UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 17-253 (RDM)

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON STANDING**

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August 6, 2019

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## INTRODUCTION

In 2017, the President issued Executive Order 13771, touting it as a transformative redirection for federal regulatory agencies. He instructed the head of the Office of Management and Budget (OMB), "You cannot put out a new reg until you get two old regs off the books," and "No new financial burden. If you come out with a new reg that raises the burdens on the private sector by a dollar, you got to go find me a reg you get rid of to reduce that burden by a dollar. So, zero net impact on the regulatory financial burden in this country."[1] The White House and OMB have continued to tout the Executive Order and credit it with slowing new regulations and prompting repeals of existing regulations.[2]

Nonetheless, in this lawsuit, President Trump, OMB, and the agency defendants have taken the position that Executive Order 13771 and the related OMB Guidances have had no effect. Defendants' litigation position is that the "1-in, 2-out" and cost-offset requirements have not delayed or blocked any rule that would impact the hundreds of thousands of consumers and workers that make up the membership of plaintiffs Public Citizen, Natural Resources Defense Council (NRDC), and Communications Workers of America (CWA). Defendants' out-of-court statements and regulatory agenda, however, belie their litigating position. And in their sworn discovery responses, defendants Department of Transportation (DOT) and Department of Energy (DOE) have confirmed that they intend to comply with the requirements of the Executive Order but have not yet begun to consider how they can do so with respect to the particular rules addressed

[1] Press Gaggle by Principal Deputy Press Secretary Sarah Sanders and OMB Director Mick Mulvaney, July 20, 2017, https://www.whitehouse.gov/briefings-statements/press-gaggle-principal-deputy-press-secretary-sarah-sanders-omb-director-mick-mulvaney-072017/.

[2] *See, e.g.*, Remarks by President Trump on Deregulation, Dec. 14, 2017, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation/; OMB, Regulatory Reform Results for Fiscal Year 2018, https://www.reginfo.gov/public/do/eAgendaEO13771 (also showing results from fiscal year 2017).

in plaintiffs' motion for partial summary judgment. Their regulatory agendas show that they cannot do so, at least not in a timely manner. As explained in plaintiffs' opening memorandum and below, plaintiffs' concrete stake in this ongoing controversy is more than adequate to satisfy Article III. The Court should grant summary judgment to plaintiffs on the issue of standing and move promptly to consider the important legal issues presented on the merits of this case.

## ARGUMENT

### I. Plaintiffs have established standing based on the V2V rulemaking.

As explained in plaintiffs' opening memorandum, DOT in January 2017 proposed a rule on vehicle-to-vehicle (V2V) communications. Estimating out 30 years, DOT estimated that the rule would cost billions of dollars. Because neither DOT's regulatory agenda, its discovery responses, nor its summary judgment briefing in this case have identified currently planned deregulatory actions with "significant" cost savings that could offset the V2V rule, and in light of DOT's negative regulatory budget, the 1-in, 2-out and cost-offset requirements of Executive Order 13771 necessarily will prevent DOT from finalizing the V2V rule in the foreseeable future. As plaintiffs have explained, their members are injured as a result of the delay that is the inevitable result of the Order.

In its February 2019 Memorandum Opinion, the Court found that plaintiffs' showing fell short because they had not established the "causal connection" between the Executive Order and their injury. Mem. Op. (2019) 39 (Dkt. 85). Now, DOT has confirmed that it intends to comply with the Executive Order, that it has not identified two or more existing regulations to be repealed that would offset the costs of a final V2V rule, and that it has neither requested nor received a waiver from the Executive Order's requirements. *See* Zieve Decl., Exh. A (DOT Resp. to Req. for Adm. #1 & ##3–5), & B (DOT Resp. to Interrog. #2). At the same time, DOT's long-term

agenda—which is the list of rules "under development but for which the agency does not expect to have a final regulatory action within the 12 months after publication" of the agenda[3]—lists *no* major deregulatory actions that might offset the costs of the V2V rulemaking.[4] Because the facts show that DOT *cannot* both comply with the Executive Order and issue the expensive V2V rulemaking, the Order necessarily will delay, if not block entirely, issuance of the rule.[5]

