**No. 22-30087**

# United States Court of Appeals for the Fifth Circuit

THE STATE OF LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL, JEFF LANDRY; THE STATE OF ALABAMA, BY AND THROUGH ITS ATTORNEY GENERAL, STEVE MARCHALL; THE STATE OF FLORIDA, BY AND THROUGH ITS ATTORNEY GENERAL, ASHLEY MOODY; THE STATE OF GEORGIA, BY AND THROUGH ITS ATTORNEY GENERAL, CHRISTOPHER M. CARR; THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH ITS ATTORNEY GENERAL, DANIEL CAMERON; THE STATE OF MISSISSIPPI, BY AND THROUGH ITS ATTORNEY GENERAL, LYNN FITCH; THE STATE OF SOUTH DAKOTA, BY AND THROUGH ITS GOVERNOR, KRISTI NOEM; THE STATE OF TEXAS, BY AND THROUGH ITS ATTORNEY GENERAL, KEN PAXTON; THE STATE OF WEST VIRGINIA, BY AND THROUGH ITS ATTORNEY GENERAL, PATRICK MORRISEY; THE STATE OF WYOMING, BY AND THROUGH ITS ATTORNEY GENERAL, BRIDGET HILL,
PLAINTIFFS-APPELLEES,

*v.*

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; CECILIA ROUSE, IN HER OFFICIAL CAPACITY AS CHAIRWOMAN OF THE COUNCIL OF ECONOMIC ADVISERS; SHALANDA YOUNG, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET; KEI KOIZUMI, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE OFFICE OF SCIENCE AND TECHNOLOGY POLICY; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY; DEB HAALAND, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; GINA RAIMONDO, SECRETARY, U.S. DEPARTMENT OF COMMERCE; XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; PETE BUTTIGIEG, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; JENNIFER GRANHOLM, SECRETARY, U.S. DEPARTMENT OF ENERGY; BRENDA MALLORY, IN HER OFFICIAL CAPACITY AS CHAIRWOMAN OF THE COUNCIL ON ENVIRONMENTAL QUALITY; MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS WHITE HOUSE NATIONAL CLIMATE ADVISOR; BRIAN DEESE, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL ECONOMIC COUNCIL; JACK DANIELSON, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF TRANSPORTATION; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF INTERIOR; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES,
DEFENDANTS-APPELLANTS.

*APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, NO. 21-CV-1074, HON. JAMES DAVID CAIN, JR., PRESIDING*

## BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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## CERTIFICATE OF INTERESTED PARTIES

*The State of Louisiana, et al. v. Joseph R. Biden, Jr., et al.*, No. 22-30087:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

***Amicus*:** America First Legal Foundation is a nonprofit corporation that does not have a parent corporation and is not publicly held.

***Counsel for Amicus*:** Christopher E. Mills of Spero Law LLC; Gene P. Hamilton of America First Legal Foundation.

*/s Christopher Mills*
Christopher Mills

Counsel for *Amicus Curiae*

June 23, 2022

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## INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

America First Legal has a substantial interest in this case. As a participant in notice-and-comment rulemaking and an organization often engaged in litigation about administrative law, it has an interest in ensuring that the Executive Branch does not abuse the Constitution and the Administrative Procedure Act, as it has done here.[1]

[1] All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

## INTRODUCTION

With the stroke of a pen, President Biden created a new government entity—the Interagency Working Group—and ordered it to make a massively significant policy determination that would immediately bind other agencies in their own decision-making: how to calculate the costs of greenhouse gas emissions. But in our system of government, all legislative power to make rules is vested in Congress. The legislative "process, cumbersome though it may often seem to eager onlookers, ensures that the People can be heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life." *Jarkesy v. SEC*, 34 F.4th 446, 459–60 (5th Cir. 2022). "[T]hat accountability evaporates if a person or entity other than Congress exercises legislative power." *Id.* at 460.

Congress did not authorize this new entity's existence, much less give it the power to promulgate binding rules on an issue of national importance. Yet President Biden commandeered agency staff from their congressionally mandated duties and ordered the Interagency Working Group to develop "estimates" of these costs. Then, he mandated that other agencies "shall use" those estimates in rulemaking, without action by Congress or even further action from the President. Because the estimates were promulgated without authority, they are *ultra vires* and void.

