

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' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

Agencies have the power to engage in rulemaking only by virtue of authority delegated by Congress, and Congress has not authorized any agency to make issuance of a new rule contingent on repeal of two or more separate rules. No statute allows federal agencies to delay, defer, or abandon new regulations unless and until they repeal existing regulations to offset new costs. The President's command in Executive Order 13771 to "knock out two" rules for each new one issued¹ upends the rulemaking system that Congress established, "put[ting] in place a constant deregulatory" regime for the purpose of "deconstruction of the administrative state."² The Executive Order offends the separation of powers by usurping the constitutional lawmaking power assigned to Congress and violates the President's unambiguous duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

While never identifying a single statute under which Executive Order 13771's regulatory trading requirements are permissible, defendants' motion to dismiss is framed around two overriding themes: first, that the Executive Order is a mere policy statement that does not mark a significant change from the regulatory policies of numerous past presidents, including President Obama, and second, that challenges to implementation of the Executive Order are premature. Both are fundamentally wrong.

¹ Andrew Soergel, *Trump Executive Order Embraces 'One-In, Two-Out' Regulatory Scheme*, U.S. News & World Report, Jan. 30, 2017, available at <https://www.usnews.com/news/articles/2017-01-30/trump-executive-order-embraces-one-in-two-out-regulatory-scheme> (quoting President Trump) (attached as Ex. A to Zieve Decl.).

² Aaron Blake, *Stephen Bannon's nationalist call to arms, annotated*, Wash. Post, Feb. 23, 2017 (quoting President's Chief of Staff and President's Chief Strategist), at <https://www.washingtonpost.com/news/the-fix/wp/2017/02/23/stephen-bannons-nationalist-call-to-arms-annotated> (attached as Ex. B to Zieve Decl.).

First, unlike any prior executive order, Executive Order 13771 prohibits federal agencies from issuing significant new regulations unless they offset all costs by repealing twice as many existing ones and caps the annual incremental cost of all new regulations each agency may issue. The President's own characterization of Executive Order 13771 makes clear that the Order is not business as usual. *See* Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, The Atlantic, Jan. 30, 2017, available at <https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007> (quoting President Trump as stating, "If there's a new regulation, they have to knock out two. But it goes far beyond that, we're cutting regulations massively for small business and for large business.") (attached as Ex. C to Zieve Decl.); Jacob Pramuk, *Trump signs executive order aiming to slash regulations*, CNBC, Jan. 30, 2017, at <http://www.cnbc.com/2017/01/30/trump-set-to-sign-executive-order-aiming-to-slash-regulations.html> ("Trump called it 'the largest ever cut by far in terms of regulation.'") (attached as Ex. D to Zieve Decl.).

Second, review of the constitutionality of Executive Order 13771 and the related Office of Management and Budget (OMB) guidance documents is appropriate, and necessary, at this time. The Executive Order is, now, in effect and affecting agency rulemaking. As a result, plaintiffs and their members are, now, injured in two concrete ways: Because "[i]f you have a regulation you want, . . . the only way you have a chance is we . . . knock out two," Soergel, *supra* note 1 (quoting President Trump), the Executive Order forces plaintiffs to choose between advocating for new regulations that would benefit them and their members, when adoption of those regulations would depend on the repeal of existing regulatory safeguards, or forsaking their right to "petition the Government for a redress of grievances." U.S. Const. amend. I. In addition, the Executive Order is currently causing federal agencies to defer, delay, or forgo rules that would benefit plaintiffs and

their members. An agency's unlawful delay or deferral of a rule has long been recognized as a cognizable injury.

Defendants' standing and ripeness challenges ignore these injuries, as well as the allegations and evidence on which they rest. Judicial review of this purely legal challenge should proceed. "The time to put on the roof is before it starts raining. The question of the constitutionality of the [Executive Order] should be decided now." *Carolina Env'tl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n*, 431 F. Supp. 203, 226 (W.D.N.C. 1977), *rev'd on other grounds sub nom. Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978).

BACKGROUND

Defendants' account of the facts confirms that Executive Order 13771 imposes regulatory cost-trading requirements and an annual cost cap that Congress has not authorized.³

Executive Order 13771 establishes an unprecedented deregulatory program by directing federal agencies to repeal two existing regulations for every new regulation adopted in order to offset the costs of the new regulation. Sec. 2(a), 2(c). The Order also imposes cost caps on new regulations. For fiscal year 2017, the cost cap is zero. Sec. 2(b). For future fiscal years, the Director of OMB is charged with setting a cost cap for each agency. 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.* For purposes of the 1-in, 2-out and cost-offset requirements, the benefits of the new rules and of existing rules play no role.

OMB has issued two guidance documents (collectively, "OMB Guidances") implementing the Executive Order: a February 2, 2017, "Interim Guidance," which addresses regulations to be

³ Executive Order 13771 was published at 82 Fed. Reg. 9339 (2017), and is attached as Exhibit A to the First Amended Complaint.

issued in fiscal year 2017, and an April 5, 2017, “Guidance Implementing Executive Order 13771,” which “supplements” the Interim Guidance.⁴ Several aspects of the OMB Guidances are particularly relevant here.

First, the OMB Guidances state that, for fiscal year 2017, Executive Order 13771 applies to “significant regulatory actions” issued after President Trump’s inauguration on January 20, 2017. Interim Guidance 2; Guidance Q2, Q3. “Significant regulatory actions” means, 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. Executive Order 12866, 58 Fed. Reg. 51735, Sec. 3(f) (1993).

Second, the OMB Guidances underscore that the benefits of both new rules and repealed rules are irrelevant to the 1-in, 2-out and cost-offset mandates of Executive Order 13771. Indeed, OMB states that, in calculating the cost 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 are ignored for purposes of complying with the Executive Order’s 1-in, 2-out and 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.

Third, the OMB Guidances require agencies to develop new cost estimates for each existing rule considered for elimination, *see* Interim Guidance 4; Guidance Q21, and to count

⁴ Copies of the OMB Guidances are attached as Exhibits B and C to the First Amended Complaint.

toward cost savings only those costs that would be incurred after the effective date of the repeal, *see* Interim Guidance 5; Guidance Q21. Because the bulk of the cost of existing rules (such as the cost of new equipment purchases to meet pollution standards) often will already have been incurred, this requirement greatly increases the number of rules that must be repealed to permit new rules to be promulgated consistent with the Executive Order.

Fourth, the OMB Guidances provide for agencies to trade costs and cost-offsets across statutes and, with OMB approval, across agencies and departments. *See* Interim Guidance 6; Guidance Q30, Q31. Thus, the costs of a new rule may be offset by repealing wholly unrelated rules, the costs of which fall on entirely separate entities.

ARGUMENT

I. Plaintiffs have standing to bring this action.

Executive Order 13771 and the OMB Guidances have a present, concrete effect on rulemaking undertaken by federal agencies and, therefore, a present adverse effect on plaintiffs' activities and interests and those of their members. Because the allegations set forth in the First Amended Complaint are now supported by declarations, the Court should accept the facts stated in the declarations as true. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).⁵

An organization "may have standing in its own right to seek judicial relief from injury to itself" and also may "assert the rights of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Here, plaintiffs do both, as they and their members are currently injured in two concrete ways.

⁵ "[U]nder Rule 12(b)(1), the court 'is not limited to the allegations of the complaint,'" and 'a court may consider such materials outside the pleadings as it deems appropriate.' *Del. Riverkeeper Network v. FERC*, ___ F. Supp. 3d ___, 2017 WL 1080929, at *3 (D.D.C. Mar. 22, 2017) (citations omitted). With the exception of the Declarations of Michael Heimbinder and Allison Zieve, the declarations cited in this memorandum are those submitted in support of plaintiffs' motion for summary judgment, filed on May 15, 2017 [Dkt. 16].

