No. 22-30087

In the United States Court of Appeals for the Fifth Circuit

THE STATE OF LOUISIANA, by and through its Attorney General, Jeff Landry; THE STATE OF ALABAMA, by and through its Attorney General, Steve Marchall; THE STATE OF FLORIDA, by and through its Attorney General, Ashley Moody; THE STATE OF GEORGIA, by and through its Attorney General, Christopher M. Carr; THE COMMONWEALTH OF KENTUCKY, by and through its Attorney General, Daniel Cameron; THE STATE OF MISSISSIPPI, by and through its Attorney General, Lynn Fitch; THE STATE OF SOUTH DAKOTA, by and through its Governor, Kristi Noem; THE STATE OF TEXAS, by and through its Attorney General, Ken Paxton; THE STATE OF WEST VIRGINIA, by and through its Attorney General, Patrick Morrisey; THE STATE OF WYOMING, by and through its Attorney General, Bridget Hill,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; CECILIA ROUSE, in her official capacity as Chairwoman of the Council of Economic Advisers; SHALANDA YOUNG, in her official capacity as Acting Director of the Office of Management and Budget; KEI KOIZUMI, in his official capacity as Acting Director of the Office of Science and Technology Policy; JANET YELLEN, Secretary, U.S. Department of Treasury; DEB HAALAND, Secretary, U.S. Department of the Interior; TOM VILSACK, in his official capacity as Secretary of Agriculture; GINA RAIMONDO, Secretary, U.S. Department of Commerce; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; JENNIFER GRANHOLM, Secretary, U.S. Department of Energy; BRENDA MALLORY, in her official capacity as Chairwoman of the Council on Environmental Quality; MICHAEL S. REGAN, in his official capacity as Administrator of the Environmental Protection Agency; GINA MCCARTHY, in her official capacity as White House National Climate Advisor; BRIAN DEESE, in his official capacity as Director of the National Economic Council; JACK DANIELSON, in his official capacity as Executive Director of the National Highway Traffic Safety Administration; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana No. 2:21-cv-1074

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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June 23, 2022

AMICUS CURIAE'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS UNDER FIFTH CIRCUIT RULE 29.2

No. 22-30087

THE STATE OF LOUISIANA,
by and through its Attorney General, Jeff Landry, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Under this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Landmark Legal Foundation ("Landmark") submits this supplemental certificate of interested persons to fully disclose all those with an interest in the amici curiae brief and provide the required information on their corporate status and affiliations.

The counsel of record below certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome, along with those listed in the briefs of the parties. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae:

Landmark Legal Foundation

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Landmark Legal Foundation is a nonpartisan, not-for-profit public interest legal organization with offices in Kansas City, Missouri, and Leesburg, Virginia. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

/s/Michael J. O'Neill
Michael J. O'Neill
Counsel for Amicus Curiae

June 23, 2022

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INTEREST OF AMICUS CURIAE[1]

Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities.

Amicus certifies that a separate brief is necessary to provide the perspective of organizations that believe separation of powers is necessary to ensure preservation of liberty. The President has violated the separation of powers doctrine by exceeding his constitutional authority by an executive order imposing tremendous changes in administrative agency cost-benefit calculations, which will have a devasting impact the U.S. economy. –The order sets new and dramatically increased calculations for the "social cost" of each additional metric ton of carbon, methane, and nitrous oxide emissions. These social cost calculations are not part of any statutory scheme and have not been subject to any administrative procedure scrutiny. The President's social cost directive violates the Administrative Procedure Act and is an unconstitutional attack on the free market in general and on the production of energy in particular.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

President Biden issued Executive Order 13990 ("EO 13990" or "the Order") just days after entering office. The Order transforms the American economy because it directs a non-accountable "Interagency Working Group" ("IWG") to publish a valuation for use by every government agency in calculating the costs and benefits of regulating greenhouse gasses or "social costs" of carbon, nitrogen, and methane respectively ("SC-GHGs").