The estimates also violate the Administrative Procedure Act. The APA's procedural requirements, including notice and comment, are a central method of protecting the rule of law in a government that operates largely through unelected bureaucracies. Yet these estimates, foisted on all parts of the government by a bureaucratic oddity that was not authorized by Congress, complied with none of the APA's requirements. The public had no chance to comment on this massive policy shift before all agencies were forced to comply.

The government waves these problems away, arguing that the estimates are not binding on other agencies and deficiencies can be challenged in future rulemakings. But accepting that argument would provide a roadmap for routine evasion of APA requirements.

First, President Biden *ordered* that agencies "shall use" the estimates; they are automatically binding. Second, the government well knows that the public will *not* have a full opportunity to address the estimates in future rulemakings. A future agency will consider itself bound, and the government will argue that judicial review is limited to determining whether the agency's reliance on the estimates was reasonable—not whether the estimates themselves comply with the law. Unelected bureaucracies will thereafter resolve major questions in a like manner: labeling all important policy choices as "internal advice or assistance" and then claiming that future agencies can reasonably rely on those choices. The effect will be to insulate the most

significant decisions that govern the People from public input, congressional oversight, and judicial review.

That cannot be the law. The Court should affirm the preliminary injunction against the unlawful estimates.

## ARGUMENT

### I. The Working Group's estimates violate the Constitution.

Though the Working Group's estimates constitute unlawful agency action for many reasons, the government's focus on the APA and its definitions obscures the more fundamental defect: the Working Group itself is *ultra vires* because Congress never authorized its existence or promulgation of binding estimates. No congressional statute authorizes the creation of the Working Group or vests the Working Group with power to promulgate rules binding on other agencies. As the government acknowledges, "[n]o statute establishes [the Working Group] or delegates it any independent authority," yet it has made "binding" estimates. Br. 43–44. Those estimates are thus illegal.

#### A. Congress did not authorize the Working Group.

The Constitution divides the powers of the sovereign United States between three branches. To "protect liberty," "[t]he 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." *INS v. Chadha*, 462 U.S. 919, 950–51 (1983). Article I orders that "[a]ll legislative Powers herein granted shall be vested in a

Congress of the United States." U.S. Const. art. I, § 1. "Government actions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.'" *Jarkesy*, 34 F.4th at 461 (quoting *Chadha*, 462 U.S. at 952). The Framers understood the legislative power to include "the power to prescribe general rules for the government of society." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (cleaned up). "Accompanying that assignment of power to Congress is a bar on its further delegation." *Id.* at 2123 (plurality opinion). When Congress seeks to delegate some of its authority, at minimum it must "lay[] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* Under the "traditional tests," Congress must "ma[k]e all the relevant policy decisions," leaving to the other branches only "the responsibility to find facts and fill up details." *Id.* at 2139 (Gorsuch, J., dissenting).

Article II vests "the executive power" in the "President of the United States of America." U.S. Const. art. II, § 1. The Framers split the legislative and executive powers because, as Madison explained, "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'" The Federalist No. 47. Thus, the President "cannot of himself make a law," *id.*, and "except for recommendation and veto, [he] has no legislative power," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

Creating a new governmental entity that will set rules for other parts of the government—and ultimately, the People—is a core aspect of the legislative power reserved to Congress. Often, assessing a congressional delegation requires courts to look at "what task [the statute] delegates and what instructions it provides." *Gundy*, 139 S. Ct. at 2123. Not so here: Congress did not authorize the *existence* of the Working Group, much less its promulgation of binding estimates. And an executive agency "literally has no power to act" "unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Courts apply these principles regularly in the context of agency action under the APA, but the principles themselves apply regardless of the APA's definitions and strictures. "[N]o matter how important, conspicuous, and controversial the issue," an executive entity's "power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (cleaned up). Such "authority may not be lightly presumed." *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (Jones, C.J.). And "if there is no statute conferring authority," the executive entity "has none." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *see Glob. Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1296 (5th Cir. 1983) ("[A]n administrative agency cannot exceed the specific statutory authority granted it by Congress.").

If there is no "statutory authorization for its act, an agency's action is plainly contrary to law and cannot stand." *Atl. City Elec.*, 295 F.3d at 8 (cleaned up). "Both 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 v. FCC*, 569 U.S. 290, 297 (2013). "To permit an agency to expand its power . . . would be to grant to the agency power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 374–75.