Defendants assert that plaintiffs' standing resembles a "risk of injury" theory and that the Court has rejected that theory as a basis for standing. Defs. Opp. 11 (Dkt. 96). Those assertions are incorrect. To begin with, the Court did not hold that a risk of injury cannot support standing as a general matter, and the Supreme Court has expressly recognized that risk of injury *can* provide standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (stating that a threatened injury "may suffice" if it "is certainly impending, or [if] there is a substantial risk that the harm will occur"), *cited in* Mem. Op. (2018) 17 (Dkt. 63). Moreover, plaintiffs have not argued that they are at "risk," but that the combination of the Executive Order, the cost of a V2V rule (according to DOT's own estimates), and the contents of DOT's own regulatory agenda (current

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[3] OMB, Spring 2019 Unified Agenda of Federal Regulatory and Deregulatory Actions, Agenda Agency Regulatory Entries for Long-term Actions, https://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GET_PUBLICATION&showStage=longterm&currentPubId=201904.

[4] OMB, Agency Rule List – Spring 2019, DOT, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201904&showStage=longterm&agencyCd=2100&Image58.x=52&Image58.y=17.

Defendants in a footnote suggest that the current roll-back of automobile fuel economy standards would provide adequate offsets, Defs. Opp. 14 n.3, but OMB has expressly disallowed use of cost savings from the fuel-economy rulemaking: "[I]t is not included in the cost allowances for" DOT. OMB, Regulatory Reform: Regulatory Budget for Fiscal Year 2019 at 2 n.*, *supra* n.2.

[5] Defendants' assertion that plaintiffs have "shift[ed] their factual allegations" and suggestion that they should have to amend their complaint, Def. Opp. 10, are meritless. The Second Amended Complaint states claims on which relief can be granted based on the allegations set forth in that pleading. Plaintiffs' showing of standing is consistent with those allegations, and the examples used to demonstrate standing do not alter the basis for their legal claims.

and long term) guarantee that a final rule will be delayed or blocked. Further, DOT has stated that it has yet to give any "meaningful consideration" to how it will comply with the repeal and offset requirements—an admission that confirms that compliance with the Executive Order's provisions will tack an additional period of delay onto whatever time would otherwise be required to promulgate the rule. *See* Zieve Decl., Exh. A (DOT Resp. to Req. for Adm. #3). In these circumstances, the injury is sufficiently certain or imminent to satisfy Article III. *See Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007) (relying on injuries expected to accrue "over the course of the next century"); *Nuclear Energy Inst. v. EPA*, 373 F.3d, 1251, 1266 (D.C. Cir. 2004) (holding that plaintiff's member's "claimed injury to his ground-water supply is neither hypothetical nor conjectural," although "radionuclides escaping from the Yucca repository may not reach Goedhart's community for thousands of years").

Defendants also argue that plaintiffs cannot establish that DOT will decide to finalize a V2V rule. Def. Opp. 11. The agency's long-term agenda continues to list the rule, however, which indicates that the agency is proceeding with the rulemaking. And DOT's discovery responses state, consistent with the regulatory agenda, that it continues to work on the rule. *See* Zieve Decl., Exh. B at 3 (DOT responses to interrogatories). DOT has offered no contrary evidence. In these circumstances, the Court should credit DOT's *non*-litigation position, reflected in its regulatory agenda, that it is intends to issue a final rule.

Defendants note that the costs of the rule and the amount of available offsets are currently unknown. Defs. Opp. 14. Although the precise details may not be available, prediction of the costs is not "premature," *id.*, because DOT's proposed rule has already made those predictions. To be sure, the final rule may differ from the proposal. But DOT offers no reason to question that its proposal offers a reasonable estimate, much less that the costs of mandating V2V technology will

drop so drastically as to be offset by the non-major deregulatory actions currently on its agenda. Defendants further suggest that plaintiffs err in citing the proposed rule's estimate of $2 billion to $5 billion in annual costs, because that amount reflects costs in the thirtieth year of implementation. Yet as defendants acknowledge, the relevant number for the required Executive Order offset is the "net present value of the *total cost of the rule*." Def. Opp. 14 n.3 (emphasis added); *see also* OMB Guidance, Q25 (explaining that agencies should calculate the present value "of costs for EO 13771 regulatory actions … over the full duration of the expected effects of the actions using both 7 percent and 3 percent end-of-period discount rates"). That number will be significantly *greater* than the number for year 30 alone. Looking at other years, DOT explained that "[t]he estimated total annual costs ranged from $0.3 to $2.1 billion in 2020, with the specific costs depending upon the technology implementation scenarios and discount rates. The costs peaked to $1.1 to $6.4 billion between 2022 and 2024, and then gradually decreased to $1.1 to $4.6 billion." 82 Fed. Reg. 3854, 3968 (2017). In short, DOT's own estimates show that the "total cost of the rule," reduced to present value under either of the required discount rates, would dwarf the cost for year 30 alone.

