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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs Public Citizen, Inc., Natural Resources Defense Council, Inc. (NRDC), and Communications Workers of America (CWA) hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, plaintiffs submit the accompanying (1) memorandum, (2) statement of material facts as to which there is no genuine dispute, (3) declarations of Public Citizen's President Robert Weissman and members Amanda Fleming, Anthony So, Jonathan Soverow, and Terri Weissman; declarations of CWA's Occupational Safety and Health Director David LeGrande and members Denise Abbott and James Bauer, Sr.; declarations of NRDC's Deputy Chief Program Officer Andrew Wetzler, Sustainability Manager Eileen Quigley, and members James Coward and Gerald Winegrad, (4) declarations of former federal regulators David Hayes, James Jones, David Michaels, Dan Reicher, and Gregory Wagner, and (5) a proposed order.

Dated: May 15, 2017

Respectfully submitted,

/s/ .
Allison M. Zieve
(DC Bar No. 424786)
Scott L. Nelson
(DC Bar No. 413548)
Sean M. Sherman
(DC Bar No. 1046357)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for all Plaintiffs

Patti A. Goldman
(DC Bar No. 398565)
EARTHJUSTICE
705 2nd Avenue, #203
Seattle, WA 98104
(206) 343-7340

Counsel for all Plaintiffs

Michael E. Wall
(CA Bar No. 170238)
Cecilia D. Segal
(CA Bar No. 310935)
NATURAL RESOURCES DEFENSE COUNCIL, INC.
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100

Counsel for Natural Resources Defense Council, Inc.

Guerino J. Calemine, III
(DC Bar No. 465413)
COMMUNICATIONS WORKERS OF AMERICA
501 3rd Street NW
Washington, DC 20001
(202) 434-1100

Counsel for Communications Workers of America

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' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Michael E. Wall
(CA Bar No. 170238)
Cecilia D. Segal
(CA Bar No. 310935)
NATURAL RESOURCES DEFENSE COUNCIL, INC.
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100

Counsel for Natural Resources Defense Council, Inc.

Guerino J. Calemine, III
(DC Bar No. 465413)
COMMUNICATIONS WORKERS OF AMERICA
501 3rd Street NW
Washington, DC 20001
(202) 434-1100

Counsel for Communications Workers of America

Allison M. Zieve
(DC Bar No. 424786)
Scott L. Nelson
(DC Bar No. 413548)
Sean M. Sherman
(DC Bar No. 1046357)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for all Plaintiffs

Patti A. Goldman
(DC Bar No. 398565)
EARTHJUSTICE
705 2nd Avenue, #203
Seattle, WA 98104
(206) 343-7340

Counsel for all Plaintiffs

May 15, 2017

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

I. Executive Order 13771 and OMB's Guidances 2

II. Agency rulemaking 5

STANDARD OF REVIEW 10

ARGUMENT 11

I. This Court has authority to grant the relief requested at this time. 11

A. The complaint states causes of action for non-statutory review. 11

B. Executive Order 13771 is causing injury to plaintiffs that is remediable by this Court. 12

C. Judicial review is appropriate at this time. 16

II. The President, through Executive Order 13771, has violated the Take Care Clause and exceeded his constitutional authority, in violation of the separation of powers. 18

A. The President lacks authority to legislate or to direct regulatory actions that are contrary to statutes through which Congress has delegated regulatory authority. 18

B. The Executive Order exceeds the President's authority 22

1. Issuance of the Executive Order was not "pursuant to an express or implied authorization of Congress." 23

2. The Executive Order's directives are incompatible with the will of Congress. 24

a. The Executive Order directs agency action contrary to the laws enacted by Congress. 25

b. The Executive Order directs agency action that violates the statutory bar against arbitrary and capricious decisionmaking. 30

c. The "consistent with applicable law" provision does not cure the constitutional defect. 35

3. The Executive Order cannot be sustained by reference to the President's conclusive and preclusive authority. 37

III. Because Executive Order 13771 is ultra vires, agency implementation of the Order is ultra vires. 38

IV. The OMB Guidances are ultra vires and, in addition, must be set aside under the APA. 39

CONCLUSION 44

TABLE OF AUTHORITIES

Pages

Cases

AFL-CIO v. OSHA,
965 F.2d 962 (11th Cir. 1992) 29

Aid Ass'n for Lutherans v. U.S. Postal Service,
321 F.3d 1166 (D.C. Cir. 2003) 11

American Historical Ass'n v. National Archives & Records Administration,
516 F. Supp. 2d 90 (2007) 17

America Iron & Steel Institute v. OSHA,
939 F.2d 975 (D.C. Cir. 1991) 29

America Textile Manufacturers Institute v. Donovan,
452 U.S. 490 (1981) 8, 26, 29

American School of Magnetic Healing v. McAnnulty,
187 U.S. 94 (1902) 11

Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000) 40, 41

Arizona Dream Act Coalition v. Brewer,
__ F.3d __, 2017 WL 461503 (9th Cir. Feb. 2, 2017) 22

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,
564 U.S. 721 (2011) 12

Arizona v. Shalala,
121 F. Supp. 2d 40 (D.D.C. 2000) 40, 41

Armstrong v. Exceptional Child Center,
135 S. Ct. 1378 (2015) 11, 12

Batterton v. Marshall,
648 F.2d 694 (D.C. Cir. 1980) 21

Bennett v. Spear,
520 U.S. 154 (1997) 40

Bowsher v. Synar,
478 U.S. 714 (1986) 19

Building and Construction Trades Department, AFL-CIO v. Allbaugh,
295 F.3d 28 (D.C. Cir. 2002) 37

Building & Construction Trades Department v. Brock,
838 F.2d 1258 (D.C. Cir. 1988) 29

Cabinet Mountains Wilderness v. Peterson,
685 F.2d 678 (D.C. Cir. 1982) 6

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 10

Center for Science in the Public Interest v. Department of the Treasury,
573 F. Supp. 1168 (D.D.C. 1983) 26

Chamber of Commerce v. Reich,
57 F.3d 1099 (D.C. Cir. 1995) 16, 39

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 11, 16, 18

Christensen v. Harris City,
529 U.S. 576 (2000) 27

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) .... *passim*

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 20, 26

City of Arlington, Texas v. FCC,
133 S. Ct. 1863 (2013) 5, 38

Clinton v. City New York,
524 U.S. 417 (1998) 19

County Of Santa Clara v. Trump,
__ F. Supp. 2d __, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017) 12, 16, 18, 35

CropLife America v. EPA,
329 F.3d 876 (D.C. Cir. 2003) 41

Dalton v. Specter,
511 U.S. 462 (1994) 40

Dart v. United States,
848 F.2d 217 (D.C. Cir. 1988)....................11

DIRECTV, Inc. v. FCC,
110 F.3d 816 (D.C. Cir. 1997)....................6

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 222 (2009)....................8

Environmental Defense Fund v. Thomas,
627 F. Supp. 566 (D.D.C. 1986)....................18

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009)....................20

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)....................27

Farmers Union Central Exchange, Inc. v. FERC,
734 F.2d 1486 (D.C. Cir. 1984)....................31, 34

Franklin v. Massachusetts,
505 U.S. 788 (1992)....................39

Hawai'i v. Trump,
__ F. Supp. 2d __, 2017 WL 1011673 (D. Haw. Mar. 15, 2017)....................17

INS v. Chadha,
462 U.S. 919 (1983)....................18

J.W. Hampton, Jr. & Co. v. United States,
276 U.S. 394 (1928)....................5, 20

Kendall v. U.S. ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838)....................19, 21

Liberty Mutual Insurance Co. v. Friedman,
639 F.2d 164 (4th Cir. 1981)....................21, 25, 32

Local 2677 America Federation of Government Employees v. Phillips,
358 F. Supp. 60 (D.D.C. 1973)....................20

Lujan v. Defenses of Wildlife,
504 U.S. 555 (1992)....................27

Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,
497 U.S. 116 (1990)....................31

Massachusetts v. EPA,
549 U.S. 497 (2007)....................31, 32, 35, 43

Medellin v. Texas,
552 U.S. 491 (2008)....................20, 21

Michigan v. EPA,
135 S. Ct. 2699 (2015)....................8

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,
463 U.S. 29 (1983).................... *passim*

NRDC v. EPA,
643 F.3d 311 (D.C. Cir. 2011)....................41

Public Citizen, Inc. v. Mineta,
340 F.3d 39 (2d Cir. 2003)....................8, 28

Public Citizen Health Research Group v. Chao,
314 F.3d 143 (3d Cir. 2002)....................35

Rainbow Navigation, Inc. v. Department of Navy,
620 F. Supp. 534 (D.D.C. 1985),
aff'd, 783 F.2d 1072 (D.C. Cir. 1986)....................31

UAW-Labor Employment & Training Corp. v. Chao,
325 F.3d 360 (D.C. Cir. 2003)....................11

Union Electric Co. v. EPA,
427 U.S. 246 (1976)....................9

Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission,
824 F.2d 108 (D.C. Cir. 1987)....................9

In re United Mine Workers of America International Union,
190 F.3d 545 (D.C. Cir, 1999)....................19

United States v. Mead Corp.,
533 U.S. 218 (2011)....................5

United States v. Texas,
136 S. Ct. 906 (2016)....................22

United Steelworkers of America v. Marshall,
647 F.2d 1189 (D.C. Cir. 1980)....6, 29

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988)....13

Waterkeeper Alliance v. EPA,
__ F.3d __, 2017 WL 1323525 (D.C. Cir. Apr. 11, 2017)....28