Here, as the government concedes, Congress did not authorize the creation, existence, or activities of the Working Group. Br. 43. The government candidly admits that "[n]o statute establishes [the Working Group] or delegates it any independent authority." *Id.* The government thinks that helps it, arguing that the Working Group must be an arm of the President because Congress did not "establish[] it" and the President made its estimates "binding." Br. 43–44. But those facts establish—rather than refute—the Working Group's illegality. Both the Executive Order and the Working Group's actions show that the Group acted as an extra-legal governmental body, developing and promulgating legislative rules without statutory authorization.

By the President's order, the Working Group must formulate and publish an interim "social cost of carbon," "social cost of nitrous oxide," and "social cost of methane." Executive Order No. 13,990, 86 Fed. Reg. 7037, 7040 § 5(b)(ii)(A) (Jan.

20, 2021). Other "agencies shall use" these interim estimates "until final values are published" by the Working Group, when agencies will have to use those final, "published" figures. *Id.* § 5(b)(ii). These requirements on other agencies do not depend on any further action by the President, much less Congress.

In other words, the Working Group is not tasked with simply "advis[ing] and assist[ing] the President." Gov. Br. 44 (cleaned up). Some of the Working Group's activities, like "provid[ing] recommendations to the President . . . regarding areas of decision-making, budgeting, and procurement by the Federal Government where the [estimates] should be applied," might qualify as internal presidential assistance. Executive Order § 5(b)(ii)(C). But publishing binding rules does not. The Group exercises independent discretion and publishes legislative rules that must be used by other parts of the government. The Group is purporting to do legislative work, without legislative authorization. That violates the Constitution.

The government contends that the Working Group's authority to promulgate legislative rules "flows" "directly from the President" and is merely a "presidential delegation of authority." Br. 43. But the President cannot delegate authority he does not have. Without a proper congressional delegation, no part of the Executive Branch, regardless of how the APA labels it, can promulgate legislative rules. "[R]ulemaking power originates in the Legislative Branch and becomes an executive

function only when delegated by the Legislature to the Executive Branch." *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989).

Next, the government suggests that while "many of Working Group's members are agency staff, when they serve on the Working Group, they act 'as the functional equivalents of assistants to the President.'" Br. 44. Yet again, the government's defense only underscores the problem. The Working Group is composed of officers from other, congressionally authorized entities. Executive Order § 5(b). These officers include various cabinet Secretaries and the EPA Administrator. *Id.* By what authority may the President take government officials away from their congressionally authorized duties to perform legislative duties *not* authorized by Congress?

Citing various APA and FOIA cases, the government tries to redirect to whether the Working Group qualifies as an "agency" as defined by one of those statutes. Br. 42–44. That misdirection misses the point; even if the Group were not an APA "agency," it cannot exercise legislative power absent a proper legislative delegation. A quasi-agency with one tentacle in the President's office cannot exercise unauthorized legislative power any more than the President himself can.

Assuming the Working Group's APA's classification matters to the question of proper authorization, it is an "agency." Invoking cases tangentially related to the APA, *see* Br. 43 n.9, the government curiously omits the APA's definition of

"agency": "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1). The definition specifically exempts "the Congress," "the courts of the United States," and even certain core executive functions like "military authority exercised in the field in time of war or in occupied territory." *Id.* But the definition does *not* exempt executive branch authorities generally. *Id.* The Working Group qualifies under the APA's broad definition, for the Group purports to have authority to develop the estimates. That ends the matter. *See Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 622 (5th Cir. 2013) ("If the statutory text is unambiguous, our inquiry begins and ends with the text.").

Considering the various (non-APA and out-of-circuit) precedents cited by the government confirms this conclusion. In *Soucie v. David*, the D.C. Circuit said that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions," but not units whose "sole function [is] to advise and assist the President." 448 F.2d 1067, 1073, 1075 (D.C. Cir. 1971). Considering whether the Office of Science and Technology qualified as an agency for FOIA purposes, the court emphasized that the Office had *both* advising-and-assistance authority *and* "evaluate[d] the scientific research programs of the various federal agencies." *Id.* at 1073–74. Because the Office's sole function

was not advice and assistance, the court held that it "must be regarded as an agency." *Id.* at 1075.

