UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 17-253 (RDM)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Agencies have the power to engage in rulemaking only by virtue of authority delegated by Congress, and Congress has not authorized any agency to make issuance of a new rule contingent on repeal of two or more separate rules. No statute allows federal agencies to delay, defer, or abandon new regulations unless and until they repeal existing regulations to offset new costs. The President's command in Executive Order 13771 to "knock out two" rules for each new one issued[1] upends the rulemaking system that Congress established, "put[ting] in place a constant deregulatory" regime for the purpose of "deconstruction of the administrative state."[2] The Executive Order offends the separation of powers by usurping the constitutional lawmaking power assigned to Congress and violates the President's unambiguous duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

While never identifying a single statute under which Executive Order 13771's regulatory trading requirements are permissible, defendants' motion to dismiss is framed around two overriding themes: first, that the Executive Order is a mere policy statement that does not mark a significant change from the regulatory policies of numerous past presidents, including President Obama, and second, that challenges to implementation of the Executive Order are premature. Both are fundamentally wrong.

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[1] Andrew Soergel, *Trump Executive Order Embraces 'One-In, Two-Out' Regulatory Scheme*, U.S. News & World Report, Jan. 30, 2017, available at https://www.usnews.com/news/articles/2017-01-30/trump-executive-order-embraces-one-in-two-out-regulatory-scheme (quoting President Trump) (attached as Ex. A to Zieve Decl.).

[2] Aaron Blake, *Stephen Bannon's nationalist call to arms, annotated*, Wash. Post, Feb. 23, 2017 (quoting President's Chief of Staff and President's Chief Strategist), at https://www.washingtonpost.com/news/the-fix/wp/2017/02/23/stephen-bannons-nationalist-call-to-arms-annotated (attached as Ex. B to Zieve Decl.).

First, unlike any prior executive order, Executive Order 13771 prohibits federal agencies from issuing significant new regulations unless they offset all costs by repealing twice as many existing ones and caps the annual incremental cost of all new regulations each agency may issue. The President's own characterization of Executive Order 13771 makes clear that the Order is not business as usual. *See* Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, The Atlantic, Jan. 30, 2017, available at https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007 (quoting President Trump as stating, "If there's a new regulation, they have to knock out two. But it goes far beyond that, we're cutting regulations massively for small business and for large business.") (attached as Ex. C to Zieve Decl.); Jacob Pramuk, *Trump signs executive order aiming to slash regulations*, CNBC, Jan. 30, 2017, at http://www.cnbc.com/2017/01/30/trump-set-to-sign-executive-order-aiming-to-slash-regulations.html ("Trump called it 'the largest ever cut by far in terms of regulation.'") (attached as Ex. D to Zieve Decl.).

Second, review of the constitutionality of Executive Order 13771 and the related Office of Management and Budget (OMB) guidance documents is appropriate, and necessary, at this time. The Executive Order is, now, in effect and affecting agency rulemaking. As a result, plaintiffs and their members are, now, injured in two concrete ways: Because "[i]f you have a regulation you want, . . . the only way you have a chance is we . . . knock out two," Soergel, *supra* note 1 (quoting President Trump), the Executive Order forces plaintiffs to choose between advocating for new regulations that would benefit them and their members, when adoption of those regulations would depend on the repeal of existing regulatory safeguards, or forsaking their right to "petition the Government for a redress of grievances." U.S. Const. amend. I. In addition, the Executive Order is currently causing federal agencies to defer, delay, or forgo rules that would benefit plaintiffs and

their members. An agency's unlawful delay or deferral of a rule has long been recognized as a cognizable injury.

Defendants' standing and ripeness challenges ignore these injuries, as well as the allegations and evidence on which they rest. Judicial review of this purely legal challenge should proceed. "The time to put on the roof is before it starts raining. The question of the constitutionality of the [Executive Order] should be decided now." *Carolina Envtl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n*, 431 F. Supp. 203, 226 (W.D.N.C. 1977), *rev'd on other grounds sub nom. Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978).

BACKGROUND

Defendants' account of the facts confirms that Executive Order 13771 imposes regulatory cost-trading requirements and an annual cost cap that Congress has not authorized.[3]

Executive Order 13771 establishes an unprecedented deregulatory program by directing federal agencies to repeal two existing regulations for every new regulation adopted in order to offset the costs of the new regulation. Sec. 2(a), 2(c). The Order also imposes cost caps on new regulations. For fiscal year 2017, the cost cap is zero. Sec. 2(b). For future fiscal years, the Director of OMB is charged with setting a cost cap for each agency. Sec. 3(d). "No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director." *Id*. For purposes of the 1-in, 2-out and cost-offset requirements, the benefits of the new rules and of existing rules play no role.

OMB has issued two guidance documents (collectively, "OMB Guidances") implementing the Executive Order: a February 2, 2017, "Interim Guidance," which addresses regulations to be

[3] Executive Order 13771 was published at 82 Fed. Reg. 9339 (2017), and is attached as Exhibit A to the First Amended Complaint.

issued in fiscal year 2017, and an April 5, 2017, "Guidance Implementing Executive Order 13771," which "supplements" the Interim Guidance.[4] Several aspects of the OMB Guidances are particularly relevant here.

First, the OMB Guidances state that, for fiscal year 2017, Executive Order 13771 applies to "significant regulatory actions" issued after President Trump's inauguration on January 20, 2017. Interim Guidance 2; Guidance Q2, Q3. "Significant regulatory actions" means, among other things, regulatory actions that have an annual effect on the economy of $100 million or more; actions with material adverse effects on the economy, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; and actions that raise novel legal or policy issues. Executive Order 12866, 58 Fed. Reg. 51735, Sec. 3(f) (1993).

Second, the OMB Guidances underscore that the benefits of both new rules and repealed rules are irrelevant to the 1-in, 2-out and cost-offset mandates of Executive Order 13771. Indeed, OMB states that, in calculating the cost of a new rule that must be offset, an agency may not factor in the benefits, including cost savings. Even where a regulation's benefits exceed its costs, benefits are ignored for purposes of complying with the Executive Order's 1-in, 2-out and offset requirements. For example, the Interim Guidance states that energy cost savings to consumers from rules requiring appliance manufacturers to make more energy efficient equipment "would not be counted as offsets to costs" incurred by those manufacturers. Interim Guidance 4; *see* Guidance Q21.

Third, the OMB Guidances require agencies to develop new cost estimates for each existing rule considered for elimination, *see* Interim Guidance 4; Guidance Q21, and to count

[4] Copies of the OMB Guidances are attached as Exhibits B and C to the First Amended Complaint.

toward cost savings only those costs that would be incurred after the effective date of the repeal, *see* Interim Guidance 5; Guidance Q21. Because the bulk of the cost of existing rules (such as the cost of new equipment purchases to meet pollution standards) often will already have been incurred, this requirement greatly increases the number of rules that must be repealed to permit new rules to be promulgated consistent with the Executive Order.

Fourth, the OMB Guidances provide for agencies to trade costs and cost-offsets across statutes and, with OMB approval, across agencies and departments. *See* Interim Guidance 6; Guidance Q30, Q31. Thus, the costs of a new rule may be offset by repealing wholly unrelated rules, the costs of which fall on entirely separate entities.

ARGUMENT

I. Plaintiffs have standing to bring this action.

Executive Order 13771 and the OMB Guidances have a present, concrete effect on rulemaking undertaken by federal agencies and, therefore, a present adverse effect on plaintiffs' activities and interests and those of their members. Because the allegations set forth in the First Amended Complaint are now supported by declarations, the Court should accept the facts stated in the declarations as true. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[5]

An organization "may have standing in its own right to seek judicial relief from injury to itself" and also may "assert the rights of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Here, plaintiffs do both, as they and their members are currently injured in two concrete ways.

[5] "[U]nder Rule 12(b)(1), the court 'is not limited to the allegations of the complaint,'" and 'a court may consider such materials outside the pleadings as it deems appropriate." *Del. Riverkeeper Network v. FERC*, __ F. Supp. 3d __, 2017 WL 1080929, at *3 (D.D.C. Mar. 22, 2017) (citations omitted). With the exception of the Declarations of Michael Heimbinder and Allison Zieve, the declarations cited in this memorandum are those submitted in support of plaintiffs' motion for summary judgment, filed on May 15, 2017 [Dkt. 16].

First, the Executive Order forces plaintiffs to choose between advocating for new regulatory protections at the cost of losing two or more existing protections, or remaining silent to avoid those deregulatory consequences. Second, the Executive Order and OMB Guidances are currently causing agencies to delay, weaken, or abandon rules that would, if issued, benefit plaintiffs and their members.

A. The Executive Order substantively conflicts with plaintiffs' missions and injures their advocacy activities.

The Executive Order and OMB Guidances adversely affect plaintiffs' ability to advocate on behalf of their members by forcing plaintiffs to make an untenable choice between urging agencies to adopt new regulatory safeguards, which now will require repeal of existing ones, and refraining from advocating for new public protections to avoid triggering the need to repeal existing ones. *See* First Am. Compl. ¶¶ 12–14; LeGrande Decl. ¶ 17; R. Weissman Decl. ¶ 8; Wetzler Decl. ¶ 11. As a Natural Resources Defense Council (NRDC) program officer explains: "[B]ecause NRDC does not know what deregulatory actions an agency will take if NRDC's advocacy for a new rule is successful, NRDC is unable to evaluate, when deciding to petition for a new agency rule, whether its advocacy might end up doing more harm than good to health and the environment." Wetzler Decl. ¶ 11. "This places NRDC in an untenable position, turning NRDC's exercise of its constitutionally protected right to 'petition the Government for [a] redress of grievances,' U.S. Const. amend. I, into a game of regulatory Russian roulette." *Id*. This injury is cognizable and occurring now. *See Autor v. Blank*, 892 F. Supp. 2d 264, 271 (D.D.C. 2012) (finding standing where "the complaint as written does allege that the plaintiffs' rights have been burdened by being forced to make the choice" between registering as a lobbyist and being eligible for membership on a federal advisory committee), *rev'd on other grounds*, 740 F.3d 176 (D.C. Cir. 2014); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 739–

40 (2011) (striking down campaign financing scheme that forces speaker either to change its message, not speak, or trigger funding of opponent); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (holding that self-censorship is a harm that can support standing).