SC-GHGs are the purported external costs that arise when these substances are released into the atmosphere. Proponents of using SC-GHGs assert that emissions of greenhouse gases "impose a negative externality by causing climate change, inflicting societal harm on the United States and the rest of the world." Nick Loris, *Flaws in the Social Cost of Carbon, the Social Cost of Methane, and the Social Cost of Nitrous Oxide*, testimony before the House Subcommittee on Energy and Mineral Resources, July 27, 2017, available at: https://www.congress.gov/115/meeting/house/106337/witnesses/HHRG-115-II06-Wstate-LorisN-20170727.pdf (accessed June 17 , 2022). SC-GHGs are therefore used "to calculate the climate benefit of abated [GHG] emissions from regulations." *Id.* In practice, governmental agencies "project a monetary value for the 'climate benefit' of regulations or a monetary 'climate cost' for proposed projects." *Id.* The SC-GHG can thus be used, for example, to justify regulations by states or the federal

government to prevent construction of new power plants or to impose a cost on construction on new pipelines. *Id.* And the use of SC-GHGs is ubiquitous. As of 2017, the Congressional Research Service found that the use of SC-GHGs underpinned at least 150 regulations. Jane A. Leggett, *Federal Citations to the Social Cost of Greenhouse Gases*, Congressional Research Service, March 17, 2017, available at: https://sgp.fas.org/crs/misc/R44657.pdf (accessed June 17, 2022).

By Defendant-Appellant's own admission, no statute vests the IWG with this authority. In fact, no statute vests the IWG with any authority. Appellants seek to minimize the role of the IWG by characterizing it as a body whose sole function is to advise and assist the President. It does so much more. Under the Order, the IWG stood in the shoes of every federal agency and issued a valuation with enormously consequential effects on the American economy.

Landmark supports Appellee's arguments and submits this brief to provide a unique perspective on the limits of presidential authority and the adverse outcomes that arise when a president bypasses the rulemaking process and directs unaccountable "working groups" to issue "super rules" that seek to reshape the American economy.

Landmark urges this Court to affirm the district court's preliminary injunction.

ARGUMENT

EO 13990 does not have a basis in constitutional or statutory law. President Biden acted beyond his constitutional authority when he directed the IWG to publish "interim" SC-GHGs and order administrative agencies to use these valuations "when monetizing the value of changes in greenhouse emissions resulting from regulations and other relevant agency actions … ." EO 13990 § 5(b)(ii)(A), 86 Fed. Reg. 7040 (Jan. 25, 2021). And he acted beyond his constitutional authority when he ordered the IWG to issue a final valuation. EO 13990 §5(b)(ii)(B), 86 Fed. Reg. 7040 (Jan. 25, 2021).

The President did not order the IWG to issue proposed SC-GHGs that would allow the public and stakeholders the opportunity to comment on their efficacy. Nor did the President direct his respective administrative agencies to begin the rulemaking process by issuing a notice of proposed rulemaking of revised SC-GHGs. Instead, he bypassed the rulemaking process by ordering all agencies to use the IWG's SC-GHGs valuations following their publication. Initially labeling the valuation "interim" creates the false impression that the initial valuations established by the IWG are not binding on agencies. They are. Section 5(b)(ii) and 5(b)(ii)(A) of the Order, labeled "Mission and Work" state, in relevant part, "The Working Group *shall*… …publish an interim SCC, SCN, and SCM within 30 days of the date of this order, which agencies *shall* use when monetizing the value of changes in

greenhouse gas emissions resulting from regulations and other relevant agency actions … " (emphasis added). 86 Fed. Reg. 7040 (Jan. 25, 2021).

The President lacks authority to direct the IWG to function as an administrative agency by issuing binding rules on the entire federal government. The Order relies on no statutory authority delegating to either the President or the IWG the power to unilaterally direct agencies to use new SC-GHGs. Nor does the Order specify any constitutional authority. It is an ultra vires action subject to review by the Court. And it was within the district court's power to enjoin enforcement of the Order.