First, the Executive Order forces plaintiffs to choose between advocating for new regulatory protections at the cost of losing two or more existing protections, or remaining silent to avoid those deregulatory consequences. Second, the Executive Order and OMB Guidances are currently causing agencies to delay, weaken, or abandon rules that would, if issued, benefit plaintiffs and their members.

A. The Executive Order substantively conflicts with plaintiffs’ missions and injures their advocacy activities.

The Executive Order and 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 regulatory safeguards, which now will require repeal of existing ones, and refraining from advocating for new public protections to avoid triggering the need to repeal existing ones. *See* First Am. Compl. ¶¶ 12–14; LeGrande Decl. ¶ 17; R. Weissman Decl. ¶ 8; Wetzler Decl. ¶ 11. As a Natural Resources Defense Council (NRDC) program officer explains: “[B]ecause NRDC does not know what deregulatory actions an agency will take if NRDC’s advocacy for a new rule is successful, NRDC is unable to evaluate, when deciding to petition for a new agency rule, whether its advocacy might end up doing more harm than good to health and the environment.” Wetzler Decl. ¶ 11. “This places NRDC in an untenable position, turning NRDC’s exercise of its constitutionally protected right to ‘petition the Government for [a] redress of grievances,’ U.S. Const. amend. I, into a game of regulatory Russian roulette.” *Id.* This injury is cognizable and occurring now. *See Autor v. Blank*, 892 F. Supp. 2d 264, 271 (D.D.C. 2012) (finding standing where “the complaint as written does allege that the plaintiffs’ rights have been burdened by being forced to make the choice” between registering as a lobbyist and being eligible for membership on a federal advisory committee), *rev’d on other grounds*, 740 F.3d 176 (D.C. Cir. 2014); *see also Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 739–

40 (2011) (striking down campaign financing scheme that forces speaker either 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).

Defendants do not contest the factual allegations that establish this injury. Instead, they argue that “issue-advocacy injuries” are not cognizable. Mot. to Dismiss 24. The right to petition the government, however, is “one of ‘the most precious of the liberties safeguarded by the Bill of Rights,’” *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (quoting *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967)). And many D.C. Circuit cases finding organizational standing involved activities that could “easily be characterized as advocacy—and, indeed, sometimes are.” *Am. Soc’y for Prevention of Cruelty to Animals v. Feld Entm’t, Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011); see, e.g., *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1139 (D.C. Cir. 2011) (explaining that an organizational plaintiff has standing where the defendant’s actions “may have reduced the effectiveness of any given level of [the organization’s] outreach efforts,” and, if so, the “actions ‘perceptibly impaired’ the plaintiff organization’s programs by making its ‘overall task more difficult’” (citation omitted)).

Center for Law & Education v. Department of Education, 396 F.3d 1152 (D.C. Cir. 2005), on which defendants rely, is not to the contrary. There, the organizational plaintiffs challenged federal rules addressing state implementation of the No Child Left Behind law that forced the plaintiffs “to address advocacy issues on an expensive State-by-State basis,” *id.* at 1158, “a more costly form of lobbying” than advocacy on a federal level, *id.* at 1161. The *substance* of the agency’s action, however, did not “direct[ly] conflict with the organization’s mission”; thus, “standing failed for lack of a conflict between the challenged conduct and the plaintiffs’ stated mission.” *Am. Soc’y for Prevention of Cruelty to Animals*, 659 F.3d at 26–27 (describing *Center*

for Law & Education). In contrast, here, as explained in the declarations of Communications Workers of America’s (CWA) David LeGrande, Public Citizen’s Robert Weissman, and NRDC’s Andrew Wetzler, the Executive Order’s regulatory trading requirements do conflict with plaintiffs’ missions of advancing health, safety, worker, and environmental protections. *Center for Law & Education* therefore “says nothing about the situation we face here, where the defendant’s conduct is both clearly ‘at loggerheads’ with the organization[s]’ mission[s], and allegedly injures the organization[s]’ advocacy activities.” *Id.* (citation omitted); *see also People for the Ethical Treatment of Animals v. Dep’t of Agric.*, 797 F.3d 1087, 1095 (D.C. Cir. 2015) (stating the denial of “a means” of an animal-rights organization “to seek redress for bird abuse” constitutes “cognizable injury sufficient to support standing”); *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937–38 (D.C. Cir. 1986) (finding standing where plaintiffs “alleged inhibition of their daily operations”).

Nor is this case like *Food & Water Watch, Inc. v. Vilsack*, in which the plaintiffs contended that “their avoidance of [certain] poultry, or alternatively the increased cost of seeking out poultry from other sources, constitutes an injury in fact to establish standing.” 808 F.3d 905, 918 (D.C. Cir. 2015). There, because the plaintiffs had not “plausibly alleged that they face[d] a substantial increase in the risk of harm” from the poultry that they were avoiding, the court found their “self-inflicted” injury to be “simply the product of their fear.” *Id.* at 919 (internal quotation marks omitted). Likewise, in *Laird v. Tatum*, the plaintiffs lacked standing where they alleged that the Army was engaging in unlawful surveillance that chilled their protesting activity, but presented “no evidence of illegal or unlawful surveillance activities.” 408 U.S. 1, 9 (1972) (citation omitted). “[S]peculative apprehensiveness that the Army may at some future date misuse the information” in a way that would injure plaintiffs was insufficient to establish standing. *Id.* at 13. And in *Clapper*

v. Amnesty International USA, the plaintiffs presented “no evidence to substantiate their fears” that their communications would be intercepted by the government, “but instead rest[ed] on mere conjecture about possible governmental actions.” 133 S Ct. 1138, 1154 (2013).

Here, notwithstanding defendants’ characterization of plaintiffs’ injury as based on “subjective fear,” Mot. to Dismiss 26, injury flows necessarily from the 1-in, 2-out and cost-offset requirements of the Executive Order, which are reiterated in the OMB Guidances and currently in effect. Defendants cannot avoid review by claiming that the Executive Order will not be implemented according to its express requirements and the President’s stated goal in signing it. *See County of Santa Clara v. Trump*, ___ F. Supp. 2d ___, 2017 WL 1459081, at *9 (N.D. Cal. Apr. 25, 2017) (rejecting reading of an executive order that is in conflict with its express language and stated purpose); *see also* Blake, *supra* note 2, at 5 (quoting President’s Chief of Staff as saying “for every regulation presented for passage [the relevant] Cabinet secretary has to identify two that person would eliminate. And that’s a big deal.”).

B. The Executive Order delays, weakens, and prevents rules that would benefit plaintiffs and their members.

Executive Order 13771 and the OMB Guidances also harm plaintiffs and their members by delaying, preventing, or forcing agencies to weaken new rules protecting public health, safety, and the environment. First Am. Compl. ¶¶ 12–14, 72, 81, 87, 95, 102, 109, 115–17, 124; 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. Defendants do not contest that such injuries, if adequately pleaded, are cognizable. *Cf. Nat’l Mining Ass’n v. Jackson*, 768 F. Supp. 2d 34, 47–48 (D.D.C. 2011) (recognizing standing to challenge agency action adding process that causes delay in agency permitting decisions). Nor do they contest that plaintiffs would have standing on behalf of their members injured by such

impacts on agency rulemaking: The members would otherwise have standing to sue in their own right; the interests they seek to protect are germane to the organizations' purposes; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

1. Executive Order 13771 is delaying new regulations, including regulations that would benefit plaintiffs and their members. *See, e.g.*, First Am. Compl. ¶¶ 12-14, 58, 62, 72, 109, 117, 124, 132, 142. Agencies' own statements acknowledge that the Executive Order causes delay. For example, the Department of Transportation (DOT) has indicated that the Executive Order is affecting the timing of ongoing rulemakings across the board. Since February 2017, its website has stated: "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." DOT, Significant Rulemaking Report Archive, <https://cms.dot.gov/regulations/significant-rulemaking-report-archive> (last visited June 23, 2017). Officials at the Treasury Department have reportedly also acknowledged that they "will not be releasing any guidance—including revenue procedures and revenue rulings"—in light of factors including Executive Order 13771. Andrew Velarde, et al., *No Substantive IRS Guidance Coming for a While, Official Says*, Taxnotes, Feb. 14, 2017, at <http://www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says> (attached as Ex. E to Zieve Decl.).