Defendants do not contest the factual allegations that establish this injury. Instead, they argue that "issue-advocacy injuries" are not cognizable. Mot. to Dismiss 24. The right to petition the government, however, is "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (quoting *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967)). And many D.C. Circuit cases finding organizational standing involved activities that could "easily be characterized as advocacy—and, indeed, sometimes are." *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc*., 659 F.3d 13, 27 (D.C. Cir. 2011); *see*, *e.g.*, *Equal Rights Ctr. v. Post Props., Inc*., 633 F.3d 1136, 1139 (D.C. Cir. 2011) (explaining that an organizational plaintiff has standing where the defendant's actions "may have reduced the effectiveness of any given level of [the organization's] outreach efforts," and, if so, the "actions 'perceptibly impaired' the plaintiff organization's programs by making its 'overall task more difficult'" (citation omitted)).

Center for Law & Education v. Department of Education, 396 F.3d 1152 (D.C. Cir. 2005), on which defendants rely, is not to the contrary. There, the organizational plaintiffs challenged federal rules addressing state implementation of the No Child Left Behind law that forced the plaintiffs "to address advocacy issues on an expensive State-by-State basis," *id*. at 1158, "a more costly form of lobbying" than advocacy on a federal level, *id*. at 1161. The *substance* of the agency's action, however, did not "direct[ly] conflict with the organization's mission"; thus, "standing failed for lack of a conflict between the challenged conduct and the plaintiffs' stated mission." *Am. Soc'y for Prevention of Cruelty to Animals*, 659 F.3d at 26–27 (describing *Center*

for Law & Education). In contrast, here, as explained in the declarations of Communications Workers of America's (CWA) David LeGrande, Public Citizen's Robert Weissman, and NRDC's Andrew Wetzler, the Executive Order's regulatory trading requirements do conflict with plaintiffs' missions of advancing health, safety, worker, and environmental protections. *Center for Law & Education* therefore "says nothing about the situation we face here, where the defendant's conduct is both clearly 'at loggerheads' with the organization[s'] mission[s], and allegedly injures the organization[s'] advocacy activities." *Id*. (citation omitted); *see also People for the Ethical Treatment of Animals v. Dep't of Agric*., 797 F.3d 1087, 1095 (D.C. Cir. 2015) (stating the denial of "a means" of an animal-rights organization "to seek redress for bird abuse" constitutes "cognizable injury sufficient to support standing"); *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937–38 (D.C. Cir. 1986) (finding standing where plaintiffs "alleged inhibition of their daily operations").

Nor is this case like *Food & Water Watch, Inc. v. Vilsack*, in which the plaintiffs contended that "their avoidance of [certain] poultry, or alternatively the increased cost of seeking out poultry from other sources, constitutes an injury in fact to establish standing." 808 F.3d 905, 918 (D.C. Cir. 2015). There, because the plaintiffs had not "plausibly alleged that they face[d] a substantial increase in the risk of harm" from the poultry that they were avoiding, the court found their "self-inflicted" injury to be "simply the product of their fear." *Id*. at 919 (internal quotation marks omitted). Likewise, in *Laird v. Tatum*, the plaintiffs lacked standing where they alleged that the Army was engaging in unlawful surveillance that chilled their protesting activity, but presented "no evidence of illegal or unlawful surveillance activities." 408 U.S. 1, 9 (1972) (citation omitted). "[S]peculative apprehensiveness that the Army may at some future date misuse the information" in a way that would injure plaintiffs was insufficient to establish standing. *Id*. at 13. And in *Clapper*

v. Amnesty International USA, the plaintiffs presented "no evidence to substantiate their fears" that their communications would be intercepted by the government, "but instead rest[ed] on mere conjecture about possible governmental actions." 133 S Ct. 1138, 1154 (2013).

Here, notwithstanding defendants' characterization of plaintiffs' injury as based on "subjective fear," Mot. to Dismiss 26, injury flows necessarily from the 1-in, 2-out and cost-offset requirements of the Executive Order, which are reiterated in the OMB Guidances and currently in effect. Defendants cannot avoid review by claiming that the Executive Order will not be implemented according to its express requirements and the President's stated goal in signing it. *See County of Santa Clara v. Trump*, __ F. Supp. 2d __, 2017 WL 1459081, at *9 (N.D. Cal. Apr. 25, 2017) (rejecting reading of an executive order that is in conflict with its express language and stated purpose); *see also* Blake, *supra* note 2, at 5 (quoting President's Chief of Staff as saying "for every regulation presented for passage [the relevant] Cabinet secretary has to identify two that person would eliminate. And that's a big deal.").

B. The Executive Order delays, weakens, and prevents rules that would benefit plaintiffs and their members.

Executive Order 13771 and the OMB Guidances also harm plaintiffs and their members by delaying, preventing, or forcing agencies to weaken new rules protecting public health, safety, and the environment. First Am. Compl. ¶¶ 12–14, 72, 81, 87, 95, 102, 109, 115–17, 124; LeGrande Decl. ¶ 18; R. Weissman Decl. ¶ 18; Wetzler Decl. ¶ 11; *see generally* Abbott Decl.; Bauer Decl.; Coward Decl.; Fleming Decl.; Quigley Decl.; So Decl.; Soverow Decl.; T. Weissman Decl.; Winegrad Decl. Defendants do not contest that such injuries, if adequately pleaded, are cognizable. *Cf. Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 47–48 (D.D.C. 2011) (recognizing standing to challenge agency action adding process that causes delay in agency permitting decisions). Nor do they contest that plaintiffs would have standing on behalf of their members injured by such

impacts on agency rulemaking: The members would otherwise have standing to sue in their own right; the interests they seek to protect are germane to the organizations' purposes; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

1. Executive Order 13771 is delaying new regulations, including regulations that would benefit plaintiffs and their members. *See*, *e.g.*, First Am. Compl. ¶¶ 12-14, 58, 62, 72, 109, 117, 124, 132, 142. Agencies' own statements acknowledge that the Executive Order causes delay. For example, the Department of Transportation (DOT) has indicated that the Executive Order is affecting the timing of ongoing rulemakings across the board. Since February 2017, its website has stated: "As DOT rulemakings are being evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month." DOT, Significant Rulemaking Report Archive, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited June 23, 2017). Officials at the Treasury Department have reportedly also acknowledged that they "will not be releasing any guidance—including revenue procedures and revenue rulings"—in light of factors including Executive Order 13771. Andrew Velarde, et al., *No Substantive IRS Guidance Coming for a While, Official Says*, Taxnotes, Feb. 14, 2017, at http://www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says (attached as Ex. E to Zieve Decl.).

Although not every agency will necessarily volunteer that the Executive Order is causing delay, plaintiffs' allegations of delay are sufficient to survive a motion to dismiss. For example, NRDC and Public Citizen have alleged that Executive Order 13771 is forcing the Department of Energy (DOE) to halt or delay issuance of more stringent energy efficiency standards under the

Energy Policy and Conservation Act (EPCA), impairing the ability of NRDC, Public Citizen, and their members to upgrade their offices' existing appliances with more energy efficient ones, leading to higher utility bills and greater environmental impacts. *See* First Am. Compl. ¶¶ 103–09; Quigley Decl. ¶¶ 9–11; R. Weissman Decl. ¶17; Wetzler Decl. ¶¶ 14, 16; Winegrad Decl. ¶¶ 24–25. DOE is currently implementing the Executive Order. *See* 82 Fed. Reg. 24582 (2017) (requesting information to assist DOE in identifying regulations to modify or repeal to implement Executive Order 13771). As explained in the declaration of a former Assistant Secretary of Energy charged with issuing such regulations, the Executive Order's directive to condition issuance of a new energy efficiency standard on repeal of two existing regulations, and to offset the incremental costs of the new standard, necessarily impairs DOE's ability to issue improved standards. Reicher ¶ 14 (former Assistant Secretary of Energy for Energy Efficiency and Renewable Energy at DOE); *see also* Wetzler Decl. ¶ 6.

In addition, thousands of CWA members employed in the healthcare, airline, social service, and corrections industries work in settings subject to the introduction of infectious diseases such as tuberculosis, severe acute respiratory syndrome (SARS), influenza, methicillin-resistant staphylococcus aureus (MRSA), and ebola. LeGrande Decl. ¶ 13. These and other infectious diseases develop from exposure to bacteria, viruses, fungi, or parasites. *Id*. The Occupational Safety and Health Administration (OSHA) is developing a standard to protect healthcare employees and employees in other high-risk environments from exposure to dangerous pathogens. 75 Fed. Reg. 24835 (2010). As illustrated by the declaration of CWA member Denise Abbott (at ¶ 7), CWA members would benefit directly from the protections afforded by an OSHA comprehensive infection control program and control measures. *See also* First Am. Compl. ¶ 81; Soverow Decl. ¶ 5 (Public Citizen member describing risk of exposure and interest in the

standard); R. Weissman Decl. ¶¶ 10–11 (describing Public Citizen's interest in strong OSHA standard on this topic, on behalf of its members).

