No. 21A658

In the Supreme Court of the United States

LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL JEFF LANDRY, *et al.*,

Applicants,

v.

JOSEPH R. BIDEN, JR. IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *et al.*,

Respondents.

On Application to Vacate an Order of the U S. Court of Appeals for the Fifth Circuit Staying an Injunction Issued by the U.S. District Court for the Western District of Louisiana Pending Appeal

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF OF THE STATE OF MISSOURI AND NINE OTHER STATES IN SUPPORT OF PETITIONERS' APPLICATION

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Movants are the States of Missouri, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Oklahoma, South Carolina, and Utah, and they respectfully request leave to file the accompanying brief as amici curiae in support of the application to vacate the order by the U.S. Court of Appeals for the Fifth Circuit staying the injunction issued by the U.S. District Court for the Western District of Louisiana pending appeal in the above captioned matter.

IDENTITY AND INTERESTS OF MOVANTS

Movants are sovereign States within the United States of America. The States have a strong interest in preserving their authority in areas of traditional state regulation and enforcing the U.S. Constitution's limits on the Executive Branch's power. That interest is heightened when the Executive violates the separation of powers and encroaches on legislative prerogatives in derogation of the States' traditional authority. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985) ("[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.").

Movants are also plaintiffs in a separate suit against the defendant agencies here, likewise challenging the Interagency Working Group's "interim" social costs of greenhouse gases ("Interim

Estimates" or "SCGHG"). That lawsuit is pending in the U.S. Court of Appeals for the Eighth Circuit. *Missouri v. Biden*, No. 21-3013 (filed Sept. 8, 2021).

REASONS TO GRANT THE MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

By analogy to Rule 37.2(b) of the Rules of the Supreme Court, Movants respectfully seek leave to file the accompanying *amici curiae* brief in support of the Applicants to vacate the stay order by the U.S. Court of Appeals for the Fifth Circuit. By filing this motion one week before respondents' deadline to file a response, there is adequate time for any response. Additionally, counsel provided notice of the filing on Friday, April 30, 2022, via electronic mail to counsel for Respondents.

Movants *Amici* States respectfully submit that the proffered amicus brief will assist the Court on the following matters relevant to the Court's disposition of the application:

- First, the *Amici* States' brief discusses jurisdictional matters concerning Article III standing and ripeness that the circuit court discussed and has been the Administration's primary defenses to judicial review of this legislative rule promulgated without notice and comment under the Administrative Procedures Act.
- Second, the brief brings to the Court's attention the Administration's litigation statements and

positions relating to the use of the Interim Estimates for the Social Cost of Greenhouse Gases in a parallel case, *Missouri v. Biden*, No. 21-3013 (8th Cir. Sept. 9, 2021). This is relevant because the Administration has repeatedly conceded that the Interim Estimates bind other third-party agencies in the exercise of those agencies' statutory duties.

- Third, the brief helps explain the numerous legal and scientific deficiencies in the probabilistic models that underlie the Interim Estimates and that these models have not been subject to notice and comment under the Administrative Procedures Act.

These issues are all relevant to the merits of the application, and Movants respectfully submit that filing the brief will aid the Court's decision on the application.

For the above reasons, *Amici* States respectfully request that this motion for leave to file the accompanying brief as amicus curiae supporting the application be granted.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the States of Missouri, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Oklahoma, South Carolina, and Utah. *Amici* have a strong interest in preserving their authority in areas of traditional state regulation, such as agricultural, energy, and environmental regulation. *See Bond* v. *United States*, 572 U.S. 844, 858 (2014) (noting land and water use as an area of traditional state responsibility). That interest is heightened when the Executive violates the separation of powers and encroaches on legislative prerogatives in derogation of the States' traditional authority. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985) ("[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.").

Amici are also plaintiffs in a separate suit against the defendant agencies here, likewise challenging the Interagency Working Group's "interim" social costs of greenhouse gases ("Interim Estimates" or "SCGHG"). *Amici*'s lawsuit is pending in the U.S. Court of Appeals for the Eighth Circuit. *Missouri* v. *Biden*, No. 21-3013 (filed Sept. 8, 2021). Their case addresses issues parallel to those at stake here—including whether States have standing to sue the Interagency

[1] Counsel has substantially complied with Supreme Court Rule 37 and provided adequate notice to all parties of its intent to file this brief in this procedural posture.