Although not every agency will necessarily volunteer that the Executive Order is causing delay, plaintiffs' allegations of delay are sufficient to survive a motion to dismiss. For example, NRDC and Public Citizen have alleged that Executive Order 13771 is forcing the Department of Energy (DOE) to halt or delay issuance of more stringent energy efficiency standards under the

Energy Policy and Conservation Act (EPCA), impairing the ability of NRDC, Public Citizen, and their members to upgrade their offices' existing appliances with more energy efficient ones, leading to higher utility bills and greater environmental impacts. *See* First Am. Compl. ¶¶ 103–09; Quigley Decl. ¶¶ 9–11; R. Weissman Decl. ¶17; Wetzler Decl. ¶¶ 14, 16; Winegrad Decl. ¶¶ 24–25. DOE is currently implementing the Executive Order. *See* 82 Fed. Reg. 24582 (2017) (requesting information to assist DOE in identifying regulations to modify or repeal to implement Executive Order 13771). As explained in the declaration of a former Assistant Secretary of Energy charged with issuing such regulations, the Executive Order's directive to condition issuance of a new energy efficiency standard on repeal of two existing regulations, and to offset the incremental costs of the new standard, necessarily impairs DOE's ability to issue improved standards. Reicher ¶ 14 (former Assistant Secretary of Energy for Energy Efficiency and Renewable Energy at DOE); *see also* Wetzler Decl. ¶ 6.

In addition, thousands of CWA members employed in the healthcare, airline, social service, and corrections industries work in settings subject to the introduction of infectious diseases such as tuberculosis, severe acute respiratory syndrome (SARS), influenza, methicillin-resistant staphylococcus aureus (MRSA), and ebola. LeGrande Decl. ¶ 13. These and other infectious diseases develop from exposure to bacteria, viruses, fungi, or parasites. *Id.* The Occupational Safety and Health Administration (OSHA) is developing a standard to protect healthcare employees and employees in other high-risk environments from exposure to dangerous pathogens. 75 Fed. Reg. 24835 (2010). As illustrated by the declaration of CWA member Denise Abbott (at ¶ 7), CWA members would benefit directly from the protections afforded by an OSHA comprehensive infection control program and control measures. *See also* First Am. Compl. ¶ 81; Soverow Decl. ¶ 5 (Public Citizen member describing risk of exposure and interest in the

standard); R. Weissman Decl. ¶¶ 10–11 (describing Public Citizen’s interest in strong OSHA standard on this topic, on behalf of its members).

Because OSHA plans to issue a proposed standard in October 2017, *see* [Reginfo.gov](http://www.reginfo.gov), OSHA regulatory agenda (Fall 2016), RIN 1218-AC46, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1218-AC46> (last visited June 23, 2017), the new rule will fall within the scope of the Executive Order. Thus, for OSHA to issue the infection control standard, the Department of Labor must offset the costs of the rule by repealing—or convincing OMB to allow it to use another agency’s repeals of—“at least two prior regulations,” Executive Order 13771, Sec. 2(c), and must determine the required offset without taking into account the benefits of the new standard, *id.* Sec. 3(a). Doing so will necessarily delay issuance of new health or safety standards. *See* Michaels Decl. ¶¶ 36, 39 (former Administrator of OSHA describing effect of Executive Order on OSHA rulemaking). And because OSHA lacks authority to repeal rules that continue to serve the purposes of the Occupational Safety and Health Act, 29 U.S.C. §§ 651(b), 655(b)(5); Michaels Decl. ¶¶ 10, 33, the delay will be exacerbated because OSHA must rely on other components of the Department of Labor or other agencies to repeal two or more of their own existing rules (including by performing new cost analyses, preparing and issuing notices of proposed rulemaking to repeal the existing rules, considering the public comments received, and preparing a final rule that address those comments), so that the Department can use those repeals to offset the costs of the new OSHA standard. Executive Order 13771 will thus delay (and may cause OSHA to weaken or forgo) the new standard on exposure to infectious disease, to the detriment of plaintiffs’ members.

As another example, in January 2017, EPA proposed a rule to regulate methylene chloride and N-Methylpyrrolidone (NMP) in paint removers. 82 Fed. Reg. 7464 (2017). Methylene chloride

poses neurotoxicity, liver toxicity, and liver and lung cancer risks to workers, consumers, and bystanders where it is used, and NMP poses health risks to pregnant women and women of child-bearing years. When finalized, the rule will either prohibit or restrict methylene chloride and NMP to protect consumers and workers. The rule will benefit plaintiffs and their members, such as Public Citizen member Amanda Fleming, who uses paint remover and paint thinner in her home. *See* Fleming Decl. ¶ 6. But as explained in the declaration of a former EPA Assistant Administrator responsible for regulation under the Toxic Substances Control Act, compliance with Executive Order 13771 will delay or prevent issuance of this rule. *See* Jones Decl. ¶ 14; *see also* First Am. Compl. ¶ 95. This delay harms plaintiffs and their members, like Ms. Fleming. *See* LeGrande Decl. ¶¶ 9, 12; Wetzler Decl. ¶¶ 7, 9; *see also* Jones Decl. ¶ 14 (“Delay in finalizing the three Toxic Substances Control Act rules proposed in December 2016 and January 2017 would subject workers, consumers, and bystanders to serious risks of life-threatening illnesses and toxicity.”). As explained by Christine Todd Whitman, EPA Administrator under President George W. Bush, “a likely scenario is that the EPA and other agencies will stop seeking new regulations so they can protect existing rules.” David Lazarus, *Former officials deride Trump’s ‘mindless’ 2-for-1 deregulation plan*, LA Times, Jan. 30, 2017, at <http://www.latimes.com/business/lazarus/la-fi-lazarus-trump-regulations-order-20170131-story.html> (attached as Ex. F to Zieve Decl.).

In at least one instance, an agency explicitly acknowledged that, to comply with the Executive Order, it was withholding a rule that the agency was otherwise prepared to issue (and, indeed, had already issued). *See* Wetzler Decl. ¶ 13 & Ex. A. In December 2016, the Environmental Protection Agency (EPA) had finalized and posted online a Clean Water Act rule designed to reduce mercury pollution, which adversely affects NRDC’s members. The rule was not published in the Federal Register before January 20, 2017, and EPA subsequently withdrew it from

publication. *Id.* ¶ 13.⁶ Explaining the subsequent delay in publishing the final rule, EPA’s Acting Principal Deputy Assistant Administrator for Water stated that Executive Order 13771 has “[t]ied up” the rule: “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.” David LaRoss, *Trump ‘Two For One’ Deregulatory Order Halts EPA’s Dental Amalgam Rule*, 38 Inside EPA Weekly Report 12, 2017 WLNR 8997168 (Mar. 24, 2017) (attached as Ex. A to Wetzler Decl.). EPA released the rule only after NRDC filed a separate lawsuit against the agency on the basis that the rule had been issued before President Trump’s inauguration (which, among other things, meant the rule was not subject to the Executive Order) and had not been lawfully rescinded. *See* First Amended Complaint, *NRDC v. EPA*, No. 17-cv-751-JPO, filed Apr. 10, 2017 (S.D.N.Y.); EPA, Final Rule, Effluent Limitations Guidelines and Standards for the Dental Category, 82 Fed. Reg. 27154 (June 14, 2017). Even the possibility of the Executive Order’s application, however, was enough to delay the rule’s publication for five months, to the detriment of plaintiffs’ members.⁷

As these examples demonstrate, there is, on an ongoing basis, at least “a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted); *see Clapper*, 133 S. Ct. at 1150 n.5 (“Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.”). Every

⁶ The Office of the Federal Register posted the final rule on its website no later than January 19, 2017, but had not published it in the Federal Register as of January 20, 2017. Wetzler Decl. ¶ 13.