Because OSHA plans to issue a proposed standard in October 2017, *see* Reginfo.gov, OSHA regulatory agenda (Fall 2016), RIN 1218-AC46, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AC46 (last visited June 23, 2017), the new rule will fall within the scope of the Executive Order. Thus, for OSHA to issue the infection control standard, the Department of Labor must offset the costs of the rule by repealing—or convincing OMB to allow it to use another agency's repeals of—"at least two prior regulations," Executive Order 13771, Sec. 2(c), and must determine the required offset without taking into account the benefits of the new standard, *id*. Sec. 3(a). Doing so will necessarily delay issuance of new health or safety standards. *See* Michaels Decl. ¶¶ 36, 39 (former Administrator of OSHA describing effect of Executive Order on OSHA rulemaking). And because OSHA lacks authority to repeal rules that continue to serve the purposes of the Occupational Safety and Health Act, 29 U.S.C. §§ 651(b), 655(b)(5); Michaels Decl. ¶¶ 10, 33, the delay will be exacerbated because OSHA must rely on other components of the Department of Labor or other agencies to repeal two or more of their own existing rules (including by performing new cost analyses, preparing and issuing notices of proposed rulemaking to repeal the existing rules, considering the public comments received, and preparing a final rule that address those comments), so that the Department can use those repeals to offset the costs of the new OSHA standard. Executive Order 13771 will thus delay (and may cause OSHA to weaken or forgo) the new standard on exposure to infectious disease, to the detriment of plaintiffs' members.

As another example, in January 2017, EPA proposed a rule to regulate methylene chloride and N-Methylpyrrolidone (NMP) in paint removers. 82 Fed. Reg. 7464 (2017). Methylene chloride

poses neurotoxicity, liver toxicity, and liver and lung cancer risks to workers, consumers, and bystanders where it is used, and NMP poses health risks to pregnant women and women of child-bearing years. When finalized, the rule will either prohibit or restrict methylene chloride and NMP to protect consumers and workers. The rule will benefit plaintiffs and their members, such as Public Citizen member Amanda Fleming, who uses paint remover and paint thinner in her home. *See* Fleming Decl. ¶ 6. But as explained in the declaration of a former EPA Assistant Administrator responsible for regulation under the Toxic Substances Control Act, compliance with Executive Order 13771 will delay or prevent issuance of this rule. *See* Jones Decl. ¶ 14; *see also* First Am. Compl. ¶ 95. This delay harms plaintiffs and their members, like Ms. Fleming. *See* LeGrande Decl. ¶¶ 9, 12; Wetzler Decl. ¶¶ 7, 9; *see also* Jones Decl. ¶ 14 ("Delay in finalizing the three Toxic Substances Control Act rules proposed in December 2016 and January 2017 would subject workers, consumers, and bystanders to serious risks of life-threatening illnesses and toxicity."). As explained by Christine Todd Whitman, EPA Administrator under President George W. Bush, "a likely scenario is that the EPA and other agencies will stop seeking new regulations so they can protect existing rules." David Lazarus, *Former officials deride Trump's 'mindless' 2-for-1 deregulation plan*, LA Times, Jan. 30, 2017, at http://www.latimes.com/business/lazarus/la-fi-lazarus-trump-regulations-order-20170131-story.html (attached as Ex. F to Zieve Decl.).

In at least one instance, an agency explicitly acknowledged that, to comply with the Executive Order, it was withholding a rule that the agency was otherwise prepared to issue (and, indeed, had already issued). *See* Wetzler Decl. ¶ 13 & Ex. A. In December 2016, the Environmental Protection Agency (EPA) had finalized and posted online a Clean Water Act rule designed to reduce mercury pollution, which adversely affects NRDC's members. The rule was not published in the Federal Register before January 20, 2017, and EPA subsequently withdrew it from

publication. *Id*. ¶ 13.[6] Explaining the subsequent delay in publishing the final rule, EPA's Acting Principal Deputy Assistant Administrator for Water stated that Executive Order 13771 has "[t]ied up" the rule: "So right now we are moving to try to get that rule out, but since it was signed on Jan. 19, and it was not put in the Federal Register before the executive order, we will have to look at the two-for-one." David LaRoss, *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017) (attached as Ex. A to Wetzler Decl.). EPA released the rule only after NRDC filed a separate lawsuit against the agency on the basis that the rule had been issued before President Trump's inauguration (which, among other things, meant the rule was not subject to the Executive Order) and had not been lawfully rescinded. *See* First Amended Complaint, *NRDC v. EPA*, No. 17-cv-751-JPO, filed Apr. 10, 2017 (S.D.N.Y.); EPA, Final Rule, Effluent Limitations Guidelines and Standards for the Dental Category, 82 Fed. Reg. 27154 (June 14, 2017). Even the possibility of the Executive Order's application, however, was enough to delay the rule's publication for five months, to the detriment of plaintiffs' members.[7]

As these examples demonstrate, there is, on an ongoing basis, at least "a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted); *see Clapper*, 133 S. Ct. at 1150 n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about."). Every

[6] The Office of the Federal Register posted the final rule on its website no later than January 19, 2017, but had not published it in the Federal Register as of January 20, 2017. Wetzler Decl. ¶ 13.

[7] Although delay of this rule is no longer ongoing, plaintiffs were suffering injury from the delay at the time the complaint was filed. *See* Heimbinder Decl. ¶¶ 4–6, 9. The end of this particular delay does not moot the controversy over the ongoing application of the Executive Order. *See City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 (1982); *City of Houston v. Dep't of Housing & Urban Dev*., 24 F.3d 1421, 1429 (D.C. Cir. 1994).

example in the First Amended Complaint qualifies as a "significant" rule, *see* First Am. Compl. ¶¶ 67, 68, 77, 78, 84, 90, 91, 98–99, 106, 113, which under the OMB Guidances the agencies can issue only in compliance with the Executive Order. *See* Guidance Q2. The declarations of former regulators attest to the unavoidable delay associated with compliance. *See* Jones Decl. ¶ 14 (former Assistant Administrator for EPA's Office of Chemical Safety & Pollution Prevention); Michaels Decl. ¶¶ 17–23 (former Assistant Secretary of Labor for Occupational Safety and Health Administration); Wagner Decl. ¶ 7 (former Deputy Assistant Secretary of Labor for Mine Safety and Health). And the declarations of plaintiffs' members show that the delay injures these members, as well as plaintiffs themselves. *See* Abbott Decl. ¶¶ 5–7 (addressing standard for worker exposure to infectious diseases); Coward Decl. ¶¶ 7–11 (addressing rail safety rules); Fleming Decl. ¶ 46 (addressing rules concerning auto safety, bus safety, and toxic substances); Quigley Decl. ¶¶ 9–10 (addressing energy efficiency rules); Soverow Decl. ¶¶ 4–5 (addressing standard for worker exposure to infectious diseases); R. Weissman. Decl. ¶ 17 (addressing energy efficiency rules); T. Weissman Decl. ¶ 4 (addressing auto safety rule); Winegrad Decl. ¶¶ 7–25 (addressing rules to curb climate change, protect Atlantic sturgeon, and strengthen energy efficiency standards for household appliances).

2. Although President Trump made clear when he issued Executive Order 13771 that its purpose is to "cut[] regulations massively," Lam, *supra* p. 2, defendants suggest that the Order's mandates may be met by modifying information collection requests and guidance documents, Mot. to Dismiss 17–18. Modifying such documents, however, cannot conceivably achieve the President's purpose. Nor would doing so eliminate the delay of new rules caused by the Executive Order. As for information collection requests, most of the defendant agencies' requests have a cost of $0, a small minority exceed $1 million, and very few exceed $20 million. *See generally* OMB,

Information Collection Review, https://www.reginfo.gov/public/do/PRAMain. Therefore, even if modifying the requests were otherwise appropriate, few would be candidates to help offset the costs of new significant rules. In addition, for each information collection request, the agency has determined that the benefits justified the costs, and has done so within the last three years. *See id.* ("An ongoing collection must be approved by OMB at least once every three years."). Accordingly, the suggestion that agencies would readily be able to identify numerous costly information requests appropriate for repeal is unfounded. As for guidance documents, even those designated "significant" do not include any estimate of costs, making them poor candidates for cost savings; eliminating a guidance could only meet the Executive Order's cost-offset requirement if the agency conducted a time-consuming review documenting its current costs.[8] Thus, even if modifying information collection requests and guidance documents could ultimately offset the costs of a significant new rule, doing so would not eliminate the delay of new rules caused by the Executive Order. The agency would still need to identify two or more items for repeal, perform new cost analyses, issue new public notices, and, at least for information collection requests, synthesize and respond to comments, and then issue two or more final rules repealing the collection requests.

[8] For example, the website of the Mine Safety and Health Administration lists two significant guidance documents, neither of which estimates costs. *See* https://arlweb.msha.gov/SignificantGuidance/SigGuidance.asp (last visited June 23, 2017). The website of the National Highway Traffic Safety Administration includes one significant guidance document, and it does not estimate costs. *See* https://www.nhtsa.gov/laws-regulations/guidance-documents (last visited June 23, 2017). OSHA currently has no significant guidance documents. *See* https://www.osha.gov/html/guidance.html (last visited June 23, 2017). A search of the 4,116 items in the guidance database of the Food and Drug Administration yielded four guidance documents that included the word "cost," none of which estimated cost. *See* https://www.fda.gov/RegulatoryInformation/Guidances/default.htm (last visited June 12, 2017).