Working Group to challenge the Interim Estimates, and whether their claims are ripe. This Court's statements are afforded deference by the Courts of Appeals and will likely impact *Amici*'s pending case. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064-65 (8th Cir. 2017) (collecting cases).

INTRODUCTION

In *Amici*'s parallel case, with respect to the Interagency Working Group, the Government conceded that "[n]o statute establishes it, nor delegates it any legislative authority." Gov. Mot. Dismiss, *Missouri et al.* v. *Biden, et al.*, No. 4:21-CV-00287-AGF, ECF No. 28, at 41 (E.D. Mo. June 4, 2021). Yet, under Executive Order 13990, the Interagency Working Group's Interim Estimates are *binding* on federal agencies, unless a statute specifically prohibits their use. Again, the Government repeatedly conceded as much in *Amici*'s parallel case. *See id.* at 23, 38. This concession follows the plain language of EO 13990, which states that federal "agencies *shall* use" the Interim Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions." EO 13990, § 5(b)(ii)(A). Thus, under EO 13990, an agency with *no* statutory authority—and thus, no statutory discipline—purports to control how agencies *with* delegated authority must exercise their delegated authority, on a specific policy question of enormous practical importance.

These concessions both establish the States' standing to sue and confess to an egregious violation of the separation of powers. "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Util. Air Regul. Grp.* v. *EPA*, 573

U.S. 302, 327 (2014). Yet the Interagency Working Group's actions are legislation, pure and simple. The "interim" estimates of the social cost of greenhouses gases are an unconstitutional workaround to compel every federal agency to regulate greenhouse gas emissions—without congressional authorization. This is a core violation of the separation of powers. It is undisputed that neither the Interim Estimates nor the Interagency Working Group are authorized by statute. But Executive Order 13990 gives the Interim Estimates the force of law—because every federal agency "*shall* use [the SCGHG] when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published." 86 Fed. Reg. 7037, 7040 (Jan. 20, 2021) (emphasis added). This unprecedented step of binding all federal agencies to use specific numerical qualities when valuing costs and benefits is presidential law-making. This sidesteps the Founders' intent that "the legislative, executive, and judiciary departments ought to be separate and distinct," and that this separation is an "essential precaution in favor of liberty." FEDERALIST NO. 47, at 301 (Madison) (C. Rossiter ed. 1961). This Administration pursues a "whole of government" approach to combat climate change—so long as Congress is not involved.

It is also undisputed that the Interim Estimates have not been subject to notice and comment under the Administrative Procedure Act. They should be. When an agency wants to state a principle "in

numerical terms," and those "numerical terms" 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) (citing Henry J. Friendly, *Watchman, What of the Night?,* in BENCHMARKS 144–45 (1967)). Even more concerning, the Interagency Working Group's methodology—averaging three probabilistic Integrated Assessment Models (IAMs) that have been revised by the Interagency Working Group—has also never been subject to notice and comment or judicial review under the APA. When the Obama-era Interagency Working Group received comments on the methodology, it "clarified that it was not requesting comments on the three peer reviewed IAMs themselves," and ignored them. Response to Comments, Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 3 (July 2015).[2] So the now *binding* Interim Estimates that merely adjust the Obama-era "social costs of greenhouse gases" for inflation, have repeated previous mistakes and avoided both notice-and-comment and judicial review altogether.

This methodology cannot withstand any serious scrutiny. The IAM-based calculation of so-called "social costs" of greenhouse gases involves wildly speculative guesswork that purports to project the

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2 *Available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf.