⁷ Although delay of this rule is no longer ongoing, plaintiffs were suffering injury from the delay at the time the complaint was filed. *See* Heimbinder Decl. ¶¶ 4–6, 9. The end of this particular delay does not moot the controversy over the ongoing application of the Executive Order. *See City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); *City of Houston v. Dep’t of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994).

example in the First Amended Complaint qualifies as a “significant” rule, *see* First Am. Compl. ¶¶ 67, 68, 77, 78, 84, 90, 91, 98–99, 106, 113, which under the OMB Guidances the agencies can issue only in compliance with the Executive Order. *See* Guidance Q2. The declarations of former regulators attest to the unavoidable delay associated with compliance. *See* Jones Decl. ¶ 14 (former Assistant Administrator for EPA’s Office of Chemical Safety & Pollution Prevention); Michaels Decl. ¶¶ 17–23 (former Assistant Secretary of Labor for Occupational Safety and Health Administration); Wagner Decl. ¶ 7 (former Deputy Assistant Secretary of Labor for Mine Safety and Health). And the declarations of plaintiffs’ members show that the delay injures these members, as well as plaintiffs themselves. *See* Abbott Decl. ¶¶ 5–7 (addressing standard for worker exposure to infectious diseases); Coward Decl. ¶¶ 7–11 (addressing rail safety rules); Fleming Decl. ¶ 46 (addressing rules concerning auto safety, bus safety, and toxic substances); Quigley Decl. ¶¶ 9–10 (addressing energy efficiency rules); Soverow Decl. ¶¶ 4–5 (addressing standard for worker exposure to infectious diseases); R. Weissman Decl. ¶ 17 (addressing energy efficiency rules); T. Weissman Decl. ¶ 4 (addressing auto safety rule); Winegrad Decl. ¶¶ 7–25 (addressing rules to curb climate change, protect Atlantic sturgeon, and strengthen energy efficiency standards for household appliances).

2. Although President Trump made clear when he issued Executive Order 13771 that its purpose is to “cut[] regulations massively,” *Lam, supra* p. 2, defendants suggest that the Order’s mandates may be met by modifying information collection requests and guidance documents, *Mot. to Dismiss* 17–18. Modifying such documents, however, cannot conceivably achieve the President’s purpose. Nor would doing so eliminate the delay of new rules caused by the Executive Order. As for information collection requests, most of the defendant agencies’ requests have a cost of \$0, a small minority exceed \$1 million, and very few exceed \$20 million. *See generally* OMB,

Information Collection Review, <https://www.reginfo.gov/public/do/PRAMain>. Therefore, even if modifying the requests were otherwise appropriate, few would be candidates to help offset the costs of new significant rules. In addition, for each information collection request, the agency has determined that the benefits justified the costs, and has done so within the last three years. *See id.* (“An ongoing collection must be approved by OMB at least once every three years.”). Accordingly, the suggestion that agencies would readily be able to identify numerous costly information requests appropriate for repeal is unfounded. As for guidance documents, even those designated “significant” do not include any estimate of costs, making them poor candidates for cost savings; eliminating a guidance could only meet the Executive Order’s cost-offset requirement if the agency conducted a time-consuming review documenting its current costs.⁸ Thus, even if modifying information collection requests and guidance documents could ultimately offset the costs of a significant new rule, doing so would not eliminate the delay of new rules caused by the Executive Order. The agency would still need to identify two or more items for repeal, perform new cost analyses, issue new public notices, and, at least for information collection requests, synthesize and respond to comments, and then issue two or more final rules repealing the collection requests.

⁸ For example, the website of the Mine Safety and Health Administration lists two significant guidance documents, neither of which estimates costs. *See* <https://arlweb.msha.gov/SignificantGuidance/SigGuidance.asp> (last visited June 23, 2017). The website of the National Highway Traffic Safety Administration includes one significant guidance document, and it does not estimate costs. *See* <https://www.nhtsa.gov/laws-regulations/guidance-documents> (last visited June 23, 2017). OSHA currently has no significant guidance documents. *See* <https://www.osha.gov/html/guidance.html> (last visited June 23, 2017). A search of the 4,116 items in the guidance database of the Food and Drug Administration yielded four guidance documents that included the word “cost,” none of which estimated cost. *See* <https://www.fda.gov/RegulatoryInformation/Guidances/default.htm> (last visited June 12, 2017).

The possibility that OMB may, in any given instance, exempt a rule from the requirements of the Executive Order and Guidances, Mot. to Dismiss 18, also does not defeat standing. To begin with, in challenging the Executive Order, “it is not necessary that [p]laintiffs establish standing with respect to each individual” rule to which the Order applies. *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 141 (D.D.C. 2012) (citing *Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994)). Rather, because plaintiffs’ “declarations allege injury with respect to” some affected rulemakings, they “are sufficient to ensure that ‘the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.’” *Id.* (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999)).

In any event, the possibility that OMB may grant exemptions from the Executive Order does not make plaintiffs’ injury speculative. *See Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (*Reich I*) (per curiam) (addressing speculativeness in context of ripeness). 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. *Id.* 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, across the board, the agencies’ decisionmaking and plaintiffs’ decisionmaking, to the detriment of plaintiffs and their members. *See also Hawai’i v. Trump*, ___ F.3d ___, 2017 WL 2529640, at *7, *11 (9th Cir. June 12, 2017) (holding plaintiff has standing to challenge an executive order barring certain

noncitizens, including plaintiff's mother-in-law, from entering the country, notwithstanding the possibility that government could grant her a waiver). Particularly where the President has touted the Executive Order as "the largest ever cut by far in terms of regulation," Pramuk, *supra* p. 2, and the OMB Guidances state that the Order applies to nearly every significant rule, defendants cannot avoid review by suggesting that OMB's implementation will eliminate its impact. *See Cty. of Santa Clara*, 2017 WL 1459081, at *9 (rejecting as unreasonable a reading that would render an executive order contrary to its stated broad intent).

Further attempting to minimize the effect of Executive Order 13771, defendants argue that repeals pursuant to Executive Order 13771 will focus on existing rules that are "not justified based on a cost-benefit analysis." Mot. to Dismiss 18. Defendants' point does not address, much less deny, that the Executive Order necessarily forces agencies to delay, weaken, or forgo *new* rules, and that such delays harm plaintiffs' members. Indeed, because most existing rules have large net benefits, defendants' explanation of how the Order will be implemented only underscores that the Order will significantly delay or prevent beneficial new rules. Given that "every administration since President Carter" has asked agencies to repeal "outdated, unnecessary, or ineffective rules," Mot. to Dismiss at 10, the notion that myriad expensive, non-cost-justified rules remain is unfounded. Yet by mandating that new federal protections be contingent on the repeal of existing ones to offset costs, the Executive Order makes promulgation of new protections dependent on the existence and identification of numerous expensive but unnecessary rules. If such rules exist, the Order forces delay as they are located, their costs are documented, and the procedures for repealing them are set in motion, as discussed above. If they do not exist, the Order blocks issuance of new health, safety, environmental, and worker protections. Either way, the outcome injures plaintiffs and their members.