The possibility that OMB may, in any given instance, exempt a rule from the requirements of the Executive Order and Guidances, Mot. to Dismiss 18, also does not defeat standing. To begin with, in challenging the Executive Order, "it is not necessary that [p]laintiffs establish standing with respect to each individual" rule to which the Order applies. *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 141 (D.D.C. 2012) (citing *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994)). Rather, because plaintiffs' "declarations allege injury with respect to" some affected rulemakings, they "are sufficient to ensure that 'the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Id*. (quoting *Wyo. Outdoor Council v. U.S. Forest Serv*., 165 F.3d 43, 48 (D.C. Cir. 1999)).

In any event, the possibility that OMB may grant exemptions from the Executive Order does not make plaintiffs' injury speculative. *See Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (*Reich I*) (per curiam) (addressing speculativeness in context of ripeness). In *Reich I*, the court concluded that the Secretary of Labor's authority to exempt certain government contractors from the terms of an executive order did not make the plaintiffs' claims speculative, because the plaintiffs' injury was not the application of the order but the order's mere existence, which skewed the plaintiffs' decisions. *Id.* at 1100 ("[W]e are unpersuaded that a 'concrete' prosecution by the Secretary would assist the court in analyzing appellants' facial challenge based on this issue."). The same is true in this case: Although OMB could exempt a regulation from requirements of the Executive Order, *see* Sec. 4(c), the Order skews, across the board, the agencies' decisionmaking and plaintiffs' decisionmaking, to the detriment of plaintiffs and their members. *See also Hawai'i v. Trump*, __ F.3d __, 2017 WL 2529640, at *7, *11 (9th Cir. June 12, 2017) (holding plaintiff has standing to challenge an executive order barring certain

noncitizens, including plaintiff's mother-in-law, from entering the country, notwithstanding the possibility that government could grant her a waiver). Particularly where the President has touted the Executive Order as "the largest ever cut by far in terms of regulation," Pramuk, *supra* p. 2, and the OMB Guidances state that the Order applies to nearly every significant rule, defendants cannot avoid review by suggesting that OMB's implementation will eliminate its impact. *See Cty. of Santa Clara*, 2017 WL 1459081, at *9 (rejecting as unreasonable a reading that would render an executive order contrary to its stated broad intent).

Further attempting to minimize the effect of Executive Order 13771, defendants argue that repeals pursuant to Executive Order 13771 will focus on existing rules that are "not justified based on a cost-benefit analysis." Mot. to Dismiss 18. Defendants' point does not address, much less deny, that the Executive Order necessarily forces agencies to delay, weaken, or forgo *new* rules, and that such delays harm plaintiffs' members. Indeed, because most existing rules have large net benefits, defendants' explanation of how the Order will be implemented only underscores that the Order will significantly delay or prevent beneficial new rules. Given that "every administration since President Carter" has asked agencies to repeal "outdated, unnecessary, or ineffective rules," Mot. to Dismiss at 10, the notion that myriad expensive, non-cost-justified rules remain is unfounded. Yet by mandating that new federal protections be contingent on the repeal of existing ones to offset costs, the Executive Order makes promulgation of new protections dependent on the existence and identification of numerous expensive but unnecessary rules. If such rules exist, the Order forces delay as they are located, their costs are documented, and the procedures for repealing them are set in motion, as discussed above. If they do not exist, the Order blocks issuance of new health, safety, environmental, and worker protections. Either way, the outcome injures plaintiffs and their members.

Defendants' examples (at 22 n.5) of rules repealed in the past highlight how difficult it will be for agencies to identify for repeal old and unnecessary rules that impose significant costs. None of defendants' three examples was economically significant. One involved repeal of regulations that were considered "obsolete and duplicative of other authorities," 80 Fed. Reg. 76630, 76631 (2015), and the second repealed regulations that had been obviated by subsequent legislation, so that the repeal was "insignificant in nature and impact and of no consequence to the industry and the public," 78 Fed. Reg. 15869, 15870 (2013). The third repeal was held unlawful, *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009), and the reinstated rule was then upheld in a court challenge, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011). Thus, none of the three repeals showcased by defendants—one of duplicative rules, one of rules "of no consequence," and one held unlawful—would have offset the costs of a new significant rule. To the contrary, defendants' examples illustrate that the difficulty of identifying costly regulations that can lawfully be repealed to offset the costs of new significant rules necessarily forces agencies to delay, weaken, or forgo the new rules.

3. Plaintiffs' showing of causation establishes redressability, for "[c]ausation and redressability typically 'overlap as two sides of a causation coin.' After all, if a government action causes an injury, enjoining the action usually will redress that injury." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (quoting *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)).

Defendants are correct that, even without Executive Order 13771 and the OMB Guidances, new regulations might be delayed for other reasons. *See* Mot. to Dismiss 22. "At a minimum," however, the requirements of the Executive Order and OMB Guidances "contribute[]" to and exacerbate plaintiffs' injuries. *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007). Particularly where

agencies have acknowledged that the Executive Order is causing delay, *see supra* p. 10, 14, eliminating the Order will ameliorate the injury by removing its time-consuming prerequisites to issuance of new regulations. Defendants' contrary "argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action." *Massachusetts v. EPA*, 549 U.S. at 524; *see also Hawai'i v. Trump*, 2017 WL 2529640, at *8, *11 n.8 (finding standing where challenged executive order posed a barrier that delayed or prevented issuance of visas, notwithstanding existence of other barriers); *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) ("When, as here, the party seeking judicial review challenges an agency's regulatory failure, the petitioner need not establish that, but for that misstep, the alleged harm certainly would have been averted."); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 & n.8 (3d Cir. 1990) (finding standing where challenged action is just one cause of plaintiff's injuries). In any event, in challenges to an unlawful rulemaking process, "the plaintiff need not demonstrate that correcting the procedural violation itself would necessarily remedy the injurious government action, so long as 'there is some possibility' that it would do so." *Nucor Steel-Arkansas v. Pruitt*, __ F. Supp. 3d __, 2017 WL 1239558, at *9 (D.D.C. Mar. 31, 2017) (quoting *Massachusetts v. EPA*, 549 U.S. at 518); *cf. Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (stating that "in those cases involving procedural injuries, the standing requirements of redressability and immediacy are applied to the present violation of the procedural right").

Plaintiffs have adequately pleaded, and have now introduced evidence to demonstrate, that Executive Order 13771 and the OMB Guidances are causing plaintiffs and their members ongoing injury that is sufficient to confer standing.

II. Plaintiffs' challenge is ripe for review.

The injuries that give rise to standing also satisfy the Article III component of ripeness. *Nat'l Treasury Emps. Union*, 101 F.3d at 1427. To the extent that inquiry into prudential ripeness is required, the considerations of fitness and hardship that frame the prudential ripeness inquiry are met here.[9]

The fitness prong incorporates three elements: whether the issues are purely legal, whether consideration would benefit from a more concrete setting, and whether the defendant's actions are sufficiently final. *In re Aiken Cty.*, 645 F.3d 428, 434 (D.C. Cir. 2011). "Purely legal questions, such as those presented in the instant case, are presumptively [fit] for judicial review." *Reich I*, 57 F.3d at 1100 (alteration in original) (internal quotation marks and citation omitted). Here, as in *Reich I*, it is unnecessary to delay consideration of the legality of an executive order until the order is further "fleshed out." *Id.*

Defendants suggest that the Court wait until agencies "engage in rulemaking" to allow consideration of "whether a particular agency action contravenes specific statutory directives or otherwise violates the" Administrative Procedure Act (APA). Mot. to Dismiss 28, 29. But this suit seeks a declaration that Executive Order 13771's unlawful rulemaking mandates exceed the President's constitutional authority and cannot lawfully be implemented in *any* rulemaking. In *Appalachian Power Co. v. EPA*, the D.C. Circuit rejected an argument that judicial review of an

[9] Because this case satisfies the standard of constitutional ripeness, defendants are wrong to suggest that the case is non-justiciable on the basis of prudential ripeness. That suggestion "is in some tension with [the Supreme Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List*, 134 S. Ct. at 2347 (citation omitted). Nonetheless, because the D.C. Circuit has required prudential ripeness in the past, *see*, *e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012), and not reconsidered the doctrine since *Susan B. Anthony List*, plaintiffs address it here.

EPA guidance document should await a challenge in the context of a particular application, where the legality of that guidance did not turn on the specifics of any such application. 208 F.3d 1015, 1023 n.18 (D.C. Cir. 2000). Similarly, this Court in *National Mining Ass'n* rejected the defendant's argument that a challenge to a permitting process was unripe until the agency had granted or denied permits, because that argument "misse[d] the point of the plaintiff's claim: that the process itself is unlawful." 768 F. Supp. 2d at 46. Likewise here, no further factual development is needed to answer the questions whether, without congressional authorization, the President constitutionally may condition issuance of a new regulation on repeal of two or more existing ones that offset the costs of the new regulation, or may impose an annual regulatory cost cap. These purely legal questions can be resolved now.

Because plaintiffs are challenging the current, ongoing implementation of a final Executive Order, this case is not analogous to those cited by defendants in which a party challenged a proposed rule or possible future application of a new rule. *See* Mot. to Dismiss 28 (citing *In re Aiken Cty.*, 645 F.3d at 430 (challenge to DOE attempt to withdraw a license application not ripe); *Am. Petroleum Inst.*, 683 F.3d at 386 (challenge to proposed EPA rule not ripe); *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (challenge to utility regulations not ripe because state had not adopted the regulations, which was necessary for the regulations to become effective)). The more relevant cases are those defendants fail to cite: In *Reich I*, for example, the court concluded that the Secretary of Labor's authority to exempt certain government contractors from the terms of an executive order did not make the plaintiffs' claims speculative, because the plaintiffs' injury was the order's "mere existence." 57 F.3d at 1100. In *American Historical Ass'n v. National Archives & Records Administration*, the court held a challenge to an executive order ripe where the Archivist's reliance on the order caused delay that adversely affected the plaintiffs.