course of all human history for 300 years into the future—including future human migration, technological developments, conflicts, adaptation patterns, and mitigation measures. The 2021 Technical Support Document (2021 TSD), announcing the Interim Estimates, admits that the methodology does "not reflect the tremendous increase in the scientific and economic understanding of climate-related damages that has occurred in the past decade." *Louisiana* v. *Biden*, No. 21-1074, Doc. 55-27, at 22 (W.D. La. July 27, 2021). It also concedes that the important choice of discount rate is a naked policy decision that "raises highly contested and exceedingly difficult questions of science, economics, ethics, and law." *Id.* at 17. The discount rate plays an outsized role because the Interagency Working Group's time horizon for *global* damages is the year 2300. The Interagency Working Group had to change one of the three IAMs because its default time horizon was the year 2200—"too short a time horizon because it could miss a significant fraction of damages under certain assumptions." *Louisiana* v. *Biden*, No. 21-1074, Doc. 55-6, at 25 (2010 TSD) (W.D. La. July 27, 2021). The Interagency Working Group also had to speculate "GDP, population, and greenhouse gas emission trajectories after 2100, the last year for which these data are available from the" input models. *Id.* Even without the benefit of statisticians and data scientists, these facts raise serious questions about the validity and reliability of the methodology that created the Interim Estimates—that other agencies previously

refused to credit. *E.g.*, *EarthReports, Inc.* v. *Fed. Energy Regul. Comm'n*, 828 F,3d 949, 956 (D.C. Cir. 2016) (noting social cost of carbon methodology unfit for use in FERC proceedings).

The Fifth Circuit's finding that the Government had "made a strong showing that they are likely to succeed on the merits, and the balance of harms to the parties favors granting the stay" is an abuse of discretion. App. C-4. To be clear, the Fifth Circuit found that oil-producing states with pipelines that transport oil and natural gas (methane) did not have standing to challenge a legislative rule that values the benefit of reducing emissions by as much as $152/ton of carbon dioxide and $3900/ton of methane. 2021 TSD, Doc. 55-27, at 5 (Tables ES-1 & ES-2). It also implied that the challenge to require the Administration to engage in rulemaking was unripe, even though the rule has issued and the status quo was "the continued use of the Interim Estimates." App. C-7. Essentially, the Fifth Circuit concluded that because judicial review might be available in future rulemakings, there was "no obstacle to prevent the States from challenging a specific agency action [later] in the manner provided by the APA." *Id.*

The Fifth Circuit's approach is contrary to this Court's precedents, and it rewards the Administration's attempt to insulate an important legislative rule from judicial review. Because the Interagency Working Group's Interim Estimates are *binding* on all federal agencies, the Interagency Working Group's acts ""alter[] the legal regime to

which the [future] agency is subject." *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). No matter how much the States comment on the IAMs in future rulemakings, those future agencies will predictably follow the President's directive that they "*shall*" use the Interagency Working Group's calculations. Federal agencies have no choice but to use the Interim Estimates in future rulemakings, making it essentially impossible for the States to convince agencies to change course. *City of Los Angeles* v. *Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("[T]his inability to compete on an even playing field constitutes a concrete and particularized injury."). Thus, the Interim Estimates cause the injury and "are the very last step in the chain of causation." *Bennett*, 520 U.S. at 168-69.

The failure to engage in notice and comment before issuing the binding Interim Estimates completes the States' Article III injury: The States' claims "can never get riper." *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726, 737 (1998). This is especially true because the "interim" label is a misnomer, as it is more accurate to call the Interagency Working Group's rule the "2021 Estimates." The Interagency Working Group has no intention of revising the Interim Estimates (already used in multiple rulemakings); instead it will update them by issuing the "final" social cost of greenhouse gases at some unspecified future date. *Nat. Res. Def. Council* v. *Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (agency action not "subject to further consideration by

the agency" are final). For all agency actions in the meantime, the "Interim" Estimates *are* the final, binding values. Periodic revision of regulations is "a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal" or interim. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016). When "there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations" it can be challenged. *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990). Contrary to the Fifth Circuit's claim that the States can simply wait and challenge another agency's actions, this Court has reserved the question of whether attacking a future agency's decision is proper. *See Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020).