Defendants' examples (at 22 n.5) of rules repealed in the past highlight how difficult it will be for agencies to identify for repeal old and unnecessary rules that impose significant costs. None of defendants' three examples was economically significant. One involved repeal of regulations that were considered "obsolete and duplicative of other authorities," 80 Fed. Reg. 76630, 76631 (2015), and the second repealed regulations that had been obviated by subsequent legislation, so that the repeal was "insignificant in nature and impact and of no consequence to the industry and the public," 78 Fed. Reg. 15869, 15870 (2013). The third repeal was held unlawful, *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009), and the reinstated rule was then upheld in a court challenge, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011). Thus, none of the three repeals showcased by defendants—one of duplicative rules, one of rules "of no consequence," and one held unlawful—would have offset the costs of a new significant rule. To the contrary, defendants' examples illustrate that the difficulty of identifying costly regulations that can lawfully be repealed to offset the costs of new significant rules necessarily forces agencies to delay, weaken, or forgo the new rules.

3. Plaintiffs' showing of causation establishes redressability, for "[c]ausation and redressability typically 'overlap as two sides of a causation coin.' After all, if a government action causes an injury, enjoining the action usually will redress that injury." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (quoting *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)).

Defendants are correct that, even without Executive Order 13771 and the OMB Guidances, new regulations might be delayed for other reasons. *See* Mot. to Dismiss 22. "At a minimum," however, the requirements of the Executive Order and OMB Guidances "contribute[]" to and exacerbate plaintiffs' injuries. *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007). Particularly where

agencies have acknowledged that the Executive Order is causing delay, *see supra* p. 10, 14, eliminating the Order will ameliorate the injury by removing its time-consuming prerequisites to issuance of new regulations. Defendants' contrary "argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action." *Massachusetts v. EPA*, 549 U.S. at 524; *see also Hawai'i v. Trump*, 2017 WL 2529640, at *8, *11 n.8 (finding standing where challenged executive order posed a barrier that delayed or prevented issuance of visas, notwithstanding existence of other barriers); *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) ("When, as here, the party seeking judicial review challenges an agency's regulatory failure, the petitioner need not establish that, but for that misstep, the alleged harm certainly would have been averted."); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 & n.8 (3d Cir. 1990) (finding standing where challenged action is just one cause of plaintiff's injuries). In any event, in challenges to an unlawful rulemaking process, "the plaintiff need not demonstrate that correcting the procedural violation itself would necessarily remedy the injurious government action, so long as 'there is some possibility' that it would do so." *Nucor Steel-Arkansas v. Pruitt*, ___ F. Supp. 3d ___, 2017 WL 1239558, at *9 (D.D.C. Mar. 31, 2017) (quoting *Massachusetts v. EPA*, 549 U.S. at 518); *cf. Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (stating that "in those cases involving procedural injuries, the standing requirements of redressability and immediacy are applied to the present violation of the procedural right").

Plaintiffs have adequately pleaded, and have now introduced evidence to demonstrate, that Executive Order 13771 and the OMB Guidances are causing plaintiffs and their members ongoing injury that is sufficient to confer standing.

II. Plaintiffs' challenge is ripe for review.

The injuries that give rise to standing also satisfy the Article III component of ripeness. *Nat'l Treasury Emps. Union*, 101 F.3d at 1427. To the extent that inquiry into prudential ripeness is required, the considerations of fitness and hardship that frame the prudential ripeness inquiry are met here.⁹

The fitness prong incorporates three elements: whether the issues are purely legal, whether consideration would benefit from a more concrete setting, and whether the defendant's actions are sufficiently final. *In re Aiken Cty.*, 645 F.3d 428, 434 (D.C. Cir. 2011). "Purely legal questions, such as those presented in the instant case, are presumptively [fit] for judicial review." *Reich I*, 57 F.3d at 1100 (alteration in original) (internal quotation marks and citation omitted). Here, as in *Reich I*, it is unnecessary to delay consideration of the legality of an executive order until the order is further "fleshed out." *Id.*

Defendants suggest that the Court wait until agencies "engage in rulemaking" to allow consideration of "whether a particular agency action contravenes specific statutory directives or otherwise violates the" Administrative Procedure Act (APA). Mot. to Dismiss 28, 29. But this suit seeks a declaration that Executive Order 13771's unlawful rulemaking mandates exceed the President's constitutional authority and cannot lawfully be implemented in *any* rulemaking. In *Appalachian Power Co. v. EPA*, the D.C. Circuit rejected an argument that judicial review of an

⁹ Because this case satisfies the standard of constitutional ripeness, defendants are wrong to suggest that the case is non-justiciable on the basis of prudential ripeness. That suggestion "is in some tension with [the Supreme Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List*, 134 S. Ct. at 2347 (citation omitted). Nonetheless, because the D.C. Circuit has required prudential ripeness in the past, *see, e.g., Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012), and not reconsidered the doctrine since *Susan B. Anthony List*, plaintiffs address it here.

EPA guidance document should await a challenge in the context of a particular application, where the legality of that guidance did not turn on the specifics of any such application. 208 F.3d 1015, 1023 n.18 (D.C. Cir. 2000). Similarly, this Court in *National Mining Ass'n* rejected the defendant's argument that a challenge to a permitting process was unripe until the agency had granted or denied permits, because that argument "misse[d] the point of the plaintiff's claim: that the process itself is unlawful." 768 F. Supp. 2d at 46. Likewise here, no further factual development is needed to answer the questions whether, without congressional authorization, the President constitutionally may condition issuance of a new regulation on repeal of two or more existing ones that offset the costs of the new regulation, or may impose an annual regulatory cost cap. These purely legal questions can be resolved now.

Because plaintiffs are challenging the current, ongoing implementation of a final Executive Order, this case is not analogous to those cited by defendants in which a party challenged a proposed rule or possible future application of a new rule. *See* Mot. to Dismiss 28 (citing *In re Aiken Cty.*, 645 F.3d at 430 (challenge to DOE attempt to withdraw a license application not ripe); *Am. Petroleum Inst.*, 683 F.3d at 386 (challenge to proposed EPA rule not ripe); *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (challenge to utility regulations not ripe because state had not adopted the regulations, which was necessary for the regulations to become effective)). The more relevant cases are those defendants fail to cite: In *Reich I*, for example, 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 the order's "mere existence." 57 F.3d at 1100. In *American Historical Ass'n v. National Archives & Records Administration*, the court held a challenge to an executive order ripe where the Archivist's reliance on the order caused delay that adversely affected the plaintiffs.

516 F. Supp. 2d 90, 107–08 (D.D.C. 2007). And in *County of Santa Clara*, a challenge to the executive order addressing federal funding for so-called “sanctuary cities,” the court rejected the government’s ripeness objection, noting that the “claims do not require further factual development, are legal in nature, and are brought against a final Executive Order.” 2017 WL 1459081, at *20.