516 F. Supp. 2d 90, 107–08 (D.D.C. 2007). And in *County of Santa Clara*, a challenge to the executive order addressing federal funding for so-called "sanctuary cities," the court rejected the government's ripeness objection, noting that the "claims do not require further factual development, are legal in nature, and are brought against a final Executive Order." 2017 WL 1459081, at *20.

As in *Reich I*, *American Historical Ass'n*, and *County of Santa Clara*, the Executive Order here dictates a new standard for agency decisionmaking that is being applied today. It corrupts agency decisionmaking across the board, because every decision whether to issue a significant new rule, every decision about the content of the rule, and every decision about repealing a rule must be made with an eye toward the need to identify and repeal two regulations of equal cost for every one regulation issued. *See Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (stating that an agency "may not simply disregard an Executive Order"). Indeed, in early March, OMB instructed agencies that their unified agendas of regulatory actions expected in fiscal years 2017 and 2018, which were due March 31, 2017, must reflect the Executive Order's offset and repeal "requirements" and include an "estimate of the total costs or savings associated with each of [the] planned fiscal year 2018 significant regulatory actions and offsetting deregulatory actions." OMB, Memorandum for Regulatory Policy Officers, Spring 2017 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions 2 (Mar. 2, 2017).[10] Additionally, agencies have stated that they are currently applying the Executive Order and OMB Guidances, and some have publicly acknowledged the resulting delay. *See supra* p. 10, 14. These facts, along with the mandatory language of the Executive Order and OMB Guidances, make plain that the interests

[10] Available at https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-and (last visited June 23, 2017).

served by the fitness prong—the government's "interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting," *Am. Petroleum Inst.*, 683 F.3d at 387—are satisfied here.[11]

"Although the court need not necessarily reach the 'hardship' prong … when institutional considerations favor immediate review," *Reich I*, 57 F.3d at 1101, plaintiffs have demonstrated hardship as well. The ongoing implementation of the Executive Order is, as discussed above, *supra* at I, now causing harm to plaintiffs and their members. As in *Reich I*, 57 F.3d at 1100–01, and *County of Santa Clara*, 2017 WL 1459081, at *21, the Order puts plaintiffs, today, to a lose-lose choice that affects their conduct. *See supra* pp. 6–8. Further, the Order is causing delay, *supra* pp. 10, 14, and "[w]aiting for the Government to" weaken or forgo specific rules "would only cause more hardship and would not resolve the legal question at issue: whether [the Executive Order] as written is unconstitutional." *Cty. of Santa Clara*, 2017 WL 1459081, at *21; *cf. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) ("We have no trouble concluding, however, that a challenge to the Board of Review's veto power is ripe even if the veto power has not been exercised to respondents' detriment. The threat of the veto hangs over the Board of Directors like the sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions."); *Eagle–Picher Indus., Inc. v. EPA*, 759 F.2d 905, 918 (D.C. Cir. 1985) (concluding that "mechanical application"

[11] *See*, *e.g.*, Executive Order 13771, Secs. 2(a)–(d), 3(a)–(e) (stating what agencies "shall" do); Interim Guidance 1 (describing "requirements" of Executive Order 13771); Guidance 1-2 (same); *id.* Q9 (stating that "[a]gencies are required to offset"); *id.* Q10 (stating that "significant interim and direct final rules must be offset"); *id.* Q29 (stating that "at the end of each fiscal year, an agency must be able to identify, and should have finalized, twice as many EO 13771 deregulatory actions as EO 13771 regulatory actions").

of the hardship element "could work mischief" when applied in situation where the institutional interests sought to be served by the doctrine militate in favor of early review).

III. Plaintiffs have stated claims on which relief can be granted.

This action primarily seeks non-statutory review of *ultra vires* official action as described in the Supreme Court's decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and its progeny. As those cases recognize, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (*Reich II*), the D.C. Circuit held that this Court had authority to review President Clinton's executive order related to qualifications for government contractors. The court explained that "courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" *Id.* at 1328 (collecting cases) (citation omitted); *see id*. at 1339 (holding executive order unlawful because it conflicted with the National Labor Relations Act); *see also UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 367 (D.C. Cir. 2003) (employing non-statutory review but concluding executive order not preempted by National Labor Relations Act); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1173 (D.C. Cir. 2003) (concluding that Postal Service regulations could be reviewed on non-statutory basis notwithstanding exemption from APA because "the case law in this circuit is clear that judicial review is available when an agency acts *ultra vires*" and holding regulations void). In this case, each of the first four causes of action fits within the *McAnnulty* framework; all four are premised on the Executive Order's unconstitutional directives compelling federal agencies to violate the statutes from which they derive their authority.

The Supreme Court recently reiterated the availability of non-statutory review, noting that it has "long held that federal courts may in some circumstances grant injunctive relief against … violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015) (citing *McAnnulty*). "The ability to sue to enjoin unconstitutional actions by … federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id*. Plaintiffs properly invoke that authority here.

A. Executive Order 13771's constitutional infirmity is not cured by the "consistent with applicable law" provisions.

Executive Order 13771 directs that no agency may issue a new rule unless the agency offsets the costs of the new rule by rescinding at least two existing ones and imposes an arbitrary annual cost cap—$0 for fiscal year 2017—regardless of benefits. These requirements are not authorized by any statute. Although many statutes address whether and how a regulatory agency may factor cost into its rulemakings, such consideration must always be within the four corners of the authorizing statutes that Congress has enacted and the regulatory programs that Congress has charged the agency with implementing. No statute authorizes any federal agency to withhold issuance of a new regulation unless it can repeal existing regulations to offset the new regulation's costs. By imposing rulemaking requirements beyond and in conflict with both the statutes from which the federal agencies derive their rulemaking authority and the requirements of the APA, the Executive Order exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And because there is no situation in which the Executive Order is consistent with applicable law, the Order's "consistent with applicable law" provision, Sec. 5(b), does not avoid the constitutional defect.

Defendants' argument that the First Amended Complaint fails to state a claim is based on a misunderstanding of the claims and a misstatement of the Executive Order's mandate. Defendants begin by describing the Executive Order as requiring consideration of "the costs of that rulemaking." Mot. to Dismiss 30. To be sure, many (but not all) statutes allow or direct agencies to consider costs in some manner when promulgating new rules. *See* Memo in Support of Plaintiffs' Mot. for Summary Judgment 6–9 (Pltfs. SJ Memo). Executive Order 13771, however, does not simply instruct agencies contemplating a new rule to consider "the costs of *that* rulemaking" (emphasis added). Rather, it requires agencies to repeal two or more *other* rules, unrelated to "that rulemaking," and conditions the issuance of the new rule on whether the costs avoided by repeal of those other rules offset those of the new rule. The requirements of the Executive Order cannot reasonably be deemed within the scope of the rulemaking authority delegated by Congress to regulatory agencies, regardless of whether Congress has authorized agencies to consider the cost of particular new rules.[12]

[12] Defendants wrongly suggest that regulatory repeal and cost-offset requirements adopted by Canada and the United Kingdom provide support for them here. Mot. to Dismiss 4. Canada's adoption of an offset requirement *by statute* provides no support for President Trump's attempt to override statutory rulemaking requirements *by executive order* in violation of constitutional principles of separation of powers. Moreover, Canada's statute is very different from Executive Order 13771: It requires only offset of paperwork and similar administrative costs, not costs of compliance with substantive regulatory requirements. Red Tape Reduction Act, S.C. 2015, c. 12 § 5 (Can.). Canada also provides for exemptions where repeals or offsets would compromise public health or safety. Red Tape Reduction Regulations, SOR/2015-202 § 6 (Can.). The UK's adoption of a repeal and cost-offset requirement likewise has no bearing on the legality of Executive Order 13771, as the UK's governmental structure does not incorporate the scheme of separated legislative and executive power fundamental to our constitutional structure. Nor does the UK model suggest that the Executive Order reflects a rational approach to rulemaking. Claimed cost savings attributable to the UK policy do not take into account lost societal benefits of repealed regulations, and the policy has been blamed for a decline in public protections, including regulatory requirements that could have prevented the recent tragic apartment fire in London. *See*, *e.g.*, Editorial, *Grenfell Tower Fire: Mindless Deregulation, Senseless Harm*, N.Y. Times (June 22, 2017), at https://www.nytimes.com/2017/06/22/opinion/london-fire-grenfell-tower.html

1. The Executive Order's provisos that it is to be implemented "consistent with applicable law" are the linchpin of defendants' argument that the first cause of action fails to state a claim. Mot. to Dismiss 31. An executive order's "consistent with law" provision does not avoid constitutional concerns, however, where the order "is entirely *inconsistent* with law in its stated purpose and directives." *Cty. of Santa Clara*, 2017 WL 1459081, at *9 (emphasis added) (rejecting as unreasonable a reading that would render the order "legally meaningless" and contrary to its stated broad intent). That is the situation here: The President lacks authority to prohibit agencies from issuing new rules unless and until the agencies repeal existing rules, the costs of which offset the costs imposed by those new rules. *See* Pltfs. SJ Memo II.B. In the wide array of statutes that delegate to federal agencies the power to administer federal programs, no statute allows an agency's rulemaking authority to be made contingent on the agency's ability to offset a rule's costs through repeal of existing rules. Thus, "the Government's attempt to resolve all of the Order's constitutional infirmities with a 'consistent with law' bandage is not convincing." *Cty. of Santa Clara*, 2017 WL 1459081, at *26.