The Interagency Working Group—a "super-agency" within the Executive Branch with *no* delegated authority—purports to bind individual, statutorily created agencies to exercise their delegated authority a particular way, and prevents them from conducting their own analysis of the potential costs and benefits of greenhouse gas emissions, subject to legal constraints and judicial review under the APA. The Interagency Working Group decides that key issue for every rulemaking or other agency action. It is, as the Chief Justice observed in *NFIB* v. *OSHA*, the Administration "trying to work across the waterfront," No. 21A244

Oral Arg. Tr. 79: 20-22 (Jan. 7, 2022). But instead of "going agency by agency," *id.*, the Executive has adopted one massive policy of enormous importance in one action behind closed doors, and dictated that all agencies must follow it. This maneuver "should be analyzed more broadly as this is, in effect, an effort to cover the waterfront." *Id.* at 80:19-20. The Constitution does not require the States to play whack-a-mole with hundreds of flawed agency actions that are traceable to this single, unlawful move across the waterfront. *See Bennett*, 520 U.S. at 169–70. The Fifth Circuit's stay should be vacated.

ARGUMENT

I. The States Have Standing to Challenge a Legislative Rule Issued Without Notice and Comment or Statutory Authority.

The States easily satisfy Article III's requirement for a "case or controversy" in at least three ways. First, they are directly, predictably, and traceably injured by the Interim Estimates and the Estimates' impact on state sovereignty, state economies, state industries, and state industrial production. Second, they suffered a clear and complete procedural injury when the Interagency Working Group promulgated the Interim Estimates without notice and comment. Third, as participators in cooperative-federalism programs with federal agencies, they are directly subject to the President's directive in EO 13990 that they "shall" monetize the social costs of greenhouse gases in certain ways. Each of these injuries is individually sufficient to satisfy standing and ripeness.

This Court has determined that standing existed based on a federal agency's refusal to regulate greenhouse gases endangered inches of coastline decades into the future. *Massachusetts* v. *EPA*, 549 U.S. 497, 521, (2007). The States here allege something much simpler and more direct—requiring all agencies to monetize greenhouse gases at a substantially higher rate will increase regulatory burdens and impose greater pocketbook harms. The States rely on a simple causal chain: (1) federal

agencies will engage in rulemakings and other agency actions that monetize greenhouse gas emissions; (2) when they do so, they will obey a direct order from the President to use the Interim Estimates; (3) the Interim Estimates will justify greater regulatory burdens because the calculated benefit of reducing greenhouse gas emissions has increased overnight by more than 700 percent. Each step in the chain follows clearly and naturally, and is virtually certain to occur. This causal chain thus relies "on the predictable effect of Government action on the decisions of [Government] parties." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2565–66 (2019). Indeed, the States' inferences here are far more direct and probable than those that were held sufficient in Department of Commerce. This is sufficient for standing.

The Fifth Circuit appeared to think that any injury was hypothetical because a court could only speculate that agencies would regulate and impose greater regulatory burdens. App. C-7. This misses the whole point of monetizing greenhouse gas emissions. Executive Order 13990 makes it clear: "[a]n accurate social cost is essential for agencies to *accurately determine the social benefits of reducing greenhouse gas emissions* when conducting cost-benefit analyses of regulatory and other actions." § 5(a), 86 Fed. Reg. at 7040 (emphasis added). The States, and Amici, are oil- and natural gas producing States and rely on fossil fuels that emit greenhouse gases for taxes and to power their economies. Reducing oil and natural gas

use harms those interests and "increased SC-GHG Estimates will necessarily cause regulatory standards for air quality, energy efficiency, and power plant regulation to become more stringent and result in significant costs increases." App. A-13.

The district court found as much, finding as a matter of fact that ""the cost estimates of 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-20. It also found that "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-19. The Fifth Circuit did not address these findings, relying on its erroneous conclusion that "[t]he Interim Estimates on their own do nothing to the Plaintiff States." App. C-6. This is clear error because the conclusion overlooks the reason for the SC-GHG—to require regulated parties to offset highly speculative benefits of reducing greenhouse gas emissions with real world capital today.