Likewise, in *Pacific Legal Foundation v. Council on Environmental Quality*, the court held that the Council on Environmental Quality was an agency under the Sunshine Act because it "not only advised the President, but . . . was also independently authorized to evaluate federal programs" and "issue guidelines to federal agencies." 636 F.2d 1259, 1262–63 (D.C. Cir. 1980). The court rejected an argument that the Council is only an agency some of the time: "a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific functions in each individual case." *Id.* at 1264.

Just like the entities in those cases, the Working Group here exercises independent authority because, without any further presidential action, it guides other agencies. Unlike the Office of Administration in another case cited by the government, "everything" the Working Group does is *not* "directly related to the operational and administrative support of the work of the President and his . . . staff." *CREW v. Office of Admin.*, 566 F.3d 219, 224 (D.C. Cir. 2009) (Gov. Br. 43). Instead, the Group promulgates estimates that bind other agencies, no matter if the President says or does anything else with the Group. *See* Executive Order §5(b)(ii). As the D.C. Circuit has said, "less continuing interaction with the President" equals "more independence." *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (cited

at Gov. Br. 44); *cf. id.* at 1294 (a Task Force not an agency because when it "wished directions given to the executive branch, it found it necessary to advise the President to put such instructions in another Executive Order"); *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 550, 552 (2d Cir. 2016) (cited at Gov. Br. 43–44) (the National Security Council is not an agency because it was only tasked with making "recommendations" to the President).

In short, any actions of the Working Group are unlawful because, as the government admits, Congress has conferred no power upon it. The estimates are *ultra vires* because the Working Group has not been granted any power by the only body constitutionally authorized to make legislative rules. The Working Group "literally has no power to act," and sanctioning its estimates would "grant . . . the agency power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 374–75.

### B. Congress did not authorize the adoption of binding estimates.

Even if Congress had somehow authorized the Working Group, it did not authorize its promulgation of estimates binding on other agencies. "[Courts] expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. DHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (cleaned up). This "major question doctrine" is "designed to protect the separation of powers" by protecting the Constitution's lawmaking process. *NFIB v. OSHA*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

In *NFIB v. OSHA*, for example, the Supreme Court stayed the Biden Administration's vaccine mandate, which required private employers to enforce a mandatory COVID-19 vaccination policy. *Id.* at 664, 667 (majority opinion). OSHA, an administrative agency, published the vaccine mandate—not Congress. *Id.* at 665. The Supreme Court invalidated the mandate, explaining that administrative agencies "possess only the authority that Congress has provided" and that Congress did not "clearly" grant the agency the power to require vaccines. *Id.* at 665–66; *accord BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("There is no clear expression of congressional intent . . . to convey OSHA such broad authority, and this court will not infer one. Nor can the Article II executive breathe new power into OSHA's authority—no matter how thin patience wears.").

This case is much easier than the vaccine mandate case, for Congress has said *nothing* about the Working Group's adoption of its estimates. Far from clearly authorizing the significant, controversial, and far-reaching development of social costs for various emissions, Congress has been silent. Because Congress did not grant the Working Group the power to formulate estimates and then force the estimates on other agencies, the Group has no power to do so. Holding otherwise would contradict the purpose of the major question doctrine: to protect the separation of powers, and ultimately the People's liberty. *See NFIB*, 142 S. Ct. 668–69 (Gorsuch, J., concurring).

In places, the government suggests that agencies need not "use the Interim Estimates" and that they are not binding. *E.g.*, Br. 25. But the government can't quite make up its mind on this point, elsewhere conceding that "E.O. 13990 directs federal agencies to use the Interim Estimates when they monetize the value of changes in greenhouse gas emissions." Br. 24; *see also* Br. 44 ("[T]he Interim Estimates are binding only to the extent that the President made them so."). The government describes the goal of the Working Group as stopping agencies from "using varying estimates of the social cost of carbon dioxide" and imposing "consistency across agencies." Br. 8. The government even favorably cites decisions finding that refusing to use the then-rescinded estimates was arbitrary and capricious. Br. 38 n.7 (citing *California v. Bernhardt*, 472 F. Supp. 3d 573, 611–14 (N.D. Cal. 2020)).