A. The President lacks authority to order the IWG to publish a binding SC-GHG estimate upon all agencies.

Unlike similar executive orders, EO 13990 cites no statutory authority in its preamble.[2] It cites no statutory authority for its creation of the IWG. And it relies on no authority for directing the IWG to publish a binding SC-GHG estimate and directing all government agencies to use said estimate. It simply states, "By authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:" 86 Fed. Reg. 7037 (Jan. 25, 2021). The Order is also not a simple policy decree or management statement on

[2] See, e.g., Executive Order 14027, "Establishment of the Climate Change Support Office," (relying on 5 U.S.C. § 3161 to create an office within the State Department to support engagement in U.S. initiatives to address climate change); Executive Order 14013, "Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration" (relying on 8 U.S.C. § 1101).

federal operations. Rather, it imposes a new, unverified valuation for agency use when calculating costs and benefits of government actions having enormous economic implications. The SC-GHG valuation is used on activities as varied as permit requests for construction of a pipeline or the quantification of the costs and benefits of rules involving energy conservation standards for microwave ovens. Loris, *Flaws in the Social Cost of Carbon, the Social Cost of Methane, and the Social Cost of Nitrous Oxide*.

Executive orders must have either a constitutional or statutory authorization. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Such authorization ensures adequate separation of powers and precludes the exercise of arbitrary power. Indeed, separation of powers' purpose "was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy." *Id.* at 629 (Douglas, J., concurring, quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)).

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). It must, in other words, "be grounded in a statutory mandate or congressional delegation of authority." *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996). Because the Constitution

vests the legislative power with Congress, "the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp*. at 302. Further, "the promulgations of these regulations must conform with any procedural requirements imposed by Congress." *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). A rule will only have the force and effect of law if it is "issued pursuant to statutory authority." *Chrysler Corp.* at 302. (citing *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977)).

The President did not rely on any statutory authority when he issued EO 13990, the IWG does not have any delegated authority, and President Biden's action revives the improper rulemaking begun under President Obama's IWG.[3] In short, this regulatory action taken by the IWG, and the President has no basis in law.

Lack of an enabling statute, however, does not bar a claim that the President has acted ultra vires. First, "the ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*

[3] The Department of Energy under the Obama Administration published Social Cost of Carbon valuations in a little- noticed rule pertaining to consumer products that relied on the EPCA for authority. This regulatory effort ignored the APA's notice and comment procedures, and it wasn't until Landmark filed a Petition for Reconsideration did the agency open the process to comments. 78 Fed. Reg. 49975 (Aug. 16, 2013). Even then, the DOE disregarded the substantive arguments that it had arrived at an incorrect SCC and finalized the originally published SCC estimate.

v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015). Next, even when a statute provides no cause of action, courts still can review the actions of government officials. "Acts of [government] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Without judicial recourse, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Id.* at 110.

Moreover, "nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review … When an executive acts ultra vires, courts are normally available to reestablish the limits on his authority." *Chamber of Com. of the United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). Thus, courts have never stated that "a lack of a statutory cause of action is per se a bar to judicial review." *Id.*

Nothing prevents the President from creating informal working groups of advisors to convene, discuss policy and make recommendations. But whatever decisions these groups may make, the formal implementation of the Executive Branch's administrative power must come from the Departments, bureaus, and councils created by Congress. Delegating to the IWG, an entity that Defendants

acknowledge has not been established by statute or delegated with any legislative authority, the power to establish valuations for the entire federal government violates basic principles of federalism. Thus, a simple question should be asked. Under what authority does the President have to designate a nonagency outside the bounds of the APA to issue SC-GHG estimates binding on all federal agencies? The answer is simple – Defendants cannot point to any authority because Congress has not delegated it. The President is not exercising a specified constitutional power. His action is therefore ultra vires.

B. The IWG is an agency and subject to the mandates of the APA.

Even if this Court finds that the President did not act ultra vires in issuing EO 13990, his actions still violated the APA. Appellants seek to minimize the role and responsibilities of the IWG by characterizing it as a body whose "sole function is to advise and assist the President" does not hold water. Brief for Appellants at 44 (quoting *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993)). In *Meyer*, the D.C. Circuit ruled that a "Taskforce on Regulatory Relief" constituted under President Reagan was not an agency for purposes of the Freedom of Information Act (FOIA). *Id.* In reaching this decision, the court compared the duties and responsibilities of two other advisory bodies, the Council on Environmental Quality (CEQ) and the Council of Economic Advisors (CEA). Both councils provided advice and assistance to the President and the underlying statutes organizing each council were

identical. *Id.* at 1292. The CEQ, however, constituted an administrative agency and was thus subject to the FOIA. The CEA was not. *Id.* at 1292.