Similarly, the Fifth Circuit's concerns about causation and redressability are misplaced. It is a virtual certitude that agencies will regulate and use the Interim Estimates to justify increased regulatory burdens—not only in rulemakings but also in "other relevant agency actions." Exec. Order 13990 § 5(b)(ii)(A), 86 Fed. Reg. at 7040 (Jan. 20, 2021). After all, they have been ordered by the President of the United States to do so. *See Kingdomware Techs,*

Inc. v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("the word 'shall' usually connotes a requirement."). As Louisiana and her co-plaintiffs have shown, federal agencies have already used the values to justify increased regulatory burdens in at least fourteen federal agency actions—which wholly discredits the notion that this injury is speculative. App. A-16 18. It is undisputed that agencies view the Interim Estimates as final and binding. Before the Eighth Circuit, the Government confirmed the binding nature of the Interim Estimates at least five times. *Missouri* v. *Biden*, No. 21-3013, Gov. CA8 Br. 31 ("the agencies must use the Interim Estimates (and not other estimates)" when conducting substantive agency actions, "unless otherwise provided by law."), *id.* at 39 (E.O. 13990 imposes a "requirement [that] is binding on an agency"), *id.* ("Agencies thus will rely on the Interim Estimate, when they would otherwise have discretion to do so."); *id.* at 40 (agency "shall use the Interim Estimates rather than another set of figures."); *id.* at 41 ("E.O. 13990 … requires use of the Interim Estimates in the rulemaking context").

The binding nature of the Interim Estimates means that agencies are not free to disregard them, and thus, the Interim Estimates plainly "alter[] the legal regime" under which agencies conduct rulemakings and other agency actions, because they dictate the outcome of a specific, extremely important aspect of the agency's cost-benefit analysis. *Bennett* v. *Spear*, 520 U.S. 154, 170 (1997). The Court has explained that when one agency issues even an

"advisory" opinion to another, "in reality it has a powerful coercive effect" on the second agency, because it "alters the legal regime to which the action agency is subject." *Id.* To disagree, the agency would need to articulate reasons it reached a different conclusion, *id.*, which can be especially difficult when the subject agency has no authority or expertise in the area. *See California* v. *Bernhardt*, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020) ("BLM concedes that the social cost of methane is beyond BLM's expertise and is outside BLM's statutory authority to consider."). This Court did not require the plaintiffs in Bennett to wait until the Bureau of Reclamation—the second agency, or "action agency"—had issued a final agency action based on the prior agency's biological opinion. 520 U.S. at 170. "This wrongly equates injury 'fairly traceable' to the defendant to injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 168 69.

The States' case is even stronger than Bennett, because there, the second agency was "technically free to disregard the Biological Opinion." *Id.* at 170. Here, by contrast, the "action agencies" are not "free to disregard" the Interim Estimates. *Id.* Federal agencies shall use them, Exec. Order 13990 § 5(b)(ii), and the States face serious consequences by not using them. App. A-21.

It is certain that agencies will regulate, that they will monetize the benefits of reducing greenhouse gases, and that those "social" benefits will justify increased regulatory burdens (which is their sole

purpose). *See Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149 (2014) (holding that an injury-in-fact is not conjectural or hypothetical if there is "a 'substantial risk' that the harm will occur"). The Fifth Circuit's reliance on *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), and *Clapper* v. *Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. It misread *Summers* as holding that plaintiffs lacked standing because the plaintiffs were not the subject of the challenged regulations. App. C-6. But the standing defect for the *Summers* plaintiffs arose because they settled the dispute over the particular land tract they had sought to comment on, thus they had not suffered any further deprivation of notice-and-comment rulemaking. 555 U.S. at 490–91.

Similarly, the Fifth Circuit misunderstood that the *Clapper* plaintiffs had not alleged redressability or traceability because the plaintiffs could only speculate that the Administration would use one of a variety of authorities to surveil them. *See* 568 U.S. 398, 412–13 ("The Government has numerous other methods of conducting surveillance, none of which is challenged here."). In contrast, no statute authorizes the Interagency Working Group or the Interim Estimates, and no authority exists to promulgate them, especially without undergoing the processes required by the APA. App. A-10; *see also Bernhardt*, 472 F. Supp. 3d at 613 (BLM disclaiming expertise and statutory authority to consider social costs).