Because no statute authorizes the 1-in, 2-out and offset requirements or the cost caps mandated by the Executive Order, reading the "consistent with applicable law" provision to mean that the Order applies only when the repeal and offset requirements would not unconstitutionally usurp legislative authority or violate the Take Care Clause would render the Executive Order a nullity. But defendants are not treating it as a nullity. OMB and the rulemaking agencies are implementing it—as the President self-evidently intended. *See*, *e.g.*, Interim Guidance 1 (discussing "requirements" of the Executive Order); Guidance 1 (same); OMB Memo on Unified

(quoting a former UK chief fire officer and honorary secretary of a parliamentary group on fire safety and rescue) (attached as Ex. G to Zieve Decl.).

Agenda, *supra* note 10; Coast Guard, 82 Fed. Reg. 26632 (2017) (requesting comments on documents to repeal or modify in light of Executive Order 13771); Dep't of Labor, 82 Fed. Reg. 16902, 16915–16 (2017) (stating that OMB has determined that a new rule delaying implementation of Department of Labor's fiduciary rule does not trigger the repeal and offset requirements of Executive Order 13771 because it provides cost savings); Fed. Aviation Admin., 82 Fed. Reg. 15785 (2017) (notice of Aviation Rulemaking Advisory Committee meeting to discuss existing regulations to repeal or modify in light of Executive Orders 13771 and 13777); 38 Inside EPA Weekly Report 12, *supra* p. 14 (stating that "dental amalgam rule" is "[t]ied up in the president's executive order"); DOT, Report on DOT Significant Rulemakings, https://www.transportation.gov/regulations/report-on-significant-rulemakings (last visited June 23, 2017) (stating that "DOT rulemakings are being evaluated in accordance with Executive Order[] 13771").

OMB's instructions confirm that Executive Order 13771 cannot be defended on the theory that, "if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law." *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002). Other than a small category of exempt rules, *see* Guidance Q33, OMB has instructed that the Executive Order's 1-in, 2-out and offset requirements apply to all significant rules. Indeed, even when issuing a rule pursuant to a statute that "prohibits consideration of cost," an agency must "offset the costs of such regulatory actions through other deregulatory actions," *id*. Q18; *see also id*. Q33 (stating that repeal and offset requirements apply in emergency situations and to new rules subject to legal deadlines). No statute authorizes or allows rulemaking authority to be constrained by such an offset requirement. The

Executive Order's boilerplate instruction to conform to applicable law thus cannot overcome the fact that Executive Order 13771's fundamental requirement directs agencies to violate the law.[13]

By contrast, in *Allbaugh*, the challenged executive order, which prohibited agencies from imposing a certain condition on bidders for government contracts, stated "a policy that, so far as the [then-] present record reveal[ed], [was] above suspicion in the ordinary course of administration." *Allbaugh*, 295 F.3d at 33. The plaintiffs' challenge did not fail solely because of the "to the extent permitted by law" provision; rather, the provision was significant because the court thought that the executive order could be lawfully implemented in some circumstances. Here, the Executive Order cannot be lawfully implemented in any circumstances. Defendants themselves agree that an executive order cannot "conflict with a legislative command." Mot. to Dismiss 34. The question whether this one does cannot be resolved by reference to *Allbaugh*.

2. Defendants mischaracterize plaintiffs' claims as resting on the premise that "agencies may only consider those factors explicitly authorized in the governing statute." Mot. to Dismiss 33. Of course, as the Supreme Court has held, a statute may *implicitly* allow an agency to consider a particular factor, including cost. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This case, however, is not about whether an agency may "consider" some factor arguably relevant to the issuance of a rule; it is about whether the President may prohibit an agency from issuing a new

[13] The government's position in the case challenging the "sanctuary cities" executive order suggests that "consistent with applicable law" provisions may refer to procedural requirements. There, the government argued that the phrase "to the extent consistent with law" means that "the President has directed the Secretary [of Homeland Security] and the Attorney General to follow the governing legal limitations, such as the procedural requirements for making or revoking the federal grants." Defs. Opp. to Pltfs. Mot. for Prelim Inj., *Cty. of Santa Clara v. Trump*, No. 17-574 (N.D. Cal.), filed Mar. 9, 2017, at 10–11, available at https://www.clearinghouse.net/chDocs/public/IM-CA-0089-0015.pdf. Here, a pro forma direction to comply with procedural requirements, such as rulemaking deadlines, Guidance Q33 (third bullet), does not lessen the substantive constitutional defects of Executive Order 13771 or its implementation.

rule unless it takes additional actions that bear no relation to its statutory authority to issue that new rule. And the problem here is not simply that no statute *explicitly* authorizes the Executive Order's new limits on agency rulemaking power. It is that defendants cannot identify a single statute that either implicitly or explicitly allows an agency to make issuance of a new rule contingent on repeal of two or more existing rules, and contingent on those repeals offsetting the costs of the new rule. No such statute exists.

Defendants thus miss the point when they state that, in this Circuit, agencies may consider costs unless "there is 'clear congressional intent to preclude'" such consideration. Mot. to Dismiss 34 (quoting *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (per curiam) (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987))). The line of cases on which defendants rely—which take *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), as their starting point—address whether an agency has reasonably interpreted a given statute to allow consideration of cost in a particular rulemaking under that statute. *See George E. Warren Corp. v. EPA*, 159 F.3d 616, 623 (D.C. Cir 1998) (deferring to agency interpretation under step two of *Chevron*); *NRDC v. EPA*, 824 F.2d at 1152, 1162–63 (finding no clear congressional intent to preclude or to allow costs and deferring to agency's view). *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467–68 (2001) (finding § 7409 of Clean Air Act could not reasonably be construed to authorize consideration of costs). *Michigan v. EPA*, for example, upheld EPA's use of costs to determine, under the Clean Air Act, when emissions of an upwind State contributed "significantly" to nonattainment of air quality standards downwind—not whether EPA could use cost in any way, for any purpose. *See* 213 F.3d at 674–79. Defendants point to no case suggesting that federal agencies possess rulemaking authority outside the bounds of that delegated by Congress. They point to no case supporting their

position here: that a statute (or any statute) can reasonably be interpreted to allow new rules to be made contingent on eliminating *other*, existing rules and the ongoing costs of those *other* rules.

In this regard, defendants' citation to the First Amended Complaint's discussion of the Occupational Safety and Health Act (OSH Act) for the point that Executive Order 13771 can be implemented consistent with applicable law, *see* Mot. to Dismiss 33, is perplexing. In the OSH Act, Congress was very specific about the role of costs in OSHA rulemaking. *See* 29 U.S.C. § 655(b)(5); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (holding that OSHA cannot use cost-benefit analysis when setting standards). If OSHA determines that a standard is necessary to address a threat to worker health and safety and is economically and technologically feasible, the OSH Act requires the agency to issue it, regardless of whether it can find two or more other rules that it can repeal to offset the costs of the standard. *See generally* Michaels Decl. ¶¶ 9–10, 15–16, 29–35. The OSH Act thus serves as a straightforward illustration of why the Executive Order is inherently *not* consistent with applicable law.

Indeed, after reciting many of plaintiffs' allegations with respect to the OSH Act, defendants neglect to explain how the Executive Order is conceivably consistent with it. Instead, they drop a footnote stating that some statutes do allow for consideration of cost, offering the Clean Air Act as their example. Yet the Clean Air Act language quoted by defendants—requiring a "standard for emission reduction to be set 'taking into account the cost of achieving such reduction'"—belies their claim that "there is no reason that agencies acting pursuant to [it] could not comply with the requirements of the Executive Order." Mot. to Dismiss 33 n.11 (quoting 42 U.S.C. § 7411(a)(1)). In the provision quoted, Congress authorized EPA to consider cost—but not any cost. A provision specifying that the agency should consider "the cost of achieving [the emission] reduction" cannot reasonably be read to authorize the agency to make issuance of a new

emission standard dependent on the future costs of existing rules on other topics—much less to authorize the agency to make issuance of a new Clean Air Act standard contingent on repeal of two or more existing rules to offset the new cost.

3. Defending inherent presidential authority to guide discretionary aspects of agency rulemaking authority, Mot. to Dismiss 33–34, defendants skirt the issue here. Whatever authority the President has to guide an agency's exercise of discretion in rulemaking must operate within the bounds delegated by Congress. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979); *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171–72 (4th Cir. 1981); *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980); *see FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 536 (2009) (Kennedy, J., concurring) ("Congress must 'lay down by legislative act an intelligible principle,' and the agency must follow it." (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))); *Local 2677, Am. Fed'n of Gov't Emps. v. Phillips*, 358 F. Supp. 60, 77 (D.D.C. 1973) ("[D]iscretion in the implementation of a program is not the freedom to ignore the standards for its implementation." (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971))). As these cases make plain, the courts have soundly rejected defendants' suggestion that executive power with respect to regulation extends to all that is not "expressly forbidden." Mot. to Dismiss 1; *see also id*. at 33 (stating that President can direct agencies to act "except to the extent that there is a direct conflict with a legislative command"). Nor are defendants aided by *Allbaugh*'s statement that "the President's power necessarily encompasses 'general administrative control of those executing the laws.'" *Id*. at 33 (quoting *Allbaugh*, 295 F.3d at 32 (internal quotation marks omitted)). The requirements of Executive Order 13771, which impose mandatory extra-statutory, across-the-board limits on agency rulemaking authority, cannot reasonably be labeled "general administrative control."

By glossing over the Order's requirement that agencies condition rulemaking on the rescission of other rules to offset costs, and by minimizing those requirements' significance, *see*, *e.g.*, Mot. to Dismiss 11 (referring to requirements of the Executive Order as an "offset policy"), defendants' motion never takes plaintiffs' claims head on. The Executive Order cannot reasonably be characterized as a "guide" to federal agencies, *id*. at 33, along the lines of orders on retrospective review, *id*. at 10. The Executive Order imposes mandates that only Congress can impose. And Congress has not done so.[14]

B. A claim based on violation of the Take Care Clause and seeking a declaration that executive action is unconstitutional is actionable.

Because the President has no inherent, exclusive authority to direct rulemaking contrary to congressional commands, the Executive Order violates the doctrine of separation of powers by usurping legislative authority. And because the Executive Order requires agencies to act contrary to statutory directives, it also violates the Constitution's directive that the President "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3; *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632–33 (1952) (Douglas, J., concurring) (explaining that duty to take care that the laws be faithfully executed "starts and ends with the laws Congress has enacted" and rejecting argument that "Take Care Clause" justified presidential intrusion into legislative domain); *id.* at 662 (Clark, J., concurring) (stating that "where Congress has laid down specific

[14] In several instances, a Member of Congress has introduced a bill that would have authorized part—but not all—of what Executive Order 13771 mandates. *See*, *e.g.*, National Regulatory Budget Act of 2014, S. 2153, 113th Cong. (proposing an "annual overall regulatory cost cap"); Regulatory Accountability Act of 1993, S. 13, 103d Cong. § 4(3)(A) (proposing to require that the costs of any new regulation be "fully offset" by repealing or modifying an existing regulation); Federal Regulatory Budget Act, S. 3550, 95th Cong. (1978) (proposing a joint legislative-executive process to create annual regulatory budgets). Congress has not passed any of these bills. A pending bill mirrors aspects of Executive Order 13771. *See* Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017, H.R. 2623, 115th Cong.

procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis").

1. Defendants do not deny that a separation of powers claim can be based on the President's usurpation of legislative authority. They briefly argue, however, that the flip-side of such a claim—that a President violates the Take Care Clause by ordering agencies to act contrary to statutory commands—cannot be the basis for a claim. The Supreme Court has suggested otherwise. *See United States v. Texas*, 136 S. Ct. 906 (2016) (order granting certiorari and asking parties to brief the additional question "Whether the Guidance [at issue] violates the Take Care Clause of the Constitution, Art. II, § 3"). And the Ninth Circuit recently considered an argument based on the Take Care Clause, although it found that the party raising it had "not shown the [government] failed to comply with its responsibilities." *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 976–77 (9th Cir. 2017); *see also Cty. of Santa Clara*, 2017 WL 1459081, at *22 (holding that plaintiffs were likely to succeed on the merits of their separation of powers claim because the challenged executive order ran afoul of "fundamental constitutional structures," including the obligation to "take Care that the Law be faithfully executed," and citing *Clinton v. City of New York*, 524 U.S. 417, 439 (1998)).

Defendants' argument to the contrary seems to be based on a misunderstanding of the claim. Plaintiffs challenge presidential action that violates the Take Care Clause by contradicting Congress's commands, whereas the cases on which defendants rely rejected challenges under the Take Care Clause claiming that the President failed to act affirmatively in ways that the plaintiffs alleged would help to promote faithful execution of the laws. Unlike the cases cited by defendants, plaintiffs do not challenge an exercise of "Presidential discretion." Mot. to Dismiss 36. The President has no discretion to instruct agency officials, including the Director of OMB, to violate

the law. Defendants themselves do not go so far as to suggest that the constitutional command to "faithfully execute" the law is a constitutional grant of discretion to violate it. Such an argument would be untenable given the plain language of the Take Care Clause and the Supreme Court's reliance on the Take Care Clause in the opinions holding that President Truman's seizure of the nation's steel mills violated the Constitution. *See Youngstown*, 343 U.S. at 587–88 (opinion of the Court); *id*. at 610 (Frankfurter, J., concurring); *id*. at 660 (Clark, J., concurring in the judgment).

Defendants' reliance on *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), is likewise unavailing. That case addressed whether the President may be enjoined by the courts from carrying into effect an act of Congress alleged to be unconstitutional. *See id.* at 499. Here, plaintiffs do not seek an injunction against the President. And in the 150 years since *Mississippi v. Johnson*, the courts have repeatedly made clear that constitutional challenges to executive orders exceeding presidential authority are justiciable. *See*, *e.g*., *Reich I*, 57 F.3d 1099; *Cty. of Santa Clara*, 2017 WL 1459081; *Hawai'i v. Trump*, __ F. Supp. 3d __, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), *aff'd on other grounds*, 2017 WL 2529640.[15]

2. Defendants also claim that, because only the President can violate the Take Care Clause, this Court cannot remedy a violation by enjoining his subordinates. Mot. to Dismiss 36. To the contrary, a declaration that Executive Order 13771 is unlawful and an injunction barring the agencies from complying with it are appropriate remedies for the President's unlawful action. In *Reich II*, the D.C. Circuit held that the plaintiffs were entitled to prevail in their non-statutory

[15] *See also U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 415 n.8 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) ("I do not dispute that the Court cannot issue an order directing the President's 'exercise of judgment' in law enforcement. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867). What is within this Court's determination, however, is whether the *Order* at issue faithfully executes existing law. It does not, and it does not because of the construction set forth by the President.").

review action seeking declaratory and injunctive relief against agency implementation of an unlawful executive order. 74 F.3d at 1325, 1332. And in *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986), this Court ordered EPA to fulfill its statutory mandate (there, issuance of a regulation by a statutory deadline), notwithstanding an executive order requiring OMB review, and declared that OMB could not use the executive order to interfere with EPA's compliance with the statute, *id*. at 571. Likewise here, both declaratory relief against all defendants as to the unlawfulness of the Executive Order, and injunctive relief against the agencies, are "necessary to ensure compliance with the clearly expressed will of Congress." *Id*. at 572.

C. Plaintiffs have no adequate alternative remedy for the harm caused by defendants' *ultra vires* actions.

As explained above, *supra* pp. 25–26, plaintiffs' third and fourth causes of action alleging *ultra vires* action by the agency defendants are based on *McAnnulty*, 187 U.S. 94, and its progeny—particularly the D.C. Circuit's decision in *Reich II*, 74 F.3d 1322, which affirmed the existence of a non-statutory right of action for review of agency action pursuant to an unlawful executive order. Without citing either case, defendants argue that the third and fourth causes of action for non-statutory review against the agency defendants fail to state a claim because plaintiffs do not satisfy the requirements of *Leedom v. Kyne*, 358 U.S. 184 (1958). There, the Court allowed a non-statutory challenge to a National Labor Relations Board decision that the plaintiff alleged was not within the Board's jurisdiction, but rather was contrary to a specific statutory prohibition. Although review of the decision was not permitted by the statutory provisions governing judicial review of NLRB actions, the Court, citing *McAnnulty*, held that non-statutory review was available: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190.

Nonetheless, describing *Leedom* as allowing a non-statutory review claim only where "there is no alternative procedure for review of the statutory claim," defendants argue that plaintiffs cannot pursue a non-statutory review claim because they "have a meaningful and adequate means of challenging the statutory violations alleged in their third and fourth causes of action through the APA." Mot. to Dismiss 37 (quoting *Nyunt v. Chairman, Broad Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)). Defendants are wrong both on the law and on the availability of an alternative remedy.

To begin with, defendants' reading of *Leedom* is contradicted by the D.C. Circuit's decision in *Reich II*. There, although the agency defendant had issued regulations implementing the challenged executive order, and future agency actions implementing the executive order at issue could have been subject to APA review, the plaintiffs had not alleged an APA cause of action. Notwithstanding "what appear[ed] to [the court] to be an available statutory cause of action," 74 F.3d at 1327, the court entertained a non-statutory review claim. And the court did so based on its review of the *McAnnulty* line of cases, specifically including *Leedom*. *See id*. at 1328 (reiterating that "[n]othing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review" (quoting *Dart v. United States*, 848 F.2d at 224)).

In addition, here, plaintiffs have no adequate alternative statutory claim for their first four causes of action, which present facial challenges to Executive Order 13771 and its implementation. Defendants suggest that plaintiffs should bring individual APA claims in the future as to individual agency actions implementing Executive Order 13771, but such cases would not provide adequate relief. Rather, even more so than in *Reich II*, "any relief short of a declaration that the Executive Order is illegal would be inadequate," *id.* at 1326, because the challenge here is to requirements that infect the rulemaking process itself. Challenges to any particular rulemaking cannot remedy

the across-the-board harm from that infection: Some rulemakings will not occur because of an agency's inability to offset costs, but identifying a discrete agency inaction that is attributable to the Executive Order and is reviewable under the APA is likely to be exceedingly difficult, if not impossible. Moreover, delays caused by the Executive Order, even if the cause can be identified in a particular instance, cannot be cured after the fact. And the public could challenge an agency's weakening of a rule to reduce the amount of the required offset only if the agency revealed that it had weakened a rule for that reason. Meanwhile, the requirements of the Executive Order—including the annual cost cap, the 1-in, 2-out requirement, and the related cost-offset requirement—are in effect now. "That the 'executive's' action here is essentially that of the President does not insulate the entire executive branch from judicial review." *Id.* at 1328. "[I]t is now well established that review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Id.* (internal quotation marks, alteration, and citation omitted).

Finally, contrary to defendants' suggestion, the fifth claim for relief—the APA claim with respect to the OMB Guidances—does not indicate that the APA provides an adequate remedy for the third and fourth claims. The fifth claim is directed at the OMB Guidances, whereas the third claim is broadly aimed at implementation of the Executive Order by all the defendant agencies, and the fourth claim seeks broader relief with respect to OMB's implementation of the Executive Order. A ruling in favor of plaintiffs on their APA claim against OMB will provide relief from the mandates of the Guidances and from resulting agency actions, but will not provide plaintiffs an injunction against implementation of the Executive Order by regulatory agencies. *See id.* at 1327. In addition, defendants themselves argue that the fifth claim for relief should be dismissed because, in their view, the OMB Guidances are not reviewable final agency action. *See* Mot. to Dismiss 41–

43. Although that argument is not correct, *see infra* pp. 42–45, defendants cannot properly rely on the APA claim against OMB as a basis for dismissing the non-statutory review claims without conceding that the APA claim will in fact provide a complete basis for relief if plaintiffs' claims that the Executive Order is unconstitutional and otherwise unlawful are well-founded—a concession they are unwilling to make.. *Cf. Reich II*, 74 F.3d at 1327 (noting that government's previous position that regulations were necessary to flesh out plaintiffs' claim was "somewhat in tension" with its position that APA review was unavailable). Finally, to the extent that the claims overlap and state alternative theories, "the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2); *Croixland Props. Ltd. P'ship v. Corcoran*, 174 F.3d 213, 218 (D.C. Cir. 1999).

D. Defendants' reliance on statutorily authorized consideration of costs is inapposite.

Arguing that *McAnnulty* review is unavailable because agencies' consideration of costs is not *ultra vires*, Mot. to Dismiss 38–39, defendants essentially rehash their point that the Executive Order can be implemented consistent with applicable law because some statutes allow consideration of costs. As discussed above, *supra* at III.A., defendants' argument fails. After stating the question as whether "weigh[ing] the costs of existing rules against the cost of potential new rules is prohibited," Mot. to Dismiss 38, defendants attempt to defend the Executive Order's mandates only by stating the unremarkable point that "consideration of the costs of a rulemaking is frequently a relevant factor in regulatory decisions." *Id*. at 39. Thus, they never actually defend the 1-in, 2-out mandate or the offset requirement. Likewise, defendants state that "agencies have routinely analyzed the costs of key regulatory decisions to provide information to lawmakers," whether to comply with statutes or as a matter of policy. *Id*. This statement likewise does not address the issues presented here. The requirements of Executive Order 13771 and the OMB

Guidances do much more than require agencies to "analyze" costs of a rule under consideration. None of the executive orders cited by defendants made issuance of new rules contingent on repeal of unrelated rules with offsetting costs, and thus imposed conditions on rulemaking that are completely unrelated to the statutory authorization for particular rules. Defendants, again, point to no statute that authorizes these 1-in, 2-out and cost-offset requirements. Only by divorcing their argument from the requirements of Executive Order 13771 can defendants suggest otherwise.

E. OMB lacks authority to implement an executive order that is itself *ultra vires*.

Defendants briefly argue that OMB's implementation of Executive Order 13771 cannot be *ultra vires* because it is carrying out a presidential directive. In support of their argument, defendants offer citations setting forth general statements about OMB's role. Such generalities do not support the action at issue here.

The starting point for defendants' argument is the general statement that "OMB is permitted to assist the President in implementing Executive Orders that are issued pursuant to his *constitutional* authority to oversee the Executive Branch." Mot. to Dismiss 40 (emphasis added). That point is undisputed. Here, however, OMB is assisting in implementing an Executive Order that is not pursuant to, but inconsistent with, the President's constitutional authority. Executive Order 13771 is not simply "a Presidential directive in an Executive Order to oversee the rulemaking process, including the consideration of the costs of that process." *Id*. at 40. It is a directive that OMB enforce an extra-statutory requirement conditioning issuance of new rules on repeal of two or more existing rules with offsetting costs, and that OMB establish and enforce an annual cost cap. Defendants cite no statute that empowers OMB to impose or assist the President in the imposition of such requirements. Instead, defendants concede that OMB's authority depends on the Executive Order. Because that Order is unlawful, OMB's implementation of it is as well.

See Chrysler Corp., 441 U.S. at 304; *Reich II*, 74 F.3d at 1328; *Liberty Mut. Ins. Co.*, 639 F.2d at 169, 172; *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971) ("The fact that the President may have ordered the Director of the [Office of Science and Technology] not to release [a certain] Report does not leave the courts without power to review the legality of withholding the Report, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands." (citing *Youngstown*)).

F. The OMB Guidances are final agency action reviewable under the APA.

Plaintiffs' fifth claim for relief challenges the OMB Guidances as final agency action that is arbitrary, capricious, or not in accordance with law, contrary to constitutional right or power, or in excess of statutory authority. 5 U.S.C. § 706(2)(A)–(C). Defendants, although conceding that OMB is an agency subject to the APA, argue that this APA claim should be dismissed because the OMB Guidances are not final agency action. Defendants are wrong.

Agency action is "final" for purposes of the APA when it "mark[s] the consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted). In *Bennett*, for example, the Supreme Court considered a challenge to a written statement of one agency, the Fish and Wildlife Service (FWS), that explained how a proposed action by another agency, the Bureau of Reclamation, would affect endangered species and set forth steps the Bureau should take to minimize the impact on endangered species. *Id*. at 158–59. After the Bureau stated that it would operate the project in compliance with the written statement, a group of plaintiffs sued the FWS officials (not the Bureau or its officers) to challenge the statement, arguing that the FWS statement affected the plaintiffs' use of the affected waterways for recreational, aesthetic and commercial purposes. *Id*. at 159.

Finding that the written statement was the culmination of FWS's decisionmaking and that the actions it effectively compelled the Bureau to take had adverse consequences for the plaintiffs, the Court held that the statement was "final agency action" subject to challenge under the APA. *Id*. at 178. *Cf*. *Dalton v. Specter*, 511 U.S. 462, 469 (1994) (holding that Secretary of Defense's recommendation to the President regarding naval base closing did not constitute "final agency action" where the report was "more like a tentative recommendation than a final and binding determination").

Likewise, OMB's issuance of the Guidances at issue is final agency action. To begin with, defendants do not contest the "well established" point that "interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action." *Arizona v. Shalala*, 121 F. Supp. 2d 40, 48 (D.D.C. 2000) (citing *Appalachian Power Co.*, 208 F.3d at 1021; *McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1321 (D.C. Cir. 1988); & *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435–38 (D.C. Cir. 1986)). And as in *Bennett*, the directives in the OMB Guidances specify mandatory prerequisites for issuing new rules and, in that way, directly control actions that affect regulated entities. The Guidances provide agencies with specific instructions for implementing Executive Order 13771, including that the Executive Order applies to "significant regulations" and that the value of "costs" to be offset by repeal of existing regulations must be determined without regard to net benefits or sunk costs. *See* Interim Guidance 2-5; Guidance Q2, Q3, Q21. Just as in *Bennett*, the agency's directive "alters the legal regime to which the action agenc[ies] [are] subject," 520 U.S. at 169, and has "direct and appreciable legal consequences" for persons whose interests are affected by the agency rulemaking activities it controls, *id*. at 178. Defendants' citations to cases involving non-final agency action that lack such consequences are inapposite. *See*, *e.g*., *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir.

2003) (holding company's challenge to agency's authority to regulate its product did not challenge final agency action, where agency investigation of product was ongoing and agency had not yet made a determination).

Moreover, the Interim Guidance and Guidance "supplement[ing]" it, *see* Guidance 1, are not of a tentative or interlocutory nature; they convey a definitive pronouncement on the requirements for implementing the Executive Order in 2017. *See* Interim Guidance 1 ("Specifically, the guidance explains, for purposes of implementing Section 2 in Fiscal Year 2017, the following requirements …"); *id*. at 2 ("[B]eginning immediately, agencies planning to issue one or more significant regulatory action on or before September 30, 2017, should …"); Guidance 1 ("The guidance explains, for purposes of implementing Section 2, the following requirements: …"); *id*. at 2 ("The incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions."). The OMB Guidances' repeated use of words like "requirements," "must," and "should" and "should not" evidences that their mandates are not tentative, but now in effect. "[T]he entire Guidance, from beginning to end … reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power Co*., 208 F.3d at 1023 (finding guidance constitutes final agency action in this circumstance, despite boilerplate disclaimer). The "language and subject matter are such as to indicate that [OMB] has completed its decisionmaking process" for 2017. *Arizona v. Shalala*, 121 F. Supp. 2d at 48 (internal quotation marks omitted); *see also NRDC v. EPA*, 643 F.3d 311, 319–21 (D.C. Cir. 2011) (concluding that guidance mandating certain action by EPA regional directors was final agency action).

The final nature of the OMB Guidances is further evidenced by the fact that agencies are complying with them as they implement the Executive Order. *See supra* p. 29 (citing examples);

Velarde, *supra* p. 10 (reporting statements of IRS official about implementation of the Executive Order and Interim Guidance).

The possibility that OMB might consider some matters on an individual basis or exempt some rules from the requirements of the Executive Order, *see* Mot. to Dismiss 42, does not affect the final nature of the Guidances themselves. Defendants offer no argument to support their suggestion that the possibility of exemptions affects finality, and the one case they cite is not on point. *Id.* (citing *Catawba Cty. v. EPA*, 571 F.3d 20, 34 (D.C. Cir. 2009) (holding that agency memo was not a legislative rule requiring notice-and-comment rulemaking because it did not impose new duties but only clarified existing statutory duties)). In short, the possibility of OMB exemptions does not immunize its Guidances from review. *See Reich I*, 57 F.3d at 1100 (agency's authority to exempt certain government contractors from the terms of an executive order did not make the plaintiffs' claims speculative).

The OMB Guidances are final agency action, and plaintiffs' APA claim is properly before the Court.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied.

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Respectfully submitted,

/s/ .

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