The CEQ constituted an agency because its duties went beyond advice and assistance. It "coordinated federal environmental regulatory programs" and "issued guidelines for preparing environmental impact statements … ." *Rushforth v. Council of Econ. Advisors*, 762 F.2d 1038, 1041 (D.C. Cir. 1985). CEA, on the other hand, was "directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard." *Id.* at 1043. Nor did CEA have any independent authority. *Id.* at 1042.

The IWG fails the "sole function" test for determining whether an entity constitutes a government agency. While EO 13990 directs the IWG to provide advice and assistance to the President, it also tasks the IWG with publishing an "interim SCC, SCN, and SCM within 30 days". 86 Fed. Reg. at 7040. It orders all federal agencies to use this valuation "when monetizing the value of changes in greenhouse gas emissions … ." *Id.* And it also directs the IWG to publish a "final SCC, SCN, and SCM by no later than January 2022." *Id.* And those directives have been followed. These valuations have been implemented in regulatory actions spanning the entire federal government, including:

- EPA, Revives 2023 and Later Model Year Light -Duty Vehicle Greenhouse Gas Emission Standards, 86 Fed. Reg. 74434 (Dec. 30, 2021).

- Department of Energy, General Service Lamps, 86 Fed. Reg. 70755 (Dec. 13, 2021).
- Bureau of Land Management (BLM), Fact Sheet: analyzing the effects of fossil fuel leasing and development on greenhouse gasses (Oct. 29, 2021).
- Department of Energy, Manufactured Housing, 86 Fed. Reg. 59042 (Oct. 26, 2021).
- Council on Environmental Quality (CEQ), NEPA Implementing Regulations Revisions, 86 Fed. Reg. 55757 (Oct. 7, 2021).

Implementing the SC-GHG valuations proscribed by the IWG goes beyond simple advice and assistance.

C. The IWG's SC-GHG valuations are subject to the procedural requirements of the APA.

The IWG has promulgated a final rule that marks "the consummation of the agency's decision-making process" and "legal consequences" result from them. *U.S. Army Corps of Engr's v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). A substantive rule is one "affecting individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The IWG released SC-GHG estimates that EO 13990 commands agencies to use. The IWG has dictated SC-GHG estimates that bind the entire federal government.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §704. Agency action will be set aside if it is taken "without observance of procedure required by law." 5 U.S.C. §706(2)(D). To determine whether an agency action is final, courts will look to

whether the action "is sufficiently direct and immediate" and "has a direct effect on day-to-day business." *Franklin v. Massachusetts*, 505 U.S. 788, 796-797 (1992). In fact, "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797. Further, an agency must "follow the same process to revise a rule as it used to promulgate it." *Clean Water Action v. United States Envtl. Prot. Agency*, 939 F.3d 308, 312 (5th Cir. 2019).

As stated before, agencies have already incorporated the SC-GHG valuations into their rulemaking.

D. Issuing SC-GHGs denies interested parties and the public the opportunity to participate in the rulemaking process.

Agency action will be set aside if it is "taken without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Rules are subject to the APA's notice and comment process unless covered by an exception. Notice and comment procedures apply because the SC-GHG estimates are not an "interpretative rule, general statement of policy, or rule of agency organization, procedure or practice." 5 U.S.C. § 553(b)(A).

The notice and comment period "encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decision-making." *Chocolate Manufacturers Assoc. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (citing *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314,

321 (4th Cir. 1980)). Providing adequate notice of a major change gives "the public the opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Comm'n.*, 412 F.2d 740, 744 (3d Cir. 1969). When an agency fails to follow the APA's notice and comment procedures "interested parties will not be able to comment meaningfully on the agency's proposals." *Connecticut Light & Power, Co. v. Nuclear Regul. Com.* 673 F.2d 525, 530 (D.C. Cir. 1982). Further, "the agency may operate with a one-sided or mistaken picture of the issues at stake in rule-making." *Id.*

As stated previously, EO 13990 circumvents traditional notice and comment process by unilaterally directing agencies to use the new SC-GHG metrics immediately. Use of these metrics violates the APA and must be suspended.

CONCLUSION

For these reasons, the district court's order should be upheld.

Respectfully submitted,

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June 23, 2022

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael J. O'Neill
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 3297 words, excluding the parts that can be excluded. This brief complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Michael J. O'Neill
Counsel for Amicus Curiae

Dated: June 23, 2022