II. The Interagency Working Group's Social Cost of Greenhouse Gases is Ripe for Review.

The Government's unlawful attempt to stack the deck in every rulemaking through a "whole of Government" approach to regulation is ripe for judicial review. In the Eighth Circuit, the Government insists that reviewing the SCGHG can only occur through a "case-by-case, statute-by-statute analysis," CA8 Gov. Br. 52.[3] But that is exactly what the *Administration* sought to avoid by promulgating uniform numerical values here. *Id.* at 8 ("[T]he social cost of carbon (SCC) as a logical and mathematical matter does not vary across regulatory contexts, [but in the past] agencies nonetheless employed quite different estimates in their analyses."). It makes little sense to require the States to challenge every rulemaking by other agencies under those agencies' statutes, when the Interagency Working Group did not take an agency-by-agency approach, and the Administration itself argues that the "social costs" do not vary across regulatory contexts.

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[3] Notably, in the *Missouri* v. *Biden* litigation, the Administration has generally represented that judicial review would be ripe "if and when" the Interim Estimates are used to justify agency action. CA8 Gov. Br. 47. *But see* App. C-7 ("The status quo at this point is the continued use of the Interim Estimates.").

The Interagency Working Group promulgated a final legislative rule that binds all other agencies in all regulatory contexts and increases the regulatory burden of emitting greenhouse gases. The States claims—that both the rule and the non-statutory process that created the rule are unlawful—cannot get any riper. This Court has cautioned against and reserved whether attacking one agency's action is the "proper vehicle[] for attacking" an another agency's mandate. *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020). Because the SCGHG create adverse effects of a strictly legal kind by altering the legal landscape in future rulemakings, the issues are fit for judicial review and create a hardship to the States by withholding court consideration. *Nat'l Park Hosp. Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 808 (2003). Indeed, this Court has noted that when one rule or action has such "across the board" effects, it is fit for review. *See Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. at 890 n.2.

This Court generally finds that when a legislative rule affects the conduct of regulated parties, the hardship prong is met. *See Nat'l Park Hosp. Ass'n,* 538 U.S. at 808. Although neither the Interagency Working Group nor the SCGHG are authorized by statute, the SCGHG requires other agencies to exercise legislative authority to monetize greenhouse gas emissions with specific numerical values that reflect a set methodology. When an agency prescribes specific numerical values untethered to a statutory principle, those values are considered to be legislative

rules. *Catholic Health Initiatives*, 617 F.3d at 495. That is because although a number may be "consistent with the statute or regulation under which the rule [is] promulgated [it is] not derived from it, because [the number] represent[s] an arbitrary choice among methods of implementation." *Hoctor* v. *U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996). Finding that such numerical values that do not derive directly or necessarily from a statute reflects the understanding that only "[l]egislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices." *Id.*

The Interagency Working Group admits that critical inputs used to generate the specific SCGHG "raise[] highly contested and exceedingly difficult questions of science, economics, ethics, and law." 2021 TSD at 17. That is why many inputs that underlie the Interim Estimates should be determined by reference to each individual agency's statutory authority and the "intelligible principle" (if any) that Congress provided to guide them. *See Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."). For example, the Executive Order's requirement that the SCGHG monetize the "global damages," and the Interagency Working Group's calculation of global damages, run contrary to the "commonsense notion that Congress generally legislates with domestic concerns in mind." *RJR*

Nabisco, Inc. v. *Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016). This "dramatically raises" the SCGHG because only accounting for domestic damages reduces the "social costs" to "$1-to-$7-per-ton CO2 values and $55-per-ton methane value." Jean Chemnick, *Cost of Carbon Pollution Pegged at $51 a Ton*, Scientific American (Mar. 1, 2021).[4] If an individual agency purported to calculate global damages that calculation would be subject to challenge on the ground that the agency's statute authorizes it to consider only domestic costs, per the *Nabisco* assumption. But the Interagency Working Group has no statutory authority, and thus no statutory discipline.

The Interagency Working Group's selection of discount rates also have an enormous impact on the SCGHG. *Amici's* expert in the Eighth Circuit case explained that under a seven percent discount rate, versus a three percent discount rate emitting an extra ton of carbon dioxide is a social *benefit* of 45 cents, as calculated by one of the IAMs. Missouri Mem. Supporting Prelim. Injunction, *Missouri* v. *Biden*, No. 4:21-cv-00287, Doc. 15-2 at 21 (Apr. 30, 2021). The discount rate largely reflects a value judgment as to how much this generation will pay to avoid speculative climate damages nearly three centuries in

