IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 1:17-cv-00253 RDM

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

DATED: June 26, 2017

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INTRODUCTION

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

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

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

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

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

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

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

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

BACKGROUND

I. FACTUAL BACKGROUND[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conflict. Guidance Implementing Executive Order 13771 ("Guidance"), Exhibit C to First Amended Complaint ("Am. Compl.") at 1.[2]

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

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

II. PROCEDURAL BACKGROUND

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

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

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

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

III. STANDARD OF REVIEW

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

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

ARGUMENT

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

I. Plaintiffs Lack Standing and Their Challenges Are Unripe

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

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

A. Plaintiffs Have Failed to Establish Associational Standing

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

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

In their Motion for Summary Judgment, Plaintiffs assert in conclusory fashion that the Executive Order will cause their members injury because it will "prevent[], delay[], or weaken[] new rules protecting public health, safety, and the environment . . . ." MSJ at 13.[3] As support for this proposition, Plaintiffs cite their declarations, including nine declarations from individual members or employees, which they invite the Court to sift for evidence supporting a viable

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

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

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

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

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

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

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

both member declarants merely repeat their "belie[f]" that, in the future, "by delaying, weakening, or prompting OSHA to forgo a new standard for workplace exposure to infectious diseases, Executive Order 13771 will negatively impact [their] ability to avoid such exposure." Abbott Decl. at ¶ 7.[5] But that allegation simply assumes, without discussion, that delay will occur and that such delay would cause them harm. The declarants do not discuss *whether* the rule will be issued, *when* the rule would be expected, *how* it would be weakened, *what* the rule would look like in final form, or *why* precisely they would be harmed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Plaintiffs Have Not Established Organizational Injury

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

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

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

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

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

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

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

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

C. Plaintiffs' Challenges Are Not Ripe

Intertwined with the requirement under Article III that an injury-in-fact be certainly impending, the doctrine of ripeness concerns "when a federal court can or should decide a case." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). A "claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). Although the constitutional component of ripeness is coextensive with the injury-in-fact requirement of standing, *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996), the doctrine of ripeness also includes prudential considerations. For the same reasons that Plaintiffs lack standing, the prudential considerations of ripeness counsel against permitting the instant challenges to go forward.

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

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

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

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

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

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

II. Plaintiffs Cannot Demonstrate a Separation of Powers Violation

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

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

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

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

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

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

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

Congress was not "quiescent" or "indifferen[t]" to the role of cost in rulemakings under these statutes, and therefore the Executive Order violates the separation of powers. *Id*. at 28-29. Plaintiffs conclude with the remarkable assertion that "[t]hese examples are representative of regulatory statutes as a whole" in an apparent attempt to extrapolate from these two examples to encompass the entirety of the regulatory state. *Id*. at 30.

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

expressly identified by statute because many grants of rulemaking power to agencies are not constrained by the consideration of specific factors. As just one example, the Family and Medical Leave Act states only that the Secretary of Labor "shall prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. § 2654.[15] Certainly this statute does not prohibit the consideration of costs or offsets by the agency as outlined in Executive Order 13,771.[16]

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

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

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

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

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

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

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

Executive Branch. *See Allbaugh*, 295 F.3d at 30.[17] As the court explained, "if an executive agency, such as the FEMA, may lawfully implement the Executive Order, then it must do so; if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law." *Id.*[18]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' Motion also alleges that the regulatory agency defendants[19] will act *ultra vires* if they comply with the offset requirements of Section 2 of Executive Order 13,771, MSJ at 38-39, and that OMB is acting *ultra vires* in assisting the President in implementing Executive Order 13,771, *id*. at 39. Plaintiffs' have not carried their substantial burden of establishing any type of *ultra vires* conduct in connection with either of these causes of action. *See* MSJ at 11-12. Most critically, Plaintiffs' Motion provides only the most cursory analysis of the requirements for *ultra vires* review and totally fails to discuss or even recognize the crucial three-part test for the application of the *ultra vires* doctrine in this Circuit. *See Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). As Plaintiffs cannot satisfy this test for either the Third or Fourth Causes of Action, the Court should deny Plaintiffs' Motion for Summary Judgment on both claims.

[19] For purposes of this section, "regulatory agency defendants" means all agency defendants other than OMB.

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

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

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

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

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

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

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

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

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

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

The only argument advanced in support of Plaintiffs' Third Cause of Action, alleging that the regulatory agency defendants' implementation of Executive Order 13,771 is *ultra vires*, is that "[b]ecause Executive Order 13771 is ultra vires and unconstitutional, agency action implementing the Order is as well." MSJ at 39.[22] Plaintiffs' Motion makes no effort to explain why agency consideration of costs and priorities in taking regulatory actions could possibly

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

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

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

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

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

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

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

As with their Third Cause of Action, Plaintiffs' Fourth Cause of Action asserts that because Executive Order 13,771 is unconstitutional, actions by OMB to implement and administer the Order are therefore *ultra vires*. MSJ at 39.[24] OMB is certainly authorized to administer a valid Executive Order, and Plaintiffs do not even attempt to argue that OMB lacks statutory authority to carry out a Presidential directive in an Executive Order to oversee the

[23] *See, e.g.*, EPA, *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground Level Ozone*, at 1-2, July 2007 available at https://www3.epa.gov/ttnecas1/docs/ria/naaqs-o3_ria_proposal_2007-07.pdf ("This RIA is intended to inform the public about the potential costs and benefits that may result when a new ozone standard is implemented, but is not relevant to establishing the standards themselves.").
[24] Plaintiffs' MSJ conflates their *ultra vires* claim against OMB (Fourth Cause of Action) and their APA claim against OMB (Fifth Cause of Action). MSJ at 39. Defendants will address each separately. *See supra* Arguments IV.C and IV.D.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Respectfully submitted,

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

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