Whatever the government's view, this Court already and correctly explained that "agencies must use the Interim Estimates when they conduct cost-benefit analyses for regulatory or other agency action." Stay Order 4. That matches the plain text of the Executive Order, which directed the Working Group to "publish an interim SCC, SCN, and SCM within 30 days" and stated that "agencies shall use" those Interim Estimates "when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published." Executive Order § 5(b)(ii)(A). Though the government points to generic language that the Executive Order "may be implemented only where

consistent with applicable law," it immediately argues that no "statutory provision" "actually prohibits agency reliance on the Interim Estimates." Br. 49. So even the government itself does not think that the "consistent with applicable law" limitation frees any agency from forced use of the estimates.

On that issue, the government finds it significant that no "statute contain[s] a clear statutory prohibition against the methodology supporting the Interim Estimates" or "agency reliance on" them. Br. 49, 53. That misses the point entirely. "[I]t is wrong to speak of agencies as having *any* inherent authority." *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016); *see id.* at 684 (Henderson, J., concurring in part and in judgment). Agencies have "no constitutional or common law existence or authority, but only those authorities conferred upon [them] by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping" with the Constitution. *Id.* at 1082 (cleaned up). Thus, courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Id.* (cleaned up).

Last, the government's suggestion that agencies "continued to use standardized SC-GHG estimates" after President Trump disbanded the working group (Br. 11) is misleading if not false. As the government's own cited examples show,

agencies then used the general cost-benefit principles in Circular A-4 to devise their own estimates. Br. 11 n.3; *see also Bernhardt*, 472 F. Supp. 3d at 611 (cited at Br. 38 n.7). That is the opposite of "standardized" government-wide estimates.

Along the same lines, the government's broader theme that the estimates are no different from routine use of cost-benefit principles (Br. 1, 4, 58) confuses an agency's decision-making *process* with its *decision*. The purpose of the Working Group is to make the decision, not provide a process for others to use. So while "[c]ompliance with Circular A-4," for example, "is not binding on any agency," Stay Order 3, the Working Group's estimates *are* binding. Because these binding estimates lacked statutory authorization, they are unlawful. *Cf. Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) ("[W]hen an agency wants to state a principle in numerical terms, terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking." (cleaned up)); *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) ("[W]here agency action withdraws an entity's previously-held discretion, that action alters the legal regime" and "binds the entity."); *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) ("[T]o

the extent that the directive . . . establishes a binding norm," "it effectively replaces agency discretion with a new binding rule of substantive law." (cleaned up)).[2]

* * *

"If administrative agencies are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people," "we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties." *Jarkesy*, 34 F.4th at 462 n.16 (quoting *Cochran v. SEC*, 20 F.4th 194, 222 (5th Cir. 2021) (Oldham, J., concurring)). The starting question here is not whether any statute *prohibits* the Working Group or its estimates, but what statute *authorizes* them. There is none. Thus, both the Working Group and its estimates are invalid and beyond the Executive's authority.

## II. The Working Group's estimates violate the APA.

As explained, the Working Group is an agency under the APA because it is an "authority of the Government of the United States." 5 U.S.C. § 551(1). Its estimates are a legislative "rule" because they prescribe "valuations, costs, or

[2] Even general use of cost-benefit analysis requires congressional authorization. *See generally Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). A fortiori, promulgating binding cost determinations does too.

accounting." *Id.* § 551(4). The government argues that the estimates were shielded from notice-and-comment requirements because "[t]hey are inputs in analyses of proposed agency actions" and do not "compel a particular outcome." Br. 50. Accepting this argument would enable routine evasion of APA requirements, including notice and comment rulemaking. The Executive could shield all major decisions from meaningful notice and comment by recharacterizing them as internal advice that merely provides a default rule for agencies, no matter how much that rule will determine the course of other rulemakings. The estimates are subject to the APA because they set a legislative rule, and the government skirted the APA's requirements. The estimates are unlawful.

"It is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). "The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). The APA's core mandate of notice and comment gives the People the chance to participate and influence their government's policy. To issue a rule under the APA, an agency is generally required to notify the public of the proposed rule, invite comments, consider and respond to the comments, and explain its reasoning in its final rule. 5 U.S.C. § 553(b)–(c). The agency must "examine the

relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

"Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). Requiring an agency to "disclose the basis of its action" also "permit[s] meaningful judicial review." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (cleaned up).