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[4] *Available at* https://www.scientificamerican.com/article/cost-of-carbon-pollution-pegged-at-51-a-ton/#:~:text=Contributing%20to%20climate%20change%20is,to%20about%20$51%20per%20ton.

the future—a choice that should be, and often is, made by legislatures. *See* Wash. Rev. Code Ann. § 80.28.405 (2019); N.Y. Env't Conserv. Law § 75-0113 (McKinney 2019). The specific numerical values are neither the general statement of policy in *NPHA* "designed to inform the public of NPS' views on the proper application of" a statute, 538 U.S. at 809, nor the Forestry Plan that was a "tool[] for agency planning and management" that "through standards guide[d] future use of forests," *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 727 (1998). The SCGHG reflects pure legislative action—wide-ranging policy choices untethered to any statutory delegation.

States have also shown that the SCGHG creates hardship in a way similar to that experienced by the landowners in *Sackett* v. *EPA*, 566 U.S. 120 (2012). There, the Army Corps of Engineers' compliance order marked the consummation of a process that was not subject to further agency review, and the landowners would have had to wait for EPA, a different agency, to bring a civil action while potentially accruing additional liability. 566 U.S. at 127. The States, like *Amici*, have argued that the mandatory nature of the Interim Estimates "impose additional duties on them when carrying out cooperative federalism programs because they are compelled to employ the IWG's methodology as a condition of approving significant funding and State environmental implementation plans." App. A-41. And the district court found that "the SC-GHG Estimates create a new cost measure the States *must* use when running cooperative

federalism programs or risk serious consequences." App. A-21 (emphasis added). Based on this "forced choice" between their sovereignty and the mandatory SC-GHG, App. A-21, States have demonstrated both a discrete Article III injury and hardship.

This suit is fit for review because it poses only legal questions and the Interim Estimates are final values for current and future agency actions. The Government has claimed that the Interim Estimates are not fit for review because they are only interim and will be superseded by the "final" values. This Court has aptly explained that the Government's labels are not determinative, *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 479 (2001), and that finality arises when the rule is the Government's "last word" on a topic, *id.* at 478. Although the Administration plans to update and revise the Interim Estimates, such periodic revision is "a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes Co.*, 136 S. Ct. at 1814. What matters is that the SCGHG are binding now and until the next set of values is announced, and the SCGHG is not subject to further consideration by the agencies. *Id.*

Though the Government will contend otherwise, *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726 (1998), shows that the SCGHG are final and fit for review. *Ohio Forestry Association* involved a challenge to the Forest Service's logging plan for a national forest that did "not itself authorize the cutting of any trees." 523 U.S. at 729. Thus, there

was "considerable legal distance between the adoption of the Plan and the moment when a tree is cut." *Id.* at 730. The Court concluded that it "would benefit from further factual development of the issues presented," *id.* at 733, because the validity and application of the Forest Service's Plan plainly hinged on the Forest Service's future refinement and application of the Plan. *Id.* The Court emphasized that the Forest Service might well "refine its policies" before any application of them, either "through revision of the Plan" or "through application of the Plan in practice." *Id.* at 735. Here, there is no such prospect that federal agencies will "refine" the Interim Estimates in future proceedings, because the Estimates are binding on federal agencies and not subject to revision. The States' claims address the validity of actions taken by the Interagency Working Group, not the as-yet-incomplete actions taken by agencies bound by the Interagency Working Group's determinations. Because the Interagency Working Group's actions in promulgating the Interim Estimates are complete, the States' claims "can never get riper." *Id.* at 737

The SCGHG are the consummation of the Interagency Working Group's process to promulgate specific binding values that all agencies must use across all regulatory contexts. The States have properly challenged that action and the process that produced it, and the legal questions are ripe for review.

CONCLUSION

The SCGHG dramatically increases the regulatory burden for all entities that emit greenhouse gases and are aimed at reducing the use of fossil fuels—that support the States' economies and taxes—based on outdated and speculative policy choices. The Court should not permit the Administration to shield extraordinarily important policy choices from review because it chose to act without Congressional authorization and outside of legislative rulemaking processes. The Court should vacate the Fifth Circuit's order staying the district court's preliminary injunction until the merits are resolved in this Court.

Respectfully submitted,

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