As in *Reich I*, *American Historical Ass’n*, and *County of Santa Clara*, the Executive Order here dictates a new standard for agency decisionmaking that is being applied today. It 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 with an eye toward the need to identify and repeal two regulations of equal cost for every one regulation issued. *See Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (stating that an agency “may not simply disregard an Executive Order”). Indeed, in early March, OMB instructed agencies that their unified agendas of regulatory actions expected in fiscal years 2017 and 2018, which were due March 31, 2017, must reflect the Executive Order’s offset and repeal “requirements” and 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.” OMB, Memorandum for Regulatory Policy Officers, Spring 2017 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions 2 (Mar. 2, 2017).¹⁰ Additionally, agencies have stated that they are currently applying the Executive Order and OMB Guidances, and some have publicly acknowledged the resulting delay. *See supra* p. 10, 14. These facts, along with the mandatory language of the Executive Order and OMB Guidances, make plain that the interests

¹⁰ Available at <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-and> (last visited June 23, 2017).

served by the fitness prong—the government’s “interest in crystallizing its policy before that policy is subjected to judicial review and the court’s interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting,” *Am. Petroleum Inst.*, 683 F.3d at 387—are satisfied here.¹¹

“Although the court need not necessarily reach the ‘hardship’ prong ... when institutional considerations favor immediate review,” *Reich I*, 57 F.3d at 1101, plaintiffs have demonstrated hardship as well. The ongoing implementation of the Executive Order is, as discussed above, *supra* at I, now causing harm to plaintiffs and their members. As in *Reich I*, 57 F.3d at 1100–01, and *County of Santa Clara*, 2017 WL 1459081, at *21, the Order puts plaintiffs, today, to a lose-lose choice that affects their conduct. *See supra* pp. 6–8. Further, the Order is causing delay, *supra* pp. 10, 14, and “[w]aiting for the Government to” weaken or forgo specific rules “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*, 2017 WL 1459081, at *21; *cf. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (“We have no trouble concluding, however, that a challenge to the Board of Review’s veto power is ripe even if the veto power has not been exercised to respondents’ detriment. The threat of the veto hangs over the Board of Directors like the sword over Damocles, creating a ‘here-and-now subservience’ to the Board of Review sufficient to raise constitutional questions.”); *Eagle–Picher Indus., Inc. v. EPA*, 759 F.2d 905, 918 (D.C. Cir. 1985) (concluding that “mechanical application”

¹¹ *See, e.g.*, Executive Order 13771, Secs. 2(a)–(d), 3(a)–(e) (stating what agencies “shall” do); Interim Guidance 1 (describing “requirements” of Executive Order 13771); Guidance 1-2 (same); *id.* Q9 (stating that “[a]gencies are required to offset”); *id.* Q10 (stating that “significant interim and direct final rules must be offset”); *id.* Q29 (stating that “at the end of each fiscal year, an agency must be able to identify, and should have finalized, twice as many EO 13771 deregulatory actions as EO 13771 regulatory actions”).

of the hardship element “could work mischief” when applied in situation where the institutional interests sought to be served by the doctrine militate in favor of early review).

III. Plaintiffs have stated claims on which relief can be granted.

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 held that this Court had authority to review President Clinton’s executive order related to qualifications for government contractors. The court 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). In this case, each of the first four causes of action fits within the *McAnnulty* framework; all four are premised on the Executive Order’s unconstitutional directives compelling federal agencies to violate the statutes from which they derive their authority.

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.

A. Executive Order 13771’s constitutional infirmity is not cured by the “consistent with applicable law” provisions.

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 and imposes an arbitrary annual cost cap—\$0 for fiscal year 2017—regardless of benefits. These requirements are not authorized by any statute. Although many statutes address whether and how a regulatory agency may factor cost into its rulemakings, 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. 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 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. And because there is no situation in which the Executive Order is consistent with applicable law, the Order’s “consistent with applicable law” provision, Sec. 5(b), does not avoid the constitutional defect.

Defendants' argument that the First Amended Complaint fails to state a claim is based on a misunderstanding of the claims and a misstatement of the Executive Order's mandate. Defendants begin by describing the Executive Order as requiring consideration of "the costs of that rulemaking." Mot. to Dismiss 30. To be sure, many (but not all) statutes allow or direct agencies to consider costs in some manner when promulgating new rules. *See* Memo in Support of Plaintiffs' Mot. for Summary Judgment 6–9 (Pltfs. SJ Memo). Executive Order 13771, however, does not simply instruct agencies contemplating a new rule to consider "the costs of *that* rulemaking" (emphasis added). Rather, it requires agencies to repeal two or more *other* rules, unrelated to "that rulemaking," and conditions the issuance of the new rule on whether the costs avoided by repeal of those other rules offset those of the new rule. The requirements of the Executive Order cannot reasonably be deemed within the scope of the rulemaking authority delegated by Congress to regulatory agencies, regardless of whether Congress has authorized agencies to consider the cost of particular new rules.¹²

¹² Defendants wrongly suggest that regulatory repeal and cost-offset requirements adopted by Canada and the United Kingdom provide support for them here. Mot. to Dismiss 4. Canada's adoption of an offset requirement *by statute* provides no support for President Trump's attempt to override statutory rulemaking requirements *by executive order* in violation of constitutional principles of separation of powers. Moreover, Canada's statute is very different from Executive Order 13771: It requires only offset of paperwork and similar administrative costs, not costs of compliance with substantive regulatory requirements. Red Tape Reduction Act, S.C. 2015, c. 12 § 5 (Can.). Canada also provides for exemptions where repeals or offsets would compromise public health or safety. Red Tape Reduction Regulations, SOR/2015-202 § 6 (Can.). The UK's adoption of a repeal and cost-offset requirement likewise has no bearing on the legality of Executive Order 13771, as the UK's governmental structure does not incorporate the scheme of separated legislative and executive power fundamental to our constitutional structure. Nor does the UK model suggest that the Executive Order reflects a rational approach to rulemaking. Claimed cost savings attributable to the UK policy do not take into account lost societal benefits of repealed regulations, and the policy has been blamed for a decline in public protections, including regulatory requirements that could have prevented the recent tragic apartment fire in London. *See, e.g.,* Editorial, *Grenfell Tower Fire: Mindless Deregulation, Senseless Harm*, N.Y. Times (June 22, 2017), at <https://www.nytimes.com/2017/06/22/opinion/london-fire-grenfell-tower.html>

1. The Executive Order’s provisos that it is to be implemented “consistent with applicable law” are the linchpin of defendants’ argument that the first cause of action fails to state a claim. Mot. to Dismiss 31. An executive order’s “consistent with law” provision does not avoid constitutional concerns, however, where the order “is entirely *inconsistent* with law in its stated purpose and directives.” *Cty. of Santa Clara*, 2017 WL 1459081, at *9 (emphasis added) (rejecting as unreasonable a reading that would render the order “legally meaningless” and contrary to its stated broad intent). That is the situation here: The President lacks authority to prohibit agencies from issuing new rules unless and until the agencies repeal existing rules, the costs of which offset the costs imposed by those new rules. *See* Pltfs. SJ Memo II.B. In the wide array of statutes that delegate to federal agencies the power to administer federal programs, no statute 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. Thus, “the Government’s attempt to resolve all of the Order’s constitutional infirmities with a ‘consistent with law’ bandage is not convincing.” *Cty. of Santa Clara*, 2017 WL 1459081, at *26.

Because no statute authorizes the 1-in, 2-out and offset requirements or the cost caps mandated by the Executive Order, reading the “consistent with applicable law” provision to mean that the Order applies only when the repeal and offset requirements would not unconstitutionally usurp legislative authority or violate the Take Care Clause would render the Executive Order a nullity. But defendants are not treating it as a nullity. OMB and the rulemaking agencies are implementing it—as the President self-evidently intended. *See, e.g.*, Interim Guidance 1 (discussing “requirements” of the Executive Order); Guidance 1 (same); OMB Memo on Unified

(quoting a former UK chief fire officer and honorary secretary of a parliamentary group on fire safety and rescue) (attached as Ex. G to Zieve Decl.).