Western Union Telegraph Co. v. FCC,
541 F.2d 346 (3d Cir. 1976)....44

Whitman v. America Trucking Ass'ns,
531 U.S. 457 (2001)....5, 6, 9

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).... *passim*

Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015)....21, 37, 38

Constitutional Provisions

U.S. Const. Art. I, § 1 19

U.S. Const. Art. I, § 8 20

U.S. Const. Art. II, § 3 ....1, 2, 19, 20, 22

U.S. Const. Art. IV, § 3....20

Statutory Materials

3 U.S.C. § 301–303....23

5 U.S.C. § 551(4) 6

5 U.S.C. § 706(2) 39

5 U.S.C. § 706(2)(A)....6, 30, 40, 42

5 U.S.C. § 706(2)(C)....44

15 U.S.C. § 2604(b)(4)(A)....15

15 U.S.C. § 2604(f)....................15
15 U.S.C. § 2605(a)....................15
15 U.S.C. § 2605(b)(4)(A)....................9
15 U.S.C. § 2605(b)(4)(F)(iii)....................9
15 U.S.C. § 2605(c)(1)(B)....................9
15 U.S.C. § 2605(c)(2)(A)(iv)....................9
16 U.S.C. § 1533(b)(1)(A)....................7, 9
16 U.S.C. § 1533(b)(2)....................7
16 U.S.C. § 1540(g)(1)....................6
29 U.S.C. § 651(b)....................14, 28
29 U.S.C. § 655(b)(5)....................14, 29
30 U.S.C. § 811(a)....................34
30 U.S.C. § 811(c)....................34
31 U.S.C. § 1101....................23
31 U.S.C. §§ 1104-1107....................23
31 U.S.C. § 1104(e)....................23
31 U.S.C. § 1104(d)....................23
31 U.S.C. § 1105....................23
31 U.S.C. § 1108....................23
31 U.S.C. §§ 1115–22....................23
33 U.S.C. § 1326(b)....................8
42 U.S.C. § 2232(a)....................10
42 U.S.C. § 6295(o)(1)....................34

42 U.S.C. § 7409(b)(1) 9

42 U.S.C. § 7410(2) 9

42 U.S.C. § 7607(d)(9) 6

49 U.S.C. § 30101 27

49 U.S.C. § 30102(10) 27

49 U.S.C. § 30111(a) 7, 27

49 U.S.C. § 30111(b) 7, 27

49 U.S.C. § 31136(a) 7

49 U.S.C. § 31136(c) 7, 28

49 U.S.C. § 31502(b) 7

Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(a)(2), 84 Stat. 1676, 1680, *codified as amended at* 42 U.S.C. § 7410(a) 9

Federal Regulatory Budget Act, S. 3550, 95th Cong. (1978) 24

National Regulatory Budget Act of 2014, S. 2153, 113th Cong. (2014) 24

Regulatory Accountability Act of 1993, S. 13, 103d Cong. (1993) 24

Regulatory Materials

58 Fed. Reg. 51735 (1993) 4

75 Fed. Reg. 24835 (2010) 14

81 Fed. Reg. 91592 (2016) 15

82 Fed. Reg. 3854 (2017) 32, 33

82 Fed. Reg. 7432 (2017) 15

82 Fed. Reg. 9339 (2017) 3

82 Fed. Reg. 12319 (2017) 36

82 Fed. Reg. 12323 (2017) 42

82 Fed. Reg. 15785 (2017) 36

82 Fed. Reg. 16902 (2017) 36

Reginfo.gov, OSHA regulatory agenda (Fall 2016), RIN 1218-AC46,
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=
201610&RIN=1218-AC46 (last visited May 10, 2017) 14

Miscellaneous

DOT, *Report on DOT Significant Rulemakings,*
https://www.transportation.gov/regulations/report-on-significant-rulemakings
(visited May 10, 2017)...13, 36

DOT, *Significant Rulemaking Report Archive*,
https://cms.dot.gov/regulations/significant-rulemaking-report-archive
(visited May 10, 2017)..13

Executive Order 12866, 58 Fed. Reg. 51735 (1993) 3, 4

Federal Rule of Civil Procedure 56 10

David Friedman, *Two for One: A Very Bad Deal for Our Nation*,
Union of Concerned Scientists Blog, Apr. 10, 2017, at http://blog.ucsusa.org/
guest-commentary/two-for-one-a-very-bad-deal-for-our-nation
(visited May 3, 2017)..30

Jason Marisam, *The President's Agency Selection Powers*,
65 Admin. L. Rev. 821 (2013)...23

Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*,
108 Mich. L. Rev. 1127 (2010)...26

Taxnotes, *No Substantive IRS Guidance Coming for a While, Official Says*,
Feb. 14, 2017, http://www.taxnotes.com/editors-pick/no-substantive-irs-
guidance-coming-while-official-says 42

OMB, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, available at
https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_
reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf
(last visited May 10, 2017) 43

OMB, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf (last visited May 3, 2017) 43

OMB, Memorandum for Regulatory Policy Officers, Spring 2017 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions (Mar. 6, 2017), available at https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-and (last visited May 3, 2017) 17, 36

Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017)................13, 36

INTRODUCTION

This action seeks declaratory and injunctive relief with respect to Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs," issued by President Donald Trump on January 30, 2017, and two Office of Management and Budget (OMB) Guidances regarding implementation of the Executive Order. The Executive Order and implementing OMB Guidances will block, weaken, or delay regulations authorized or mandated by Congress to protect health, safety, and the environment, across a broad range of topics—from automobile safety, to occupational health, to air pollution, to endangered species. The Order exceeds the President's constitutional authority, violates his duty under the Take Care Clause of the Constitution, U.S. Const. art. II, § 3, and directs federal agencies to engage in unlawful actions that will harm many Americans, including plaintiffs and their members.[1]

Executive Order 13771 directs that no agency may issue a new rule unless the agency offsets the costs of the new rule by rescinding at least two existing ones. Specifically, the Executive Order requires agencies (1) to eliminate at least two existing regulations for each new regulation issued, to offset any costs imposed by the new regulation, and (2) to promulgate regulations that, together with repealed regulations, have combined incremental costs that do not exceed an arbitrary cost cap—$0 for fiscal year 2017—regardless of the benefits. And in implementing the 1-in, 2-out requirement, agencies must net out costs, even if doing so reduces overall benefits. The OMB Guidances reinforce and elaborate on these requirements.

None of these requirements is authorized by any statute. Many statutes governing rulemaking address whether and how a regulatory agency may factor cost into rulemaking: Some

[1] Exhibits A–C to the First Amended Complaint are copies of Executive Order 13771 and the OMB Guidances.

allow agencies to consider the costs of a new rule in setting the level or protection, and others allow agencies to consider cost-effective ways of providing protection under a new rule. But such consideration must always be within the four corners of the authorizing statutes that Congress has enacted and the regulatory programs that Congress has charged the agency with implementing. None of those statutes authorizes federal agencies to consider the costs of unrelated regulations when determining whether to promulgate new regulations. No statute authorizes any federal agency to withhold issuance of a new regulation unless it can repeal existing regulations to offset the new regulation's costs.

By imposing rulemaking requirements beyond and in conflict with both the statutes from which the federal agencies derive their rulemaking authority and the requirements of the Administrative Procedure Act (APA), the Executive Order exceeds the President's authority under the Constitution, usurps Congress's Article I legislative authority, and violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This Court should enjoin implementation and enforcement of the Executive Order and the OMB Guidances.

BACKGROUND

I. Executive Order 13771 and OMB's Guidances

A. President Trump signed Executive Order 13771 on January 30, 2017. 82 Fed. Reg. 9339 (2017). The Executive Order directs that, unless prohibited by law, when a federal agency proposes or promulgates a new regulation, "it shall identify at least two existing regulations to be repealed." Sec. 2(a). It further directs that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated

with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law." Sec. 2(c).

The Executive Order also directs that "the total incremental cost of all new regulations, including repealed regulations, to be finalized this year [fiscal year 2017] shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of [OMB]." Sec. 2(b). In future years, each agency "shall identify, for each regulation that increases incremental cost," the offsetting regulations to be repealed, and shall "provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation." Sec. 3(a). The Director of OMB is directed to "identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year." Sec. 3(d). "No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director." *Id.*

Executive Order 13771 requires agencies to offset the costs of a new regulation regardless of the benefits associated with the new rule, and regardless of whether the new rule or the existing rules designated for repeal have net benefits. Even where the benefits of a new regulation exceed its costs, the Executive Order requires the agency to identify and repeal two existing regulations that have ongoing costs at least equal to the costs of the new regulation.

Although previous executive orders have required calculation of the costs and benefits of a particular rule, *see* 58 Fed. Reg. 51735 (1993) (Executive Order 12866), none has imposed a regulatory cost cap or required agencies to consider in one rulemaking the costs of unrelated rules, let alone conditioned an agency's issuance of a new rule on repealing two or more existing ones.

B. OMB has issued two guidance documents to implement the Executive Order: On February 2, 2017, OMB issued "Interim Guidance Implementing Section 2 of the Executive Order," which addresses regulations to be issued in fiscal year 2017. On April 5, 2017, OMB issued "Guidance Implementing Executive Order 13771," which "supplements" the Interim Guidance.

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

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

The OMB Guidances further provide that agencies may not base the estimated cost savings of repealing an existing rule on the regulatory impact analysis produced when the rule was issued. Interim Guidance 4; *see* Guidance Q21. This directive requires agencies to develop new cost estimates for each existing rule considered for elimination. The Guidances also instruct agencies not to count the "sunk" (or already incurred) costs of repealed rules, and require that they instead count only those costs that would be incurred after the effective date of the repeal. Interim Guidance 5; *see* Guidance Q21. Because the bulk of the costs of existing rules (such as the cost of new equipment purchases to meet pollution standards) often will already have been incurred, this requirement will greatly magnify the number of rules that need to be repealed to permit new rules to be promulgated consistent with the Executive Order. As a whole, these requirements will impede issuance of new rules whose costs must be offset through repeals.

OMB makes explicit that, under Executive Order 13771, costs and cost offsets may be exchanged across statutes and agencies. That is, costs eliminated by repealing a rule of one agency component may be used to offset the costs of a rule issued by another component. Interim Guidance 6; Guidance Q30. Costs eliminated through repeals may be transferred between agencies if OMB approves the transfer. Interim Guidance 6; Guidance 31.