The government does not dispute that it failed to follow the APA's procedural requirements. Instead, it argues that "the APA will ultimately provide an adequate opportunity for meaningful review of any individual agency's future use of the Interim Estimates as a basis for issuing a final rule or other final agency action." Br. 53; *see* Br. 50–51. The government's argument cannot be squared with the Executive Order's *requirement* for agencies to use the Working Group's estimates. Because of that requirement, the estimates have "binding effect on agency discretion." *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015); *see id.* ("If a statement denies the decisionmaker discretion in the area of its coverage then the statement is binding, and creates rights or obligations." (cleaned up)); *accord Prof'ls. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595–96 (5th Cir. 1995).

The government identifies no basis on which agencies could depart from that binding norm, and indeed *argues* that they have no such authority. Br. 49. Sure enough, in practice "incorporation of the SCC into cost-benefit analysis appears to be almost automatic" even under the prior estimates. Arden Rowell, *Foreign Impacts and Climate Change*, 39 Harv. Envtl. L. Rev. 371, 402 (2015). Thus, the new estimates constitute a binding legal rule, not merely some optional statement of policy that would have to be supported by an agency in the future "just as if the policy statement had never been issued." *Shalala*, 56 F.3d at 596.

Though the government insists that the estimates would be but "one among many inputs" in future rulemakings (Br. 1), notice-and-comment is not excused for any part of a substantive rulemaking. And the government's argument is disingenuous, given that a major problem with the estimates is that they can (and have been) manipulated to be so "overwhelming" as to all but determine the outcome of future rulemakings (and demands for rulemakings). *High Country Conservation Advocs. v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014). Even if the estimates do not swamp other considerations, there is a heavy thumb on the scale for certain outcomes.

Finally, after other agencies use the estimates, as required by the President, the government can be expected to argue that those uses are *not* subject to full APA procedures and judicial review—underscoring that the estimates should be reviewed

now. We know that because the government has already made this argument, even about the non-binding estimates offered by President Obama's working group. Defending the Department of Energy's use of those estimates in one rulemaking, the government argued that the agency could "rely on" "qualified experts" like the interagency working group. Brief for Respondents at 35, *Zero Zone, Inc. v. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016) (No. 14-02334, Doc. 39). DOE's rulemaking simply adopted wholesale the estimates. *See* 79 Fed. Reg. 17,726, 17,779, 17,805 (2014). And in a decision repeatedly praised by the government here (Br. 10, 39, 49–50), the Seventh Circuit agreed that the agency did not need to "respond to the specific points" raised by commenters about the estimates as long as it responded to "general concerns and made clear that, despite those concerns, the calculation of SCC could be used." *Zero Zone*, 832 F.3d at 678.

The government's argument in the case after this one is predictable. The second "agency need not undertake a separate, independent analysis of the issues" resolved by the first agency, the government will say. *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006) (cleaned up). "[T]he critical question" in the later case is just "whether the [second] agency's *reliance* was arbitrary and capricious, not whether the [original decision] itself is somehow flawed." *Id.* Even though the second agency "makes the final decision" on the future rulemaking, "it functions well within its statutory directive to rely on the [Working Group's] expertise so long as a

basis for its decision is apparent in the record." *Ergon-West Virginia, Inc. v. EPA*, 980 F.3d 403, 414 (4th Cir. 2020).

Letting the government get away with this neat trick of calling a substantive legal rule "internal advice or assistance" and then claiming that the rule cannot be collaterally attacked in a subsequent proceeding would enable routine avoidance of the APA's requirements. Major, policy-laden inputs into rulemaking would be decided and shielded behind this "internal" veil. Congressional oversight and public notice-and-comment could be avoided by proclaiming an exercise of executive power. And judicial review would be forestalled by labeling the first rule "internal" and successive rules as reasonable applications of existing, expert decisions. Unelected bureaucracies would set unreviewable law. In a system of government that depends on the separation of powers, that result would be intolerable.

Even accepting the government's dubious claim—that the estimates would be subject to full procedural review in future cases—they are still binding norms that have already taken effect. They serve as the default legal rule in all rulemakings. They constrain agency discretion. Thus, they must go through APA notice-and-comment. Because they did not, they are unlawful.

## CONCLUSION

The Court should affirm the preliminary injunction.

Respectfully submitted,

s/ Christopher Mills

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Dated: June 23, 2022

/s Christopher Mills
Christopher Mills

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

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