DOT's speculation that its annual regulatory budget will not pose an obstacle cannot be credited. The agency's annual regulatory budget—representing the net costs imposed by issuing new rules and eliminated by repealing existing rules—was $0 for fiscal year 2017, was *negative* $500 million for fiscal year 2018, and is *negative* $1.8695 billion for fiscal year 2019. *See* OMB, Regulatory Reform: Cost Caps Fiscal Year 2018 (Dec. 2017)[6]; OMB, Regulatory Reform: Regulatory Budget for Fiscal Year 2019 (Nov. 2019).[7] The suggestion that the cost cap may rise

[6] https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf (attached as Exh. D to Zieve Decl.).

[7] https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2019.pdf (attached as Exh. E to Zieve Decl.).

in a future year enough to enable issuance of the expensive V2V rule is unsubstantiated and counter to the repeated statements of defendants and the objective of the Executive Order itself. *See, e.g.*, Remarks by President Trump on Deregulation, *supra* n.1 ("Earlier this year, we set a target of adding zero new regulatory costs onto the American economy. Today, I'm proud to announce that we beat our goal by a lot. Instead of adding costs, as so many others have done—and other countries, frankly, are doing, in many cases, and it's hurting them—for the first time in decades, we achieved regulatory savings."). At bottom, defendants' argument relies on the implication that DOT may evade the repeal and offset requirements of the Executive Order and OMB Guidances. Yet DOT has admitted that it intends to comply with the Order as long as it remains in force. *See* Zieve Decl., Exh. A at 2.

Resurrecting an argument that this Court has already rejected, DOT asserts that plaintiffs will not be harmed by delay of the V2V rule because one automaker (Cadillac) in one sedan model offers V2V technology and one other automaker plans to do so starting in 2022. Defs. Opp. 17; *see* Mem. Op. (2019) 31–32 (rejecting this argument). The argument remains meritless: DOT itself has recognized that, "[w]ithout a mandate to require and standardize V2V communications, the agency believes that manufacturers will not be able to move forward in an efficient way and that a critical mass of equipped vehicles would take many years to develop, if ever." 82 Fed. Reg. at 3854. To address this fact, it proposed to phase in the final rule by requiring 50 percent of new cars to have V2V communications in the first year and 100 percent in the third year. *See* 82 Fed. Reg. at 4006. Doing so would provide Public Citizen members with a meaningful opportunity to purchase vehicles with V2V technology that they will not otherwise have. *See* Mem. Op. (2019) 31. The case law strongly supports plaintiffs' standing on this basis. *See Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1331, 1331–35 (D.C. Cir. 1986) (finding organization had standing to challenge

NHTSA's failure to adopt a meaningful fuel-efficiency standard, based on reduced consumer choice of fuel-efficient vehicles); *accord Pub. Citizen v. NHTSA*, 848 F.2d 256, 262–63 (D.C. Cir. 1988); *see also Pub. Citizen v. NHTSA*, 374 F.3d 1251 (D.C. Cir. 2004) (deciding on the merits Public Citizen's challenge to a NHTSA safety standard). "[A] lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements." *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990); *see Pub. Citizen v. NHTSA*, 848 F.2d at 262–63 (finding standing to challenge NHTSA action that "will diminish the types of fuel-efficient vehicles and options available" (quoting *Ctr. for Auto Safety*, 793 F.2d at 1332)).[8]

Finally, defendants are wrong to suggest that plaintiffs cannot show redressability without showing that, absent the Executive Order, DOT would imminently issue a rule with a short phase-in schedule. Defs. Opp. 18. As the Court has already explained, "[s]tanding depends on the probability of harm, not its temporal proximity," and there is "no reason to believe that Fleming and Weissman's desire to purchase V2V-equipped vehicles will diminish over time or that [], if the V2V rule is adopted, auto manufacturers will be unable to comply with the rule." Mem. Op. (2019) 33–34 (quoting *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017) (quoting *520 Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006))).

[8] In addition, as noted in plaintiffs' opening memorandum, several cases in this Circuit have considered on the merits challenges to DOT motor vehicle standards, including standards related to safety. *See Pub. Citizen v. NHTSA*, 374 F.3d at 1253 (challenge to NHTSA airbag standard); *Competitive Enter. Inst.*, 901 F.2d at 113 (challenge to fuel-economy standard on safety ground); *see also Ctr. for Auto Safety*, 793 F.2d at 1323 (challenge to NHTSA fuel-economy standard).

## II. Plaintiffs have established standing based on the commercial water-heater rulemaking.

As plaintiffs have explained, DOE in May 2016 proposed a rule under the Environmental Policy and Conservation Act to strengthen the energy-efficiency standards for commercial water-heating equipment. 81 Fed. Reg. 34440 (2016). Because DOE concluded that the statutory factors for issuing new standards have been met, *see id.*, the agency's proposal to issue the standard triggered a statutory requirement (and deadline), 42 U.S.C. § 6313(a)(6)(C)(iii)(I). By law, DOE should have published a final rule no later than two years after this proposal—that is, by April 2018. *Id*. After repeatedly postponing the projected date, DOE's regulatory agenda currently states that it anticipates finalizing the rule in December 2019.[9] Thus, although defendants suggest in this litigation that DOE is still considering the "policy decision to move forward on the merits of the rule," Defs. Opp. 20, the law requires DOE to "move forward" and its non-litigation statements evince a continuing intent to do so.

In light of the statutory deadline, there can be no question that the rule has been, and is being, delayed. Further, there can be no question that the Executive Order will increase the delay: DOE's regulatory agenda indicates that the agency will otherwise be ready to finalize the commercial water heater rule this year, but it does not list *any* major deregulatory actions intended for completion this year. *See* OMB, Agency Rule List – Spring 2019, DOE.[10] And DOE admits that it has not yet identified two or more existing regulations to be repealed, has not identified repeals that would offset the costs of a final rule on commercial water heating equipment, and has

[9] *See* DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Spring 2019), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1904-AD34 (attached as Exh. K p. 4, to Zieve Decl.).

[10] *See* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1900&Image58.x=48&Image58.y=17.

not sought a waiver of the repeal and offset requirements. *See* Zieve Decl., Exh. L (DOE Resp. to Req. for Adm. ##13–14). Indeed, DOE admits that it has not yet even begun "meaningful consideration of E.O. 13771's requirements." *Id.* (#13). Under these circumstances, the Executive Order and OMB Guidances ensure delay of the final rule.

Defendants argue that NRDC member R.J. Mastic cannot support NRDC's standing because he does not plan to purchase a commercial water heater for himself. Mr. Mastic's business, however, "depends on being able to source cost-effective energy efficient equipment for [his] clients." Mastic Decl. ¶¶ 2, 4 (Dkt. 64-7). Those clients—commercial property owners—hire him to help them obtain energy-efficient products that meet their needs. *Id*. ¶¶ 3–4. Mr. Mastic has explained that a new energy-efficiency standard will increase his business because, when a new standard is in effect, his clients "cannot simply buy the same model they had previously bought" and so they employ his company "to help them find a different model that meets the new standard, is cost effective, and satisfies their other requirements." *Id.* ¶ 5. A "wider selection of products" better enables his company to do so. *Id.* ¶ 6. Although defendants continue to profess doubt about whether a new standard will increase the availability of energy-efficient products, Def. Opp. 23–24, DOE has affirmatively stated—outside of litigation—that the standard will do so, *see* Zieve Decl., Exh. N (DOE, Saving Energy and Money with Appliance and Equipment Standards in the U.S., Jan. 2017)). Indeed, that consequence follows necessarily from the fact that compliance with an energy-efficiency standard would be required for "all" commercial water heating equipment manufactured in or imported into the United States. *See* 81 Fed. Reg. at 34443.

Defendants fault plaintiffs' showing on the ground that Mr. Mastic has not identified clients that will need a new water heater at a particular time. Defendants point to no case, however, suggesting that a business must identify clients to challenge an agency action that impacts its

business. Moreover, his declaration attests to plans to utilize commercial water heaters in client projects "on a yearly basis." Mastic Decl. ¶ 3. Based on his experience running his business for more than ten years, *id*. ¶ 2, he is amply qualified to speak to the business's operation and plans. *See D.C. Redev. Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337, 339 (D.C. Cir. 1976) (stating that landowner is "deemed qualified by reason of his relationship as owner to give estimates of the value of what he owns"); *cf. Heller v. Dist. of Columbia*, 952 F. Supp. 2d 133, 142 (D.D.C. 2013) (noting that opinion evidence based on "professional judgment obtained through long experience in the field" is a "methodology precisely contemplated" by Federal Rule of Evidence 702); *Groobert v. President of Georgetown College*, 219 F. Supp. 2d 1, 7 (D.D.C. 2002) (stating that "personal experience can be a reliable and valid basis for expert testimony").

## III. Plaintiffs, including plaintiff CWA, have neither abandoned nor waived their argument based on organizational standing or their claims against other defendants.

Plaintiffs argued in both their 2017 motion for summary judgment and their 2018 motion for partial summary judgment that they have organizational standing. In ruling on those motions, the Court held that they do not. *See* Mem. Op. (2019) 52; Mem. Op. (2018) 44. Defendants argue that plaintiffs, by not raising that argument in the pending motion for partial summary judgment, have abandoned or waived it. Although defendants are correct that plaintiffs have not reargued those points in their current motion for summary judgment, plaintiffs have not abandoned or waived their organizational standing argument, which is well preserved for purposes of appeal. *See* 15A Charles Alan Wright, et al., *Federal Practice & Procedure* § 3905.1 (2d ed. 1992) (explaining that "appeal from final judgment opens the record and permits review of all rulings that led up to the judgment").

Defendants further assert that plaintiffs have abandoned or waived any assertion of standing to pursue claims against agency defendants other than DOT, DOE, and OMB. First,

plaintiffs expressly have *not* waived any claims against defendant Department of Labor. *See* Plts. Motion 6 (Dkt. 95) ("Thus, without waiving their argument that the undisputed material facts previously set forth with respect to each of the previously identified rulemakings also establishes plaintiffs' standing, this motion focuses on only two rulemakings.") Second, defendants do not assert that plaintiffs have abandoned or waived their claims against the United States and President Trump. *See* Defs. Opp. 28 (listing only agency defendants). Of course, if the Court agrees that plaintiffs have shown injury caused by the Executive Order based on the Order's effect on any rulemakings, plaintiffs would have standing as against the United States (which may be sued interchangeably with federal agencies), as well as the President, who issued (and could rescind) the Executive Order. Moreover, relief against the United States declaring the Executive Order unlawful would bind all of the agency defendants. *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 417 (D.D.C. 2008) (stating that "[w]here a suit binds the United States, it binds its subordinate officials" as well (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940))).

Finally, defendants in a footnote ask the Court to enter judgment against CWA because plaintiffs do not argue that the two rulemakings on which plaintiffs' instant motion for partial summary judgment is based establish CWA's standing. Defs. Opp. 26 n.9. Only one plaintiff must have standing, however, for the Court to proceed to decide the merits issues in this case. *See Nat'l Fed'n of Fed. Emps. v. United States*, 905 F.2d 400, 402 (D.C. Cir. 1990) ("We affirm the district court's finding that [one plaintiff] has standing to pursue its constitutional claims and consequently need not reach the question of [the other plaintiff's] standing."). Thus, only if the Court were to conclude that no plaintiff has standing should it dismiss CWA's claims, together with those of all

plaintiffs. As demonstrated above, however, and in plaintiffs' opening memorandum, Public Citizen and NRDC have standing.

## CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion for partial summary judgment, deny defendants' cross-motion for summary judgment, and declare that plaintiffs have standing to pursue this action and that the Court has subject matter jurisdiction over plaintiffs' claims. The Court should then expeditiously consider the merits on the 2017 summary judgment briefing or, in the alternative, order the parties to submit supplemental briefs on the merits on an expedited schedule.

Dated: August 6, 2019

Respectfully submitted,

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