II. Agency rulemaking

Federal agencies' authority to issue rules with the force of law comes from Congress.[2] *See, e.g.*, *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1869 (2013); *United States v. Mead Corp.*, 533 U.S. 218, 227–30 (2001); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). As the Supreme Court has

[2] The APA defines "rule" to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The Executive Order (sec. 4) largely tracks this definition.

explained: "The legislative power of the United States is vested in the Congress, and 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. v. Brown*, 441 U.S. 281, 302 (1979). Thus, when exercising its delegated authority to promulgate rules, an agency must consider the factors that Congress has directed it to consider and cannot "rel[y] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). An agency's decisionmaking must be reasoned and evidence-based; decisionmaking that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is unlawful. 5 U.S.C. § 706(2)(A); *see also* 42 U.S.C. § 7607(d)(9) (Clean Air Act); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d. 678, 685 (D.C. Cir. 1982) (holding that challenges under judicial review provision of Endangered Species Act, 16 U.S.C. § 1540(g)(1), are reviewable under the arbitrary and capricious standard of the APA). Accordingly, rulemaking (whether to issue a new rule or to repeal an existing rule) must be in furtherance of the public policy objectives embodied in the authorizing statutes, and must comply with those statutes' substantive and procedural requirements and also, for most rulemakings, with section 553 of the APA.

This principle applies fully to consideration of costs: An agency may take costs into consideration only to the extent permitted by Congress in the statute delegating rulemaking authority to the agency. *See*, *e.g.*, *Whitman*, 531 U.S. at 467–68 (holding that cost is a permissible consideration in regulating under some provisions of the Clean Air Act, but not another); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980) (discussing how cost is considered under the Occupational Safety and Health Act). Although federal regulatory statutes

address costs in various ways, no statute that plaintiffs have found (and no statute identified in the Executive Order, the OMB Guidances, or defendants' motion to dismiss) authorizes agencies to condition issuance of a new rule on repeal of existing rules to offset the costs of the new one. No statute authorizes an agency to forgo, weaken, or delay a new rule that it would otherwise issue, based on its inability to repeal other rules with offsetting costs.

Importantly, the cost of regulations is an issue to which Congress has given much attention. Many statutes define precisely whether and how agencies may consider costs when promulgating regulations. The Endangered Species Act, for example, does not permit the Secretaries of the Interior or Commerce to consider cost when determining whether a species is threatened or endangered, 16 U.S.C. § 1533(b)(1)(A) (stating that determination must be made "solely" on the basis of the best science and specified factors), but directs that "economic impact" should be considered as one factor in excluding discrete areas from critical habitat for endangered species, *id*. § 1533(b)(2). When the Federal Motor Carrier Safety Administration (FMCSA), an agency within DOT, develops standards of equipment "needed to promote safety of operation" under the Motor Carrier Safety Act, 49 U.S.C. § 31502(b), it must consider five predominantly safety-related factors, *id*. § 31136(a), as well as costs and benefits of the standard under consideration "to the extent practicable and consistent with the purposes of" the statute, *id*. § 31136(c). Similarly, when promulgating a federal motor vehicle safety standard, NHTSA—another agency within DOT—must consider "relevant available motor vehicle safety information," "whether a proposed standard is reasonable, practicable, and appropriate" for the types of motor vehicles or motor vehicle equipment for which it is prescribed, and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. *Id*. §§ 30111(a), (b). The cost of compliance with a particular rule is a permissible consideration but must be weighed against safety

benefits, the "preeminent" factor. *State Farm*, 463 U.S. at 55; *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) (citing *State Farm*, 463 U.S. 29). And although costs play a role in the decisionmaking process under the Occupational Safety and Health Act (OSH Act), which instructs the Occupational Safety and Health Administration (OSHA) to establish occupational health standards involving toxic materials or harmful physical agents, 29 U.S.C. § 655(b)(5), that role is limited by the statute; weighing costs and benefits is impermissible. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981); *see generally* Michaels Decl. ¶¶ 14-16.

Other statutes do not expressly state that costs may be considered, but impliedly allow consideration of the costs of a proposed rule, limited by requirements that the agency act rationally and consistent with statutory objectives. In deciding whether an agency has implied power to consider costs, courts look to whether such consideration is warranted in light of the language and regulatory goals of the particular statute. For example, in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court held that EPA's authority under the Clean Air Act to regulate emissions of hazardous air pollutants from power plants "if [EPA] finds such regulation to be 'appropriate and necessary,'" *id.* at 2404 (quoting 42 U.S.C. § 7412(n)(1)), requires the agency to consider costs to the extent they are relevant to whether a particular regulation would rationally serve the statute's goals, *id*. at 2707. *See also*, *e.g*., Clean Water Act, 33 U.S.C. § 1326(b), *discussed in Entergy Corp. v. Riverkeeper, Inc*., 556 U.S. 208, 222 (2009) (holding that statutory structure and context permit EPA to consider costs of control technologies in relation to benefits under § 1326(b)).

Finally, some statutes forbid consideration of cost altogether. For example, as mentioned above, under the Endangered Species Act, cost is not a permissible consideration in the determination whether a species is threatened or endangered because the statute states that the determination must be made "solely" on the basis of the best science and specified factors. 16

U.S.C. § 1533(b)(1)(A). Likewise, the Toxic Substance Control Act (TSCA) directs the administrator of EPA to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment "without consideration of costs or other nonrisk factors." 15 U.S.C. § 2605(b)(4)(A); *see id.* § 2605(b)(4)(F)(iii) ("In conducting a risk evaluation under this subsection, the Administrator shall … not consider costs or other nonrisk factors."). A determination of unreasonable risk triggers a two-year statutory deadline for issuing a final rule, *id.* § 2605(c)(1)(B), at which point the agency may consider the "costs and benefits" and the "cost effectiveness" of the rule designed to eliminate the unreasonable risk and of the primary alternatives considered, *id.* § 2605(c)(2)(A)(iv). And under the Clean Air Act, EPA is not permitted to consider costs when setting national ambient air quality standards (NAAQS) for air pollution at levels "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1); *see Whitman*, 531 U.S. at 467–68 (refusing to find implicit authorization to consider costs under § 7409); *see also* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(a)(2), 84 Stat. 1676, 1680, *codified as amended at* 42 U.S.C. § 7410(a), *discussed in Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) ("The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, and none of the eight factors appears to permit consideration of … economic feasibility." (citation omitted)); Atomic Energy Act, 42 U.S.C. § 2232(a), *discussed in Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 114 (D.C. Cir. 1987) ("In sum, the Act precludes the [Nuclear Regulatory Commission] from [taking] costs into account in establishing or enforcing the level of adequate protection.").

* * * * *

The statutory examples described above illustrate the ways Congress has allowed or forbidden agencies to consider cost when exercising their congressionally delegated authority. Every regulatory agency must comply with the statutes delegating authority and, in so doing, with the requirement that its rules be based on reasoned and evidence-based consideration of permissible factors.

No statute allows a regulatory agency to withhold a new rule unless its costs are offset by repeal of existing rules. No statute gives the President power to condition an agency's congressionally delegated authority to issue a new rule on the offset of its costs through repeal of other rules.

STANDARD OF REVIEW

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 where the moving party "shows that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility" of "identifying those portions" of the record that "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries that initial burden, the burden then shifts to the nonmoving party to show that sufficient evidence exists for a reasonable jury to find in the nonmoving party's favor with respect to the "element[s] essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 322. The nonmoving party's opposition must consist of competent evidence setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324.

ARGUMENT

I. This Court has authority to grant the relief requested at this time.

A. The complaint states causes of action for non-statutory review.

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

The Supreme Court recently reiterated the availability of non-statutory review, noting that it has "long held that federal courts may in some circumstances grant injunctive relief against … violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct.

1378, 1384 (2015) (citing *McAnnulty*). "The ability to sue to enjoin unconstitutional actions by … federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* Plaintiffs properly invoke that authority here.[3]

B. Executive Order 13771 is causing plaintiffs injury that is remediable by this Court.

As discussed in the accompanying declarations, the Executive Order and the OMB Guidances have an immediate, concrete effect on rulemaking undertaken by federal agencies and, therefore, an immediate adverse effect on plaintiffs' activities and interests and those of their members.

The Executive Order and the OMB Guidances adversely affect plaintiffs' ability to advocate on behalf of their members, by forcing plaintiffs to make an untenable choice between urging agencies to adopt new regulations, when adopting those regulations would depend on the repeal of existing regulatory safeguards, or refraining from advocating for new public protections to avoid triggering the need to repeal existing ones. *See* R. LeGrande Decl. ¶ 17; R. Weissman Decl. ¶ 8; Wetzler Decl. ¶ 11. This cognizable harm is occurring now. *Cf. Ariz. Free Enter. Club's*

[3] In their motion to dismiss (at 37-38), defendants assert that the APA will, eventually, provide an adequate remedy for the third and fourth causes of action. As plaintiffs will discuss in their opposition to defendants' motion, the challenge here is not to a particular rulemaking, but to Executive Order requirements that infect the rulemaking process itself. Challenges to any particular rulemaking cannot remedy the harm of that infection, for several reasons: Some rulemakings will not occur because of an agency's inability to offset costs, but the fact that the agency would have otherwise undertaken a rulemaking will not be known to the public. Delays, even if the cause is known to the public, cannot be cured after the fact. And a challenge to a rule weakened so as to lower the costs that need to be offset would be possible only if the agency revealed that it had weakened a rule for that reason. Meanwhile, the requirements of the Executive Order are in effect now, including the annual cost cap, the 1-in, 2-out requirement, and the related cost-offset requirement. Delaying judicial review "would only cause more hardship and would not resolve the legal question at issue: whether [the executive order] as written is unconstitutional." *Cty. Of Santa Clara v. Trump*, __ F. Supp. 3d __, 2017 WL 1459081, at *9 (N.D. Cal. Apr. 25, 2017).

Freedom Club PAC v. Bennett, 564 U.S. 721, 739-40 (2011) (striking down campaign financing scheme that forces speaker to change its message, not speak, or trigger funding of opponent); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (holding that self-censorship is a harm that can support standing).

The Executive Order also prevents, delays, or weakens new rules protecting public health, safety, and the environment, to the detriment of plaintiffs and their members. LeGrande Decl. ¶ 18; R. Weissman Decl. ¶ 18; Wetzler Decl. ¶ 11; *see generally* Abbott Decl.; Bauer Decl.; Coward Decl.; Fleming Decl.; Quigley Decl.; So Decl.; Soverow Decl.; T. Weissman Decl.; Winegrad Decl. And it is already occurring. For example, EPA's Acting Principal Deputy Assistant Administrator for Water recently said that the Executive Order had "tied up" a Clean Water Act rule that would protect municipal water systems from discharges of mercury from dental filling material: "So right now we are moving to try to get that rule out, but since it was signed on Jan. 19, and it was not put in the Federal Register before the executive order, we will have to look at the two-for-one." *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017). DOT has also indicated that the Executive Order is affecting the timing of ongoing rulemakings: "As DOT rulemakings are being evaluated in accordance with Executive Orders 13771 and 13777, the schedules for many ongoing rulemakings are still to be determined, so we will not post an Internet Report for the month of May." DOT, Report on DOT Significant Rulemakings, https://www.transportation.gov/regulations/report-on-significant-rulemakings (last visited May 10, 2017); DOT, Significant Rulemaking Report Archive, https://cms.dot.gov/regulations/significant-rulemaking-report-archive (last visited May 10, 2017) (same for February 2017–April 2017). Because such delays result from Executive Order 13771's requirement that agencies identify existing rules for potential

repeal, perform new cost analyses of the ongoing costs of those rules, and undertake rulemaking to repeal them—all in addition to conducting the rulemaking to issue the new rule—the delays will occur across all agencies to which Executive Order 13771 applies.

For example, OSHA is developing a standard to protect health care employees and employees in other high-risk environments from exposure to pathogens that can cause significant infectious disease, such as tuberculosis, pandemic influenza, and SARS. 75 Fed. Reg. 24835 (2010). The standard would require employers to establish a comprehensive infection control program and control measures. According to its most recent regulatory agenda, OSHA anticipated issuing a proposed rule in October 2017. *See* Reginfo.gov, OSHA regulatory agenda (Fall 2016), RIN 1218-AC46, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AC46 (last visited May 10, 2017). For OSHA to issue the rule in compliance with the Executive Order, however, the Department of Labor must now offset the costs of this rule by repealing—or convincing OMB to allow it to use another agency's repeals of—"at least two prior regulations," Executive Order sec. 2(c) & 3(a), and must determine the required offset without taking into account the benefits of the new standard. For OSHA to consider costs in this way will necessarily delay issuance of new health or safety standards. Because OSHA lacks authority to repeal rules that continue to serve the purposes of the Act, 29 U.S.C. §§ 651(b), 655(b)(5); Michaels Decl. ¶¶ 10, 33, the delay will be exacerbated by the need for other components of the Department of Labor to repeal two or more of their own existing rules, so that the Department can use those repeals to offset the costs of the new OSHA standard. For this reason, Executive Order 13771 will delay and may force OSHA to weaken or forgo the new standard on exposure to infectious disease, to the detriment of plaintiffs and identified members. *See also* Abbott Decl. ¶ 7

(describing interest in the standard); LeGrande Decl. ¶¶ 13-14 (same); Soverow Decl. ¶ 5 (same); Michaels Decl. ¶ 36 (discussing delay).

As another example, EPA proposed two TSCA rules in December 2016 and January 2017 that would phase out trichloroethylene (TCE), a highly toxic volatile organic compound, for use in vapor degreasing, aerosol degreasing, and spot cleaning in dry cleaning facilities. 82 Fed. Reg. 7432 (2017) (vapor degreasing); 81 Fed. Reg. 91592 (2016) (aerosol degreasing and spot cleaning). The rules are aimed at preventing cancer, documented harms to developing fetuses, and respiratory, nervous system, kidney, liver, and immune system effects. EPA estimates that the vapor degreasing rule will impose costs of $30 million to $45 million annually but have net benefits of $35 million to $402 million annually, while the aerosol degreasing and spot cleaning rule will impose costs of $170,000 annually but have net benefits of $9 million to $24.6 million annually. 82 Fed. Reg. at 7453; 81 Fed. Reg. at 91594. Both rules are classified as "significant," 82 Fed. Reg. at 7458; 81 Fed. Reg. at 91622, and therefore fall within the scope of the Executive Order. Under TSCA, 15 U.S.C. § 2605(a), EPA's determination whether chemicals present an unreasonable risk of injury to health or the environment under the conditions of use must be made "without consideration of costs or other nonrisk factors," *id*. §§ 2604(b)(4)(A), (F); 82 Fed. Reg. at 7455. And once it makes an unreasonable risk determination, EPA must adopt a rule imposing requirements "to the extent necessary so that the chemical substance or mixture no longer presents such risk." 82 Fed. Reg. at 7433; *see also* Jones Decl. ¶ 9. Requiring EPA to offset costs by repealing two or more rules to enable it to issue one new TSCA rule conflicts with the statute's purpose and the regulatory criteria it establishes, and will delay or prevent issuance of the new rule, Jones Decl. ¶¶ 14, 16, to the detriment of plaintiffs and their members. *See* LeGrande Decl. ¶¶ 9, 12; Wetzler Decl. ¶¶ 7, 9; Fleming Decl. ¶ 6.

In short, the present and imminent harmful effects of Executive Order 13771 and the OMB Guidances on plaintiffs and their members confer standing on plaintiffs.

C. Judicial review is appropriate at this time.

"Purely legal questions, such as those presented in the instant case, are presumptively [fit] for judicial review." *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (*Reich I*) (per curiam) (alteration in original; internal quotation marks and citation omitted) (finding it unnecessary to delay consideration of the legality of an executive order until it was further "fleshed out" or applied against one of the plaintiffs). Thus, judicial review need not wait for an agency to promulgate regulations infected by the unlawful requirements of the Executive Order (or to fail to issue new regulations in light of the requirements of the Executive Order), because this suit seeks a declaration that the Order itself is unlawful. *See Reich II*, 74 F.3d at 1326–27 (citing *Reich I*); *Cty. of Santa Clara*, 2017 WL 1459081, at *9 ("Waiting for the Government to decide how it wants to apply the Order would only cause more hardship and would not resolve the legal question at issue: whether Section 9(a) as written is unconstitutional. The Counties' claims are prudentially ripe.").

Nor is the Executive Order's unlawful impact too speculative for review now. In *Reich I*, the court concluded that the Secretary of Labor's authority to exempt certain government contractors from the terms of an executive order did not make the plaintiffs' claims speculative, because the plaintiffs' injury was not the application of the order but the order's mere existence, which skewed the plaintiffs' decisions. *Reich I*, 57 F.3d at 1100 ("[W]e are unpersuaded that a 'concrete' prosecution by the Secretary would assist the court in analyzing appellants' facial challenge based on this issue."). The same is true in this case: Although OMB could exempt a regulation from requirements of the Executive Order, *see* Sec. 4(c), the Order skews agency

decisionmaking to the detriment of plaintiffs and their members today. *See supra* pp. 12–15; *see also Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 516 F. Supp. 2d 90, 106, 107–08 (D.D.C. 2007) (holding challenge to executive order ripe where Archivist's reliance on order caused delay that adversely affected plaintiffs and plaintiffs' claim was "not made in a vacuum with respect to [relevant provision of executive order] as requested documents are pending review"); *Hawai'i v. Trump*, __ F. Supp. 3d __, 2017 WL 1011673, at *11 (D. Haw. Mar. 15, 2017) (holding challenge to executive order barring noncitizens from entering the country ripe notwithstanding the government's argument that individuals could potentially qualify for visa waivers). The Executive Order corrupts agency decisionmaking across the board, because every decision whether to issue a significant new rule, every decision about the content of the rule, and every decision about repealing a rule must be made under the shadow of the Order's mandate to identify and repeal two regulations to offset the cost of any one regulation issued.

A recent OMB memorandum to agencies reinforces this point by instructing agencies that their unified agendas of regulatory actions expected in fiscal years 2017 and 2018, which were "due by March 31, 2017," should reflect the Executive Order's offset and repeal "requirements" and should include an "estimate of the total costs or savings associated with each of [the] planned fiscal year 2018 significant regulatory actions and offsetting deregulatory actions." *See* OMB, Memorandum for Regulatory Policy Officers, Spring 2017 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions 2 (Mar. 2, 2017) (hereafter, OMB Memo on Unified Agenda).[4] Because Executive Order 13771 controls agencies' current decisionmaking, prompt

[4] Available at https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-and (last visited May 10, 2017). *See also infra* at 36 (examples of agencies' implementing Executive Order 13771).

judicial review of plaintiffs' challenge to the lawfulness of the Executive Order and OMB Guidances is needed to protect plaintiffs and their members.

A declaration that Executive Order 13771 and OMB Guidances are unlawful and an injunction barring the agencies from complying with them are appropriate remedies for the unlawful action. In *Reich II*, the D.C. Circuit held that the plaintiffs were entitled to prevail in their non-statutory review action seeking declaratory and injunctive relief against agency implementation of an unlawful executive order. 74 F.3d at 1325, 1332. And in *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986), this Court ordered EPA to fulfill its statutory mandate (there, issuance of a regulation by a statutory deadline), notwithstanding an executive order requiring OMB review, and declared that OMB could not use the executive order to interfere with EPA's compliance with the statute, *id*. at 571. *See also Cty. of Santa Clara*, 2017 WL 1459081, at *29 (granting preliminary injunction against implementation of executive order). Likewise here, injunctive relief against the agencies and declaratory relief against all defendants as to the unlawfulness of the Executive Order and OMB Guidances are "necessary to ensure compliance with the clearly expressed will of Congress." *Id*. at 572.

II. The President, through Executive Order 13771, has violated the Take Care Clause and exceeded his constitutional authority, in violation of the separation of powers.

A. The President lacks authority to legislate or to direct regulatory actions that are contrary to statutes through which Congress has delegated regulatory authority.

The Constitution divides the powers of the federal government into three branches—legislative, executive, and judicial—and aims "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id*. Separation

of powers "assure[s] full, vigorous, and open debate on the great issues affecting the people and … provide[s] avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

The President has a constitutional responsibility with respect to laws: the duty to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. But the Constitution grants all legislative powers to Congress. *See* U.S. Const., art. I, § 1. "The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). "[N]o provision in the Constitution … authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City New York*, 524 U.S. 417, 438 (1998). "Needless to say, the President is without authority to set aside congressional legislation by executive order." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999); *see Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is entirely inadmissible."). Holding otherwise "would be clothing the President with a power to control the legislation of congress." *Kendall*, 37 U.S. at 613.

Thus, in *Clinton v. City New York*, the Supreme Court held that the Line Item Veto Act violated the Constitution by allowing the President effectively to amend acts of Congress by vetoing parts of them. "Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition." *Clinton*, 524 U.S. at 439. "As Madison explained in The Federalist No. 47, under our constitutional

system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'" *Medellin v. Texas*, 552 U.S. 491, 527–28 (2008) (alteration in original).

To be sure, Congress may enact statutes directing federal agencies to administer programs to promote public purposes, including by promulgating rules with the force of law. Accordingly, Congress has used its legislative power, including its authority over interstate commerce and federal property, U.S. Const. art. I, § 8; *id.* art. IV, § 3, to enact numerous statutes authorizing agencies to protect public health, safety, and the environment. Those statutes establish national policies and entrust federal agencies with implementing them. The statutes also provide the law to be applied in agency rulemakings by specifying factors that may or must be considered, prohibiting consideration of other factors, or prescribing how an agency may or must address such factors. *See supra* pp. 6–7.

In implementing these statutes, the President's constitutional responsibility is to "take Care that [these] Laws be faithfully executed." U.S. Const. art. II, § 3. In so doing, the President may issue regulations with the force of law only to the extent that Congress has set "intelligible" standards to guide the rulemaking. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring) ("Congress must 'lay down by legislative act an intelligible principle,' and the agency must follow it." (quoting *J.W. Hampton & Co.*, 276 U.S. at 409). Although regulatory statutes delegate to the Executive Branch discretion in implementing federal regulatory schemes, "discretion in the implementation of a program is not the freedom to ignore the standards for its implementation." *Local 2677 Am. Fed'n of Gov't Emps. v. Phillips*, 358 F. Supp. 60, 77 (D.D.C. 1973) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971)). "In the framework of our Constitution, the President's power to see that the laws are faithfully

executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587; *see Kendall*, 37 U.S. at 613. Because the President generally has no inherent power to issue substantive regulations with the force of law, his authority to direct agency rulemaking must operate within the strictures set by Congress. *See Chrysler Corp.*, 441 U.S. at 304; *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171-72 (4th Cir. 1981); *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980). In sum, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (quoting *Youngstown*, 343 U.S. at 585).

With this principle in mind, Justice Jackson's concurring opinion in *Youngstown* sets forth "the accepted framework for evaluating" the constitutionality of presidential action. *Id*. at 524; *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2034–84 (2015). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Absent such express authority, the President may sometimes possess authority to act "on independent presidential responsibility" in the face of "congressional inertia, indifference or quiescence." *Id*. at 637. But "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*. at 637–38. In such circumstances, presidential action can be sustained only where "the President's asserted power [is] both 'exclusive' and 'conclusive' on the issue." *Zivotofsky*, 135 S. Ct. at 2084.

B. The Executive Order exceeds the President's authority.

Application of these settled principles shows that Executive Order 13771 exceeds the President's authority: The Executive Order is neither supported by congressional authorization nor operates within a zone of congressional inaction. Rather, it establishes new standards for rulemaking without congressional authorization, and directs actions that are incompatible with Congress's will as expressed in statutes granting regulatory authority to the Executive Branch and in the APA, which enjoins agencies to act rationally, in light of the rulemaking record, and in accordance with law.

Because the President has no inherent, exclusive authority to direct rulemaking contrary to congressional commands, the Executive Order violates the doctrine of separation of powers by assuming legislative authority. And because the Executive Order requires agencies to act contrary to statutory directives, it also violates the Constitution's directive that the President "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3; *see Youngstown*, 343 U.S. at 632–33 (Douglas, J. concurring) (explaining that duty to take care that the laws be faithfully executed "starts and ends with the laws Congress has enacted" and rejecting argument that "Take Care Clause" justified presidential intrusion into legislative domain); *id* at 662 (Clark, J., concurring) (stating that "where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis"); *cf. United States v. Texas*, 136 S. Ct. 906 (2016) (order granting certiorari and asking parties to brief the question "Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3"); *Arizona Dream Act Coalition v. Brewer*, __ F.3d __, 2017 WL 461503, at *18 (9th Cir. Feb. 2, 2017) (entertaining claim alleging violation of Take Care clause but finding no violation).

1. Issuance of the Executive Order was not "pursuant to an express or implied authorization of Congress."

The absence of statutory authority for Executive Order 13771 is reflected in the fact that the two statutes it cites as authority are plainly inapposite: Neither the Budget and Accounting Act of 1921, 31 U.S.C. § 1101 *et seq.*; *id.* § 1105, nor the Presidential Subdelegation Act of 1951, 3 U.S.C. §§ 301–303, provides a basis for the Executive Order or excuses its unlawful effect.

The Budget and Accounting Act says nothing about the costs of regulations to regulated entities and does not empower the President to amend or decline to execute any other law. The Act requires the President to submit to Congress annually a proposed budget for the federal government, a supplemental summary of the budget midway through the year, and proposed deficiency and supplemental appropriations requests for laws enacted after the submission of the annual budget. 31 U.S.C. §§ 1104–1107. The Act mandates that agencies provide the President with their budget needs, *id.* §§ 1104(e), 1108, and requires agencies to develop priorities and plans to implement those priorities in accordance with their missions and goals, *id.* §§ 1115–1122. It further provides that the President, through OMB's Office of Information and Regulatory Affairs, will develop programs and prescribe regulations to improve federal agencies' creation and dissemination of statistical information, and that each agency must provide the President with the information he needs to propose a budget. *Id.* § 1104(d). These duties do not relate to, much less authorize, the substance of the Executive Order.

The Presidential Subdelegation Act likewise provides no authority for Executive Order 13771. Enacted to resolve the question whether the President could delegate some ministerial tasks, the Act provides that the President can delegate to a subordinate the authority delegated to him by Congress, unless such redelegation is prohibited by law. 3 U.S.C. §§ 301–302; *see* Jason Marisam, *The President's Agency Selection Powers*, 65 Admin. L. Rev. 821, 828 (2013). This

authority to redelegate authority does not, of course, give the President authority that Congress never delegated at all. The Presidential Subdelegation Act, like the Budget and Accounting Act, provides no authority for the President to instruct federal agencies to take action inconsistent with federal law.[5]

2. The Executive Order's directives are incompatible with the will of Congress.

Because the Executive Order not only lacks express authorization but conflicts directly with Congress's exercise of its legislative powers, it operates in circumstances where the President's power is at its "lowest ebb." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring). Congress has authorized regulatory agencies to administer particular programs to achieve public policy goals and has crafted statutory schemes that prescribe relevant considerations to guide and constrain the agencies' promulgation of regulations to advance those goals. The Executive Order directs agencies to act in ways that contradict those congressional delegations and violate the agencies' authorizing statutes.

Specifically, in directing that agencies forgo regulation unless two or more regulations with offsetting costs are repealed, the Executive Order sets up regulatory trading requirements that Congress has never authorized. It directs agencies to violate the substantive statutes that provide their regulatory authority—which do not authorize or permit the repeal and offset requirements—and also to violate the APA's prohibition against arbitrary and capricious agency action. The

[5] Underscoring the lack of statutory authority for the Executive Order, bills have been introduced that would have authorized only part of what Executive Order 13771 now mandates. *See*, *e.g.*, National Regulatory Budget Act of 2014, S. 2153, 113th Cong. (2014) (proposing an "annual overall regulatory cost cap"); Regulatory Accountability Act of 1993, S. 13, 103d Cong. §4(3)(A) (1993) (proposing to require that the costs of any new regulation be "fully offset" by repealing or modifying an existing regulation); Federal Regulatory Budget Act, S. 3550, 95th Cong. (1978) (proposing a joint legislative-executive process to create annual regulatory budgets). Congress has not passed any of these bills.

Executive Order "does not direct that a congressional policy be executed in a manner prescribed by Congress." *Youngstown*, 343 U.S. at 588 (majority opinion). Rather, it "directs that a presidential policy be executed in a manner prescribed by the President." *Id.* Yet courts have rejected the notion that "regulations promulgated under an Executive Order that traces its lawmaking authority to a particular statute need bear no relation to the purposes of that authorizing statute so long as the regulations bear relation to national policies reflected in other sources[,] common law, statutory, or constitutional." *Liberty Mut. Ins. Co.*, 639 F.2d at 171. To hold otherwise "would render meaningless the simple, fundamental separation of powers requirement, … that such an 'exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of (legislative) power by the Congress …,' and lie "reasonably within the contemplation of that grant of authority." *Id.* (quoting *Chrysler Corp.*, 441 U.S. at 302, 309).

a. The Executive Order directs agency action contrary to the laws enacted by Congress.

To implement programs adopted to protect public health, safety, workers, and the environment, Congress has authorized Executive Branch agencies to engage in rulemaking in ways that advance statutory goals by congressionally approved means. Executive Order 13771, however, directs that agencies withhold regulations to promote statutory goals unless other regulations—the costs of which have already been considered to the extent permitted by their authorizing statutes—are repealed. Nothing in any governing statutes, or in the APA, suggests that Congress authorized any agency to trade regulations off against one another or to withhold, weaken, or delay new regulations until the agency identifies and repeals two or more existing regulations with offsetting costs.

To the contrary, by enacting laws providing for regulation for the benefit of health, safety, and the environment, Congress necessarily contemplated imposition of costs to achieve those

goals. *See*, *e.g*., *State Farm*, 463 U.S. at 55 ("NHTSA should bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act."); *Am. Textile Mfrs. Inst.*, 452 U.S. at 509 ("Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable. Any standard based on a balancing of costs and benefits by the Secretary [of Labor] that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5) [of the OSH Act]."); *Citizens to Preserve Overton Park*, 401 U.S. at 412–13 ("[T]he very existence of the statutes [at issue] indicates that protection of parkland was to be given paramount importance." (footnote omitted)).

"Whatever the consideration given to costs and benefits … an agency may not substitute its policy judgment for the judgment that has already been articulated by Congress." *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168, 1174 (D.D.C. 1983), *vacated in part as moot sub nom. Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984). Thus, this Court has held that, where Congress "did not condition [the] grant of authority with a proviso that the regulations could be withdrawn if the costs to the industry turned out to be too high," *id*., a presidential executive order "provides an insufficient basis for the [agencies] to disregard their statutory duties," *id*. at 1175; *see also* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1141 (2010) ("A President cannot, of course, push an agency to take action not authorized by law.").

The Executive Order turns the regulatory system on its head by making an agency's ability to issue a new regulation contingent on repeal of two or more existing regulations with offsetting costs. That requirement applies regardless of how beneficial the new regulation would be or the degree to which its issuance would comport with the statutory criteria established by Congress.

The requirement cannot be squared with the texts and purposes of the statutes through which Congress delegated authority to federal agencies. It is "incompatible with the express or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (noting the "canon" that "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode'" (alteration in original) (quoting *Raleigh & Gaston R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872))); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (stating that an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'" (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944))).

For example, Congress enacted the Motor Vehicle Safety Act "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. The Safety Act mandates motor vehicle safety standards that are "practicable, meet the need for motor vehicle safety, and [are] stated in objective terms." *Id.* § 30111(a). "Motor vehicle safety standard" means a minimum performance standard for motor vehicles or motor vehicle equipment. *Id.* § 30102(10). When prescribing such standards, NHTSA must consider all relevant, available motor vehicle safety information, and whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths. *Id.* § 30111(b). Although the cost of compliance with a particular rule is a permissible consideration for the agency under the Safety Act, the agency must weigh safety benefits against

economic costs. *Pub. Citizen v. Mineta*, 340 F.3d at 58 (citing *State Farm*, 463 U.S. 29). Further, "*State Farm* instructs the agency to place a thumb on the safety side of the scale." *Id*. "Whatever it means to treat safety as the 'pre-eminent factor,' it must mean that the economic advantages of a standard cannot be considered without reference to the associated safety concerns." *Id*. at 58 (quoting *State Farm*, 463 U.S. at 55).

Congress's specification of factors, and of the preeminent factor of safety, that NHTSA must consider in developing motor vehicle safety standards belies any claim that Congress has, in *Youngstown* terms, been "quiescent" with respect to the standards governing NHTSA rulemaking. *See also* 49 U.S.C. § 31136(c) (providing that FMCSA "shall consider … costs and benefits" "to the extent practicable and consistent with the purposes of" the statute). The President's instruction that NHTSA superimpose the regulatory trading requirements of Executive Order 13771 onto its consideration of the statutory factors specified by Congress in the Motor Vehicle Safety Act, and thus withhold a new safety regulation unless and until DOT can identify two or more for repeal, is incompatible with the Safety Act. The instruction exceeds the scope of delegated authority and is incompatible with the will of Congress. *Cf. Waterkeeper Alliance v. EPA*, __ F.3d __, 2017 WL 1323525, at *6 (D.C. Cir. Apr. 11, 2017) ("[A]s we've long made clear, "[a]gencies are … bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." (internal quotation marks and citation omitted)).

As another example, the OSH Act aims "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The OSH Act requires an occupational health standard involving "toxic materials or harmful physical agents" to "adequately assur[e], to the extent feasible, on the

basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *Id.* § 655(b)(5). After a significant risk is identified, OSHA must promulgate a standard that will eliminate that risk, unless doing so is infeasible in a particular industry. *AFL-CIO v. OSHA*, 965 F.2d 962, 973 (11th Cir. 1992). OSHA has a "duty to keep adding [protective] measures so long as they afford benefit and are feasible, up to the point where [it] no longer finds significant risk." *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988). "Feasibility" under the OSH Act encompasses economic feasibility: a "standard is economically feasible if the costs it imposes do not 'threaten massive dislocation to, or imperil the existence of, the industry.'" *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (quoting *United Steelworkers of Am.*, 647 F.2d at 1265). In light of the OSH Act's legal standard directing OSHA to set safety and health standards based on findings of significant risk of material impairment and technological and economic feasibility, OSHA may not use cost-benefit analysis as a basis for setting OSHA health standards. *See Am. Textile Mfrs. Inst.*, 452 U.S. at 509. In addition, the OSH Act does not permit OSHA to withhold a standard simply because the standard would impose costs, or because it and other standards in combination would impose net costs. *See generally* Michaels Decl. ¶¶ 9–10, 15–16, 29–35. The OSH Act cannot reasonably be read to authorize OSHA to withhold, weaken, or forgo a standard based on its inability to identify two or more existing rules to repeal, to offset costs. Far from evincing congressional "indifference," *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), to the role of cost in OSHA rulemaking, Congress expressly addressed that point in a way inconsistent with Executive Order 13771.

These examples are representative of regulatory statutes as a whole. *See also* Hayes Decl.; Jones Decl.; Michaels Decl.; Reicher Decl.; Wagner Decl.; David Friedman, *Two for One: A Very Bad Deal for Our Nation*, Appendix 4–5, Union of Concerned Scientists Blog, Apr. 10, 2017, at http://blog.ucsusa.org/guest-commentary/two-for-one-a-very-bad-deal-for-our-nation. As they illustrate, no statute authorizes agencies to decide whether to issue new regulations based on whether they can repeal two or more existing rules to offset costs. And no governing statute authorizes an agency to weaken or forgo a new rule so as to avoid costs that would otherwise have to be offset through repeal. The Executive Order thus cannot be excused as action in an area where "congressional inertia, indifference or quiescence" has "invite[d] measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

b. The Executive Order directs agency action that violates the statutory bar against arbitrary and capricious decisionmaking.

Executive Order 13771 not only directs that agencies violate substantive requirements of their governing statutes (or, in APA terms, to take action that is "not in accordance with law," 5 U.S.C. § 706(2)(A)); it also orders the agencies to violate the congressional prohibition in the APA and other statutes against rulemaking that is "arbitrary, capricious, [or] an abuse of discretion." *Id.*; *see supra* p. 6.

An agency acts arbitrarily and capriciously when it "relie[s] on factors [that] Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its 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." *State Farm*, 463 U.S. at 43. "Agency decisionmaking, of course, must be more than 'reasoned' in light of the record. It must also be true to the congressional mandate from which it derives authority" and should "not deviate from or ignore the ascertainable legislative intent." *Farmers*

Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1500 (D.C. Cir. 1984) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc)). In addition, final agency action is arbitrary and capricious if the agency has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted).

Thus, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court rejected as arbitrary and capricious EPA's decision to deny a petition requesting that it regulate greenhouse gas emissions from motor vehicles. The Court began by reiterating the principle that the agency's decisionmaking could not be "divorced from the statutory text," *id*. at 532, and that the agency's discretion must be exercised "within defined statutory limits," *id.* at 533. Although EPA's denial rested in part on the President's judgments with respect to foreign policy (an area in which the President has significant inherent authority), and although the Court recognized that it had "neither the expertise nor the authority to evaluate [the President's] policy judgments," the Court held that "they have nothing to do with [the statutory considerations]. Still less do they amount to a reasoned justification for declining to form a scientific judgment" regarding regulation of greenhouse gases, as required by the statute. *Id*. at 533–34. The Court explained that, "[t]o the extent that this [statutory scheme] constrains agency discretion to pursue other priorities," specifically including priorities of the President, "this is the congressional design." *Id*. at 533; *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116, 134-35 (1990) (stating that an agency "does not have the power to adopt a policy that directly conflicts with its governing statute"); *Rainbow Navigation, Inc. v. Dep't of Navy*, 620 F. Supp. 534, 543 (D.D.C. 1985) (stating that, where foreign affairs considerations were not permissible factors for agency action, consideration of such factors was arbitrary and capricious; "any expansion of the exception to the [Cargo Preference] Act to

accommodate foreign policy or other considerations would require congressional action"), *aff'd*, 783 F.2d 1072 (D.C. Cir. 1986).

Executive Order 13771 forces agencies to violate the bar against arbitrary and capricious agency action. The Executive Order's 1-in, 2-out scheme requires that agencies make decisions based on factors that "Congress has not intended [them] to consider," *State Farm*, 463 U.S. at 43, and to forgo, weaken, or delay regulations for that impermissible purpose. Agency action on this basis is not reasoned decisionmaking based upon a consideration of the relevant factors. *See Massachusetts v. EPA*, 549 U.S. at 535 ("EPA must ground its reasons for action or inaction in the statute."); *Chrysler Corp*. 441 U.S. at 304-06; *Liberty Mut. Ins. Co*., 639 F.2d at 171-72; *see also* Michaels Decl. ¶ 40; Reicher Decl. ¶ 17; Wagner Decl. ¶ 19.

A pending NHTSA rulemaking illustrates the point. In January 2017, NHTSA proposed to require all new light vehicles to include crash-avoidance technologies known as vehicle-to-vehicle (V2V) communications, such that they will send information about a vehicle's speed, heading, brake status, and other data to surrounding vehicles, and receive the same information from other vehicles. 82 Fed. Reg. 3854, 3855–57 (2017). If finalized, the safety standard will be phased in over time, with costs that change over that period. Total estimated vehicle costs per year range from $2 to $5 billion ($135-$300 per vehicle). *Id.* at 3858. On the benefit side, the technology "could potentially prevent 424,901–594,569 crashes and save 955–1,321 lives [annually] when fully deployed throughout the light-duty vehicle fleet. Converting these and the accompanying reductions in injuries and property damage to monetary values, [NHTSA] estimate[s] that in 2051 the proposed rule could reduce the costs resulting from motor vehicle crashes by $53 to $71 billion (expressed in today's dollars)." *Id*. NHTSA estimates that the safety standard will have net positive benefits in 7 years. *Id.* at 3999–4000. Notably, NHTSA believes that, without a federal standard,

“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.” *Id.* at 3854. Despite the huge net benefits to society, and the agency’s view that a federal standard is necessary to advance the technology, NHTSA will not be able to finalize this safety standard without repealing at least two others with costs of $2 to $5 billion annually (regardless of the net benefits of those existing rules). By directing NHTSA to make the decision whether to issue a final V2V rule contingent on the repeal of other rules with offsetting costs, the Executive Order directs action that lacks a rational connection to facts pertinent to the statutory considerations governing issuance of federal motor vehicle safety standards.

Similar examples abound because the point here is straightforward: Agency decisionmaking conditioned on repeal of at least two existing regulations will necessarily fail to satisfy the standard articulated by the Supreme Court in *State Farm*. *See*, *e.g.*, Jones Decl. ¶¶ 15–16 (former regulator at EPA); Michaels Decl. ¶¶ 29, 20, 33, 40 (former regulator at OSHA); Reicher Decl. ¶¶ 12, 14, 17 (former regulator at Department of Energy); Wagner Decl. ¶¶ 17–19 (former regulator at Mine Safety and Health Administration); David Friedman, *Two for One*, *supra* p. 30, at Appendix 4–5 (former regulator at NHTSA). The Executive Order cannot be implemented consistent with the APA and *State Farm* principles.

In addition, that agencies may trade among components, *see* Interim Guidance 6; Guidance Q30—one new NHTSA regulation, for example, in exchange for two Federal Aviation Administration regulations, or one new wage and hour regulation in exchange for the Employee Benefits Security Administration’s fiduciary rule and an OSHA health standard—highlights that decisionmaking pursuant to Executive Order 13771 is guided by a factor unauthorized by the governing statutes through which Congress has delegated rulemaking authority to federal agencies.

See also Farmers Union Cent. Exch., Inc., 734 F.2d at 1500 (stating that the "arbitrary and capricious" standard applies to deregulatory, as well as regulatory, agency action). The OMB guidance documents even contemplate inter-agency trading: an OSHA standard for two Clean Air Act regulations, perhaps, or a TSCA standard for two trucking regulations. *See* Interim Guidance 6; Guidance Q31.

Such intra- and even inter-agency trading, unauthorized by Congress, is necessary under the Executive Order because some agencies regulate pursuant to statutes that prohibit weakening of their existing regulations or would permit repeals only if they were consistent with statutory requirements that rules advance protective purposes. For example, the Mine Safety Act directs the Mine Safety and Health Administration to develop and promulgate mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. 30 U.S.C. § 811(a). Once a mine safety standard is in place, the Mine Safety Act permits the standard to be modified only if "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or [] the application of such standard to such mine will result in a diminution of safety to the miners in such mine." *Id.* § 811(c). Accordingly, finalizing the proposed rule to require coal mine operators to equip certain mobile equipment with proximity detection systems, *see* Wagner Decl. ¶ 15, for example, will require rescission of two or more regulations of *other* agency components or agencies. *See also* 42 U.S.C. § 6295(o)(1) (barring Department of Energy from prescribing any new or amended standard that either increases the maximum allowable energy use in specified appliances or decreases the minimum required energy efficiency of certain covered products). A requirement that holds new standards hostage in this way plainly adds a non-statutory prerequisite to issuance of a new rule.

These defects are not ameliorated by OMB's instruction that agencies should not cite the need for offsets as a "rationale" for repealing existing rules. Guidance Q37. Whatever the stated rationale for repeals, a fundamental flaw in the Executive Order and implementing OMB Guidances is that they unlawfully prohibit new regulations unless the agencies satisfy a criterion unrelated to the agencies' regulatory authority—namely, the ability to repeal existing regulations. A decision not to issue a regulation, or to weaken the new regulation to lessen the costs that must be offset, is arbitrary and capricious when based on this improper criterion. *See*, *e.g.*, *Massachusetts v. EPA*, 549 U.S. at 534; *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 154 (3d Cir. 2002) (unreasonable delay not excused by competing policy priorities in light of agency's own recognition that current standard was inadequate to protect worker health).

c. The "consistent with applicable law" provision does not cure the constitutional defect.

Executive Order 13771's constitutional infirmity is not cured by the proviso that it shall be "implemented consistent with applicable law." Sec. 5(b); *see also* Secs. 2(b), (c), 3(d). That language would alleviate the problem only if the Executive Order could constitutionally apply to some set of statutes. But no such statutes exist. None among the wide array of statutes that delegate to federal agencies the power to administer federal programs authorizes the President to require an intra- and inter-agency regulatory trading program, and none allows an agency's rulemaking authority to be made contingent on the agency's ability to offset a rule's costs through repeal of existing rules. Therefore, reading the "consistent with applicable law" provision to mean that the Executive Order applies only when the repeal and offset requirements would not unconstitutionally usurp legislative authority would render the Executive Order a nullity. *See Cty. of Santa Clara*, 2017 WL 1459081, at *9 (stating that an executive order's "consistent with law" provision does not avoid constitutional concerns where order "is entirely inconsistent with law in its stated

purpose and directives" and rejecting as unreasonable a reading that would render the order "legally meaningless" and contrary to its stated broad intent). In short, "the Government's attempt to resolve all of the Order's constitutional infirmities with a 'consistent with law' bandage is not convincing." *Id*. at *26.

Agency statements since the Executive Order was issued demonstrate that it does have effect—as the President self-evidently intended. *See also* Interim Guidance 1 (discussing "requirements" of the executive Order); Guidance 1 (same); OMB Memo on Unified Agenda, *supra* note 4; Dep't of Labor, 82 Fed. Reg. 16902, 16915 (2017) (stating that OMB has determined that a new rule delaying implementation of Department of Labor's fiduciary rule does not trigger the repeal and offset requirements of Executive Order 13771 because it provides cost savings); DOT, 82 Fed. Reg. 15785 (2017) (notice of Aviation Rulemaking Advisory Committee meeting to discuss existing regulations to repeal or modify in light of Executive Orders 13771 and 13777); Dep't of Labor, 82 Fed. Reg. 12319, 12323 (2017) (addressing "requirements" of Executive Order 13771 but stating that proposed rule extending applicability date of previously issued final rule was not a "significant regulatory action" that triggered those requirements); *Trump 'Two For One' Deregulatory Order Halts EPA's Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Apr. 6, 2017); DOT, Report on DOT Significant Rulemakings, https://www.transportation.gov/regulations/report-on-significant-rulemakings (last visited May 3, 2017) (stating that "DOT rulemakings are being evaluated in accordance with Executive Order[] 13771"). Because the Executive Order cannot be implemented consistent with law, and is nonetheless being implemented, provisos directing agencies to comply with the law do not save it.

Indeed, OMB's instructions confirm that Executive Order 13771 does *not* mean that, "if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the

Executive Order itself instructs the agency to follow the law." *Building & Const. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002). OMB states that, even when issuing a rule subject to a legal deadline or pursuant to a statute that prohibits consideration of cost, Executive Order 13771 requires that two or more regulations must be repealed to offset the costs of each new one. *See* Interim Guidance 5 (stating that repeal and offset requirements apply even if new rule is subject to legal deadline); Guidance Q18 (stating that repeal and offset requirements apply even if new rule issued pursuant to a statute that prohibits consideration of cost). Thus, OMB itself construes Executive Order 13771 to require consideration of unlawful and arbitrary factors. The boilerplate instruction to conform to applicable law cannot overcome the facts that Executive Order 13771 imposes congressionally unauthorized intra- and inter-agency regulatory trading requirements and that its fundamental repeal and offset requirements direct agencies to violate the law.[6]

3. The Executive Order cannot be sustained by reference to the President's conclusive and preclusive authority.

Because Executive Order 13771 is "incompatible with the expressed or implied will of Congress," *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), it can be sustained only if permitted as an exercise of the President's own "exclusive" and "conclusive" power. *Zivotofsky*, 135 S. Ct. at 2084. The Executive Order does not meet this standard: It was not undertaken

[6] The government's position in a recent case challenging Executive Order 13768, which purports to make so-called "sanctuary cities" ineligible to receive federal grants, also supports reading the "consistent with applicable law" provisions to refer to procedural requirements. There, the government argued that the phrase "to the extent consistent with law" means that "the President has directed the Secretary [of Homeland Security] and the Attorney General to follow the governing legal limitations, such as the procedural requirements for making or revoking the federal grants." Defs. Opp. to Pltfs. Motion for Prelim Inj., *Cty. of Santa Clara v. Trump*, No. 17-574 (N.D. Cal.), filed Mar. 9, 2017, at 10-11, available at https://www.clearinghouse.net/chDocs/public/IM-CA-0089-0015.pdf. Here, phrases directing agencies to continue to comply with *procedural* requirements, such as deadlines and notice-and-comment rulemaking, do not lessen the *substantive* constitutional defects of Executive Order 13771 or its implementation.

pursuant to the President's Article II exclusive authority as commander in chief, his sole power to make treaties, or his exclusive authority to recognize foreign states, for example. *See id.* at 2085. The President has no similar inherent authority with respect to substantive rulemaking. *See Chrysler Corp*. 441 U.S. at 302, 404–05. No power granted to the President under the Constitution authorizes him to revise statutes to condition issuance of new regulations on repeal of two or more existing regulations that offset the new costs, or otherwise to direct agencies to violate their governing statutes or the APA. *See supra* pp. 19–21, 24–30.

* * * * *

Executive Order 13771 elevates the President's policy preferences—capping new regulatory costs and eliminating existing regulations—above congressional mandates that agencies develop regulatory programs to protect public health, safety, and the environment. Because the Executive Order is unauthorized by either Congress or the Constitution, it violates the President's duty to take care that the laws be faithfully executed and infringes on congressional authority in contravention of the separation of powers. The Court should declare the Executive Order ultra vires and unconstitutional.

III. Because Executive Order 13771 is ultra vires, agency implementation of the Order is ultra vires.

"[F]or agencies charged with administering congressional statutes … their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *City of Arlington*, 133 S. Ct. at 1869. As discussed above, no statute authorizes the agency defendants to delay, weaken, or forgo new rules for the purpose of offsetting costs imposed by other rules. No statute authorizes these defendants, when determining whether to issue a proposed or final rule, to choose between the benefits of that rule and the benefits of other rules that, pursuant to the Executive

Order, must be repealed in the same fiscal year in which the new rule is adopted. Nonetheless, Executive Order 13771 directs these defendants to exercise their authority in ways that are contrary to the Constitution and their governing statutes, and that violate the bar against agency action that is arbitrary, capricious, or contrary to law.

Because Executive Order 13771 is ultra vires and unconstitutional, agency action implementing the Order is as well. *See Chrysler Corp.*, 441 U.S. at 304–05 (stating that a regulation issued pursuant to an executive order cannot have force and effect of law absent a corresponding delegation of authority by Congress). Accordingly, the Court should enjoin the federal agency defendants from implementing it.

IV. The OMB Guidances are ultra vires and, in addition, must be set aside under the APA.

OMB issued its Interim Guidance and Guidance to explain to agencies how to implement section 2 of the Executive Order in fiscal year 2017. Executive Order 13771 is the sole basis for the OMB Guidances. Because that Order is ultra vires, the OMB Guidances instructing agencies on compliance with it are likewise ultra vires. Although in issuing the two Guidances OMB "act[ed] at the behest of the President," the "courts have power to compel subordinate executive officials to disobey illegal Presidential commands.'" *Reich II*, 74 F.3d at 1328 (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)).

In addition, although a presidential executive order is not directly reviewable under the APA, *see Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), OMB's issuance of guidance is final agency action subject to APA review. The APA empowers courts to set aside final agency action that is arbitrary, capricious, or not in accordance with law, contrary to constitutional right or power, or in excess of statutory authority. 5 U.S.C. § 706(2)(A)–(C). The OMB Guidances fail on all counts.

A. Agency action is "final" for purposes of the APA when it "mark[s] the consummation of the agency's decisionmaking process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted). In *Bennett*, for example, the Supreme Court considered a challenge to written statements of one agency, the Fish and Wildlife Service (FWS), about how a proposed action by another agency, the Bureau of Reclamation, would affect endangered species and setting forth steps with which the Bureau had to comply to minimize the impact on endangered species. *Id*. at 158. After the Bureau stated that it would operate the project in compliance with the written statement, a group of plaintiffs sued the FWS (not the Bureau) to challenge the written statements, arguing that the FWS statements affected the plaintiffs' use of the affected waterways for recreational, aesthetic and commercial purposes. *Id*. at 159. Finding that the written statements were the culmination of FWS's decisionmaking and that the actions it compelled the Bureau to take had adverse consequences for the plaintiffs, the Court held that the statement was "final agency action" subject to challenge under the APA. *Id*. at 178. *Cf. Dalton v. Specter*, 511 U.S. 462, 798 (1994) (holding that Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census did not constitute "final agency action" where the report was "more like a tentative recommendation than a final and binding determination").

Importantly, "it is well established that interpretative guidance issued without formal notice and comment rulemaking can qualify as final agency action." *Arizona v. Shalala*, 121 F. Supp. 2d 40, 48 (D.D.C. 2000) (citing *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1021 (D.C. Cir. 2000), *McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1321 (D.C. Cir. 1988), and *Ciba-Geigy Corp. v. EPA,* 801 F.2d 430, 435–38 (D.C. Cir. 1986)).

Here, the OMB's issuance of the Interim Guidance and Guidance is final agency action. The OMB Guidances provide agencies with specific instructions for implementing the Executive Order, including that the Order applies to "significant regulations" as defined by Executive Order 12866 and that the value of "costs" to be offset by repeal of existing regulations must be determined without regard to net benefits or sunk costs. *See* Interim Guidance 2-5; Guidance Q2, Q3, Q21. The Interim Guidance and the April Guidance "supplement[ing]" it, *see* Guidance 1, are not of a tentative or interlocutory nature; they convey a definitive pronouncement as to implementation of the Executive Order in 2017. *See* Interim Guidance 1 ("Specifically, the guidance explains, for purposes of implementing Section 2 in Fiscal Year 2017, the following requirements …"); *id.* at 2 ("[B]eginning immediately, agencies planning to issue one or more significant regulatory action on or before September 30, 2017, should …."); Guidance 1 ("The guidance explains, for purposes of implementing Section 2, the following requirements: …"); *id.* at 2 (:The incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions."). The "language and subject matter are such as to indicate that [OMB] has completed its decisionmaking process" for 2017. *Arizona v. Shalala*, 121 F. Supp. 2d at 48 (internal quotation marks omitted); *see also NRDC v. EPA*, 643 F.3d 311, 319–21 (D.C. Cir. 2011) (concluding that guidance mandating certain action by EPA regional directors was final agency action); *Appalachian Power Co.*, 208 F.3d at 1023 (concluding that guidance giving regulators their "marching orders" and expecting them to "fall in line" was final agency action); *cf. CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (concluding directive in a press release announcing EPA would no longer consider third-party human studies bound agency "with the 'force of law'"). Notably, although the Interim Guidance stated that OMB "may revise [its] Q&As," Interim Guidance 2, the Interim Guidance includes no such statement with respect to

the "General Requirements." *See* Interim Guidance 1–2. The April Guidance also includes no such statement. *See* Guidance 1. Moreover, as in *Reich I*, the agency cannot avoid review of final agency action by leaving open the possibility that it may grant exemptions. *Reich I*, 57 F.3d at 1100; *see supra* p. 16.

The final nature of the OMB Guidances is evidenced by the fact that agencies are complying with them as they implement the Executive Order. *See* 82 Fed. Reg. at 12323 (Department of Labor proposed rule, citing OMB Interim Guidance and statement of applicability as to scope of Executive Order 13771); Taxnotes, *No Substantive IRS Guidance Coming for a While, Official Says*, Feb. 14, 2017, http://www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says (reporting statements of IRS official about implementation of the Executive Order and OMB guidance).

B. The OMB Guidances are unlawful under the APA because they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). They condition agencies' ability to issue new "significant regulations" on revocation of two (or more) existing regulations, without consideration of whether the benefits of either the new or the existing regulations outweigh their costs, in disregard of the statutory criteria that govern agency rulemaking, as explained above. OMB's statements that agencies within a department, or even entirely separate agencies, may trade with one another, *see* Interim Guidance 6; Guidance Q30 & Q31, also highlight the arbitrariness of the OMB Guidances and the Executive Order they implement: Unrelated costs (and public protections), potentially borne by unrelated industries (and segments of the public) may be traded off for one another. *See supra* p. 33–34.

The OMB Guidances also "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. They effectively direct agencies to make regulatory decisions based on

cross-agency regulatory cost caps and the President's desire to reduce the number of regulations, rather than the factors Congress directed the agencies to consider in rulemaking. Instead of focusing on the "problems" that Congress identified—consumer, health, safety, and environmental harms—the OMB Guidances conceive of "the problem" as regulations themselves and set out to eliminate them, regardless of the harm to individuals from repeal. OMB has no warrant from Congress to recast the congressionally defined objectives of federal agencies to suit the deregulatory policy of the President. *See Massachusetts v. EPA*, 549 U.S. at 532–33.

"[T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation." *State Farm*, 463 U.S. at 42. Indeed, a draft 2016 OMB report to Congress estimates that the annual benefits from all major regulations over the last ten years were between $208 billion and $627 billion, while the costs were between $57 billion and $85 billion. OMB's 2005 report to Congress estimated that major rules from the previous ten years provided benefits of $69.6 billion to $276.8 billion, while costing between $34.8 billion and $39.4 billion.[7] The OMB Guidances, however, condition issuance of new regulations on repeal of existing regulations without regard to the benefits that new regulations afford the public in furtherance of congressional mandates. The OMB Guidances are thus arbitrary and capricious. *Cf. State Farm*, 463 U.S. at 42 ("If Congress

---

[7] *See* OMB, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf (last visited May 3, 2017); OMB, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf (last visited May 3, 2017).

established a presumption from which judicial review should start, that presumption … is not *against* safety regulation, but *against* changes in current policy that are not justified by the rulemaking record.”).

C. The OMB Guidances also exceed OMB’s statutory authority. 5 U.S.C. § 706(2)(C). “A claim that agency action is ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,’ necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority. *W. Union Tel. Co. v. FCC*, 541 F.2d 346, 354 (3d Cir. 1976) (quoting 5 U.S.C. § 706(2)(C)) (citing *Fed. Power Comm’n v. Moss*, 424 U.S. 494 (1976)). OMB has no statutory authority to dictate that agencies repeal two or more rules for each new rule issued. The only purported authority is the Executive Order, and as explained above, it is unlawful. *See Chrysler Corp.*, 441 U.S. at 304–05 (stating that an executive order cannot provide a lawful basis for rulemaking not authorized by law).

CONCLUSION

For the foregoing reasons, this Court should declare the Executive Order unlawful and set it aside, declare the OMB Interim Guidance and Guidance unlawful, and enjoin implementation of the Executive Order, the Interim Guidance, and the Guidance.

Dated: May 15, 2017

Respectfully submitted,

/s/ .

Allison M. Zieve
(DC Bar No. 424786)
Scott L. Nelson
(DC Bar No. 413548)
Sean M. Sherman
(DC Bar No. 1046357)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Michael E. Wall
(CA Bar No. 170238)
Cecilia D. Segal
(CA Bar No. 310935)
NATURAL RESOURCES DEFENSE COUNCIL, INC.
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100

Counsel for Natural Resources Defense

Council, Inc.

Guerino J. Calemine, III
(DC Bar No. 465413)
COMMUNICATIONS WORKERS OF AMERICA
501 3rd Street NW
Washington, DC 20001
(202) 434-1100

Counsel for Communications Workers of America

Counsel for all Plaintiffs

Patti A. Goldman
(DC Bar No. 398565)
EARTHJUSTICE
705 2nd Avenue, #203
Seattle, WA 98104
(206) 343-7340

Counsel for all Plaintiffs