Agenda, *supra* note 10; Coast Guard, 82 Fed. Reg. 26632 (2017) (requesting comments on documents to repeal or modify in light of Executive Order 13771); Dep't of Labor, 82 Fed. Reg. 16902, 16915–16 (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); Fed. Aviation Admin., 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); 38 Inside EPA Weekly Report 12, *supra* p. 14 (stating that "dental amalgam rule" is "[t]ied up in the president's executive order"); DOT, Report on DOT Significant Rulemakings, <https://www.transportation.gov/regulations/report-on-significant-rulemakings> (last visited June 23, 2017) (stating that "DOT rulemakings are being evaluated in accordance with Executive Order[] 13771").

OMB's instructions confirm that Executive Order 13771 cannot be defended on the theory 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." *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002). Other than a small category of exempt rules, *see* Guidance Q33, OMB has instructed that the Executive Order's 1-in, 2-out and offset requirements apply to all significant rules. Indeed, even when issuing a rule pursuant to a statute that "prohibits consideration of cost," an agency must "offset the costs of such regulatory actions through other deregulatory actions," *id.* Q18; *see also id.* Q33 (stating that repeal and offset requirements apply in emergency situations and to new rules subject to legal deadlines). No statute authorizes or allows rulemaking authority to be constrained by such an offset requirement. The

Executive Order's boilerplate instruction to conform to applicable law thus cannot overcome the fact that Executive Order 13771's fundamental requirement directs agencies to violate the law.¹³

By contrast, in *Allbaugh*, the challenged executive order, which prohibited agencies from imposing a certain condition on bidders for government contracts, stated "a policy that, so far as the [then-] present record reveal[ed], [was] above suspicion in the ordinary course of administration." *Allbaugh*, 295 F.3d at 33. The plaintiffs' challenge did not fail solely because of the "to the extent permitted by law" provision; rather, the provision was significant because the court thought that the executive order could be lawfully implemented in some circumstances. Here, the Executive Order cannot be lawfully implemented in any circumstances. Defendants themselves agree that an executive order cannot "conflict with a legislative command." Mot. to Dismiss 34. The question whether this one does cannot be resolved by reference to *Allbaugh*.

2. Defendants mischaracterize plaintiffs' claims as resting on the premise that "agencies may only consider those factors explicitly authorized in the governing statute." Mot. to Dismiss 33. Of course, as the Supreme Court has held, a statute may *implicitly* allow an agency to consider a particular factor, including cost. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This case, however, is not about whether an agency may "consider" some factor arguably relevant to the issuance of a rule; it is about whether the President may prohibit an agency from issuing a new

¹³ The government's position in the case challenging the "sanctuary cities" executive order suggests that "consistent with applicable law" provisions may 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. Mot. 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, a pro forma direction to comply with procedural requirements, such as rulemaking deadlines, Guidance Q33 (third bullet), does not lessen the substantive constitutional defects of Executive Order 13771 or its implementation.

rule unless it takes additional actions that bear no relation to its statutory authority to issue that new rule. And the problem here is not simply that no statute *explicitly* authorizes the Executive Order's new limits on agency rulemaking power. It is that defendants cannot identify a single statute that either implicitly or explicitly allows an agency to make issuance of a new rule contingent on repeal of two or more existing rules, and contingent on those repeals offsetting the costs of the new rule. No such statute exists.

Defendants thus miss the point when they state that, in this Circuit, agencies may consider costs unless “there is ‘clear congressional intent to preclude’” such consideration. Mot. to Dismiss 34 (quoting *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (per curiam) (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987))). The line of cases on which defendants rely—which take *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), as their starting point—address whether an agency has reasonably interpreted a given statute to allow consideration of cost in a particular rulemaking under that statute. See *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623 (D.C. Cir. 1998) (deferring to agency interpretation under step two of *Chevron*); *NRDC v. EPA*, 824 F.2d at 1152, 1162–63 (finding no clear congressional intent to preclude or to allow costs and deferring to agency's view). Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467–68 (2001) (finding § 7409 of Clean Air Act could not reasonably be construed to authorize consideration of costs). *Michigan v. EPA*, for example, upheld EPA's use of costs to determine, under the Clean Air Act, when emissions of an upwind State contributed “significantly” to nonattainment of air quality standards downwind—not whether EPA could use cost in any way, for any purpose. See 213 F.3d at 674–79. Defendants point to no case suggesting that federal agencies possess rulemaking authority outside the bounds of that delegated by Congress. They point to no case supporting their

position here: that a statute (or any statute) can reasonably be interpreted to allow new rules to be made contingent on eliminating *other*, existing rules and the ongoing costs of those *other* rules.

In this regard, defendants' citation to the First Amended Complaint's discussion of the Occupational Safety and Health Act (OSH Act) for the point that Executive Order 13771 can be implemented consistent with applicable law, *see* Mot. to Dismiss 33, is perplexing. In the OSH Act, Congress was very specific about the role of costs in OSHA rulemaking. *See* 29 U.S.C. § 655(b)(5); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (holding that OSHA cannot use cost-benefit analysis when setting standards). If OSHA determines that a standard is necessary to address a threat to worker health and safety and is economically and technologically feasible, the OSH Act requires the agency to issue it, regardless of whether it can find two or more other rules that it can repeal to offset the costs of the standard. *See generally* Michaels Decl. ¶¶ 9–10, 15–16, 29–35. The OSH Act thus serves as a straightforward illustration of why the Executive Order is inherently *not* consistent with applicable law.

Indeed, after reciting many of plaintiffs' allegations with respect to the OSH Act, defendants neglect to explain how the Executive Order is conceivably consistent with it. Instead, they drop a footnote stating that some statutes do allow for consideration of cost, offering the Clean Air Act as their example. Yet the Clean Air Act language quoted by defendants—requiring a “standard for emission reduction to be set ‘taking into account the cost of achieving such reduction’”—belies their claim that “there is no reason that agencies acting pursuant to [it] could not comply with the requirements of the Executive Order.” Mot. to Dismiss 33 n.11 (quoting 42 U.S.C. § 7411(a)(1)). In the provision quoted, Congress authorized EPA to consider cost—but not any cost. A provision specifying that the agency should consider “the cost of achieving [the emission] reduction” cannot reasonably be read to authorize the agency to make issuance of a new

emission standard dependent on the future costs of existing rules on other topics—much less to authorize the agency to make issuance of a new Clean Air Act standard contingent on repeal of two or more existing rules to offset the new cost.

3. Defending inherent presidential authority to guide discretionary aspects of agency rulemaking authority, Mot. to Dismiss 33–34, defendants skirt the issue here. Whatever authority the President has to guide an agency’s exercise of discretion in rulemaking must operate within the bounds delegated by Congress. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979); *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); see *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, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))); *Local 2677, Am. Fed’n of Gov’t Emps. v. Phillips*, 358 F. Supp. 60, 77 (D.D.C. 1973) (“[D]iscretion in the implementation of a program is not the freedom to ignore the standards for its implementation.” (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971))). As these cases make plain, the courts have soundly rejected defendants’ suggestion that executive power with respect to regulation extends to all that is not “expressly forbidden.” Mot. to Dismiss 1; see also *id.* at 33 (stating that President can direct agencies to act “except to the extent that there is a direct conflict with a legislative command”). Nor are defendants aided by *Allbaugh*’s statement that “the President’s power necessarily encompasses ‘general administrative control of those executing the laws.’” *Id.* at 33 (quoting *Allbaugh*, 295 F.3d at 32 (internal quotation marks omitted)). The requirements of Executive Order 13771, which impose mandatory extra-statutory, across-the-board limits on agency rulemaking authority, cannot reasonably be labeled “general administrative control.”

By glossing over the Order’s requirement that agencies condition rulemaking on the rescission of other rules to offset costs, and by minimizing those requirements’ significance, *see, e.g.*, Mot. to Dismiss 11 (referring to requirements of the Executive Order as an “offset policy”), defendants’ motion never takes plaintiffs’ claims head on. The Executive Order cannot reasonably be characterized as a “guide” to federal agencies, *id.* at 33, along the lines of orders on retrospective review, *id.* at 10. The Executive Order imposes mandates that only Congress can impose. And Congress has not done so.¹⁴

B. A claim based on violation of the Take Care Clause and seeking a declaration that executive action is unconstitutional is actionable.

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 usurping 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 Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632–33 (1952) (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

¹⁴ In several instances, a Member of Congress has introduced a bill that would have authorized part—but not all—of what Executive Order 13771 mandates. *See, e.g.*, National Regulatory Budget Act of 2014, S. 2153, 113th Cong. (proposing an “annual overall regulatory cost cap”); Regulatory Accountability Act of 1993, S. 13, 103d Cong. § 4(3)(A) (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. A pending bill mirrors aspects of Executive Order 13771. *See* Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017, H.R. 2623, 115th Cong.

procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis”).

1. Defendants do not deny that a separation of powers claim can be based on the President’s usurpation of legislative authority. They briefly argue, however, that the flip-side of such a claim—that a President violates the Take Care Clause by ordering agencies to act contrary to statutory commands—cannot be the basis for a claim. The Supreme Court has suggested otherwise. *See United States v. Texas*, 136 S. Ct. 906 (2016) (order granting certiorari and asking parties to brief the additional question “Whether the Guidance [at issue] violates the Take Care Clause of the Constitution, Art. II, § 3”). And the Ninth Circuit recently considered an argument based on the Take Care Clause, although it found that the party raising it had “not shown the [government] failed to comply with its responsibilities.” *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 976–77 (9th Cir. 2017); *see also Cty. of Santa Clara*, 2017 WL 1459081, at *22 (holding that plaintiffs were likely to succeed on the merits of their separation of powers claim because the challenged executive order ran afoul of “fundamental constitutional structures,” including the obligation to “take Care that the Law be faithfully executed,” and citing *Clinton v. City of New York*, 524 U.S. 417, 439 (1998)).

Defendants’ argument to the contrary seems to be based on a misunderstanding of the claim. Plaintiffs challenge presidential action that violates the Take Care Clause by contradicting Congress’s commands, whereas the cases on which defendants rely rejected challenges under the Take Care Clause claiming that the President failed to act affirmatively in ways that the plaintiffs alleged would help to promote faithful execution of the laws. Unlike the cases cited by defendants, plaintiffs do not challenge an exercise of “Presidential discretion.” Mot. to Dismiss 36. The President has no discretion to instruct agency officials, including the Director of OMB, to violate

the law. Defendants themselves do not go so far as to suggest that the constitutional command to “faithfully execute” the law is a constitutional grant of discretion to violate it. Such an argument would be untenable given the plain language of the Take Care Clause and the Supreme Court’s reliance on the Take Care Clause in the opinions holding that President Truman’s seizure of the nation’s steel mills violated the Constitution. *See Youngstown*, 343 U.S. at 587–88 (opinion of the Court); *id.* at 610 (Frankfurter, J., concurring); *id.* at 660 (Clark, J., concurring in the judgment).

Defendants’ reliance on *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), is likewise unavailing. That case addressed whether the President may be enjoined by the courts from carrying into effect an act of Congress alleged to be unconstitutional. *See id.* at 499. Here, plaintiffs do not seek an injunction against the President. And in the 150 years since *Mississippi v. Johnson*, the courts have repeatedly made clear that constitutional challenges to executive orders exceeding presidential authority are justiciable. *See, e.g., Reich I*, 57 F.3d 1099; *Cty. of Santa Clara*, 2017 WL 1459081; *Hawai‘i v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), *aff’d on other grounds*, 2017 WL 2529640.¹⁵

2. Defendants also claim that, because only the President can violate the Take Care Clause, this Court cannot remedy a violation by enjoining his subordinates. Mot. to Dismiss 36. To the contrary, a declaration that Executive Order 13771 is unlawful and an injunction barring the agencies from complying with it are appropriate remedies for the President’s unlawful action. In *Reich II*, the D.C. Circuit held that the plaintiffs were entitled to prevail in their non-statutory

¹⁵ *See also U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 415 n.8 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (“I do not dispute that the Court cannot issue an order directing the President’s ‘exercise of judgment’ in law enforcement. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867). What is within this Court’s determination, however, is whether the *Order* at issue faithfully executes existing law. It does not, and it does not because of the construction set forth by the President.”).

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. Likewise here, both declaratory relief against all defendants as to the unlawfulness of the Executive Order, and injunctive relief against the agencies, are "necessary to ensure compliance with the clearly expressed will of Congress." *Id.* at 572.

C. Plaintiffs have no adequate alternative remedy for the harm caused by defendants' *ultra vires* actions.

As explained above, *supra* pp. 25–26, plaintiffs' third and fourth causes of action alleging *ultra vires* action by the agency defendants are based on *McAnnulty*, 187 U.S. 94, and its progeny—particularly the D.C. Circuit's decision in *Reich II*, 74 F.3d 1322, which affirmed the existence of a non-statutory right of action for review of agency action pursuant to an unlawful executive order. Without citing either case, defendants argue that the third and fourth causes of action for non-statutory review against the agency defendants fail to state a claim because plaintiffs do not satisfy the requirements of *Leedom v. Kyne*, 358 U.S. 184 (1958). There, the Court allowed a non-statutory challenge to a National Labor Relations Board decision that the plaintiff alleged was not within the Board's jurisdiction, but rather was contrary to a specific statutory prohibition. Although review of the decision was not permitted by the statutory provisions governing judicial review of NLRB actions, the Court, citing *McAnnulty*, held that non-statutory review was available: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190.

Nonetheless, describing *Leedom* as allowing a non-statutory review claim only where “there is no alternative procedure for review of the statutory claim,” defendants argue that plaintiffs cannot pursue a non-statutory review claim because they “have a meaningful and adequate means of challenging the statutory violations alleged in their third and fourth causes of action through the APA.” Mot. to Dismiss 37 (quoting *Nyunt v. Chairman, Broad Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)). Defendants are wrong both on the law and on the availability of an alternative remedy.

To begin with, defendants’ reading of *Leedom* is contradicted by the D.C. Circuit’s decision in *Reich II*. There, although the agency defendant had issued regulations implementing the challenged executive order, and future agency actions implementing the executive order at issue could have been subject to APA review, the plaintiffs had not alleged an APA cause of action. Notwithstanding “what appear[ed] to [the court] to be an available statutory cause of action,” 74 F.3d at 1327, the court entertained a non-statutory review claim. And the court did so based on its review of the *McAnnulty* line of cases, specifically including *Leedom*. *See id.* at 1328 (reiterating that “[n]othing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review” (quoting *Dart v. United States*, 848 F.2d at 224)).

In addition, here, plaintiffs have no adequate alternative statutory claim for their first four causes of action, which present facial challenges to Executive Order 13771 and its implementation. Defendants suggest that plaintiffs should bring individual APA claims in the future as to individual agency actions implementing Executive Order 13771, but such cases would not provide adequate relief. Rather, even more so than in *Reich II*, “any relief short of a declaration that the Executive Order is illegal would be inadequate,” *id.* at 1326, because the challenge here is to requirements that infect the rulemaking process itself. