-gas lease-sale programs and revenues is irreparable. These presently occurring damages cannot be remedied in the ordinary

course of litigation because of the federal government's sovereign immunity. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015).

The Panel ignores these specific findings and mischaracterizes them as "speculat[ion]." App. C at 7. Far from it. The district court did not speculate—it made specific jurisdictional factual findings supported by an extensive record. Those jurisdictional findings are entitled to the highest deference, not the utter disregard they received from the panel.

3. The court of appeals also insinuated (App. C at 6, 7) that the States' claims are not ripe because they may challenge the Estimates in future rulemakings. But as the district court recognized, this argument ignores the reality that *the Estimates are themselves a final rule* with immediate legal consequences. App. A at 25-26. And the Estimates are now harming (and will continue to harm) the States. Waiting to participate in future rulemakings does not undo the extensively documented *presently occurring* harms the Estimates cause.

This "Court has found hardship to inhere in legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being

'force[d] ... to modify [one's] behavior in order to avoid future adverse consequences.'" *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998)). As explained, the SC-GHG Estimates and EO13990 do all three. And courts routinely find asserted harms identical to the States' to justify immediate review. *See, e.g.*, *id.* ("If Texas cannot challenge the Procedures in this lawsuit, the State is forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input."); *Florida v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974) ("As for that hardship, the state is presently faced with the dilemma whether to bow to the Secretary's volte-face and amend its laws and procedures, with all the likely financial outlay and certain legislative and administrative effort which that process entails.").

Indeed, executive actions that bind agencies to a certain course are immediately reviewable. For example, in *Lujan v. National Wildlife Federation*, this Court noted that an agency action "applying some

particular measure across the board to all individual classification terminations and withdrawal revocations" would be reviewable "at once" if "as a practical matter [it] requires the plaintiff to adjust his conduct immediately." 497 U.S. 871, 890 n.2, 891 (1990). Such actions that "pre-determine[] the future through the selection of a long-term plan (to the exclusion of others which will not be among the available options at the implementation phase) [are] ripe for review." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003); *see also Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 444 (5th Cir. 2019) ("Although the order 'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier,' [the Supreme Court] held that the order was ... immediately reviewable.'").

That's why the States will not have an adequate opportunity to challenge EO13990 and the Estimates in the future. By imposing a new binding regime on agency decisionmaking by force of executive order, the SC-GHG Estimates predetermine the factors agencies will rely on, making it futile for the States to challenge those factors in individual

rulemakings. Thus this is the States' only adequate opportunity to challenge EO13990 itself and the 2021 SC-GHG Estimates themselves.

4. Finally, the court of appeals improperly refused to apply the special solicitude doctrine set out by this Court in *Massachusetts v. E.P.A.* Because States "are not normal litigants for the purposes of invoking federal jurisdiction," they are entitled to "special solicitude" in the standing analysis if two factors are present. 549 U.S. at 518. First, the challenged action must affect the States' "quasi-sovereign" interests. *Id.* at 519-20. Second, the States must possess a procedural right to challenge the infringement on their quasi-sovereign interest. *Id.* at 516-17.

Both elements are met here. The Estimates impinge several quasi-sovereign State interests, such as avoiding regulatory pressure from the Estimates to change their laws and policies. And the States have a procedural right under the APA to challenge the Estimates' infringement of their quasi-sovereign interests. Yet the court of appeals went out of its way to avoid mentioning or applying this Court's special solicitude precedent, instead treating the States as it would any individual litigant.

This mode of standing analysis in regulatory litigation by States does not comport with this Court's precedents and would justify merits review.

II. THE COURT OF APPEALS' STAY ORDER IMPOSES IRREPARABLE HARM ON THE APPLICANT STATES.

A. If this Court lets the Fifth Circuit's stay order stand, the States will suffer irreparable harm. As an initial matter, the Fifth Circuit's order is internally inconsistent: it simultaneously claims that EO13990 and the Estimates do not embody a major question because they have a "merely hypothetical" impact on the States, App. C. at 5, yet later holds *precisely the opposite*—that the federal government's "continued use" of the Estimates is necessary to avoid irreparable harm, *id.* at 7.

Such inconsistency is suspect in any case, but it's worse here because at every stage of this litigation in the district court, the federal government insisted that the Executive Branch *does not actively use* the SC-GHG Estimates—or, to the extent they are used, *they make no difference* in analysis and decisionmaking. That the government switched tacks to try to convince an appellate court to stay an injunction should color this Court's view of whether the court of appeals properly reviewed (under the proper standards of review) the district court's factual findings that contradict the panel's holding.

In any case, the States agree that the Executive Branch is using the Estimates in scores of regulatory actions and that they represent a major initiative with economy-shaking implications. *That's exactly why it was necessary to enjoin them.* Contrary to the panel's determination (App. C at 6) that the injunction "halts the President's directive to agencies in how to make agency decisions, before they even make those decisions," the Estimates are a legislative rule promulgated without statutory authority or following required notice-and-comment procedures. The Fifth Circuit's stay order thus ignores the foundational remedies tenet that halting an illegal measure works no irreparable harm to the Executive. *See, e.g.*, *State v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021); *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020).

What's more, the court of appeals assumed its conclusion. It reasoned that the district court's injunction "effectively stops or delays agencies in considering SC-GHG in the manner the current administration has prioritized within the bounds of applicable law." App. C at 6. But the predicate question is whether Defendants *have* authority to promulgate them; and there is no irreparable harm when the Executive is "stop[ped] or delay[ed]" from performing acts *beyond*

statutory authority. *Biden*, 10 F.4th at 558. And as noted, the federal government has never identified *any* statute authorizing the Estimates generally, their global scope specifically, or EO13990's directive to apply them to regulatory actions government-wide.

The panel's conclusion that the Executive Branch suffers irreparable harm when it is enjoined from acting to further what it merely *perceives* to be the public interest—without regard to statutory authority—would mean that "no act of the executive branch asserted to be inconsistent with a legislative enactment could be the subject of a preliminary injunction." *Doe #1*, 957 F.3d at 1059. "That cannot be so." *Id.*

Beyond that, if the injunction remains stayed, the States will continue to suffer the irreparable harms that the district court correctly concluded support injunctive relief. *See* App. A at 40-43. The SC-GHG Estimates increase States' energy costs, decrease their tax revenues, compound their burdens in cooperative federalism programs, threaten their coastline restoration and protection projects, divest them of administrative process and consultation rights, and impose economic harms on their citizens that States have a *parens patriae* right to protect.

See id. Each of those harms itself justifies a stay; together, they all but require it.

The district court correctly held that EO13990 and the Estimates exceed the Executive Branch's authority and impose irreparable harm on the States. The panel's conflicting conclusion—that the *injunction* works irreparable harm on the *Executive* but the Estimates work no harm to *the States*—cries out for further review.

B. To the extent they are relevant, other equitable factors traditionally applicable to stay inquiries—the public interest and balance-of-harms factors—also favor Applicants.

Most obviously, the federal government has no legitimate interest in the implementation of an unlawful measure. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S.Ct. at 2490. And the "public interest favors maintenance of [an] injunction" that "maintains the separation of powers." *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015).

Should the government argue that the Estimates further an interest in combatting climate change, there are countervailing interests in preserving State sovereignty and the States' economies. It is not this

Court's "role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." *NFIB*, 142 S.Ct. at 666. Because Congress has not clearly authorized the SC-GHG Estimates, it is not for the Executive to usurp power to disturb this balance.

CONCLUSION

For the foregoing reasons, this Court should grant the application and vacate the Fifth Circuit's order staying the district court's preliminary injunction.

Respectfully submitted,

Dated: April 27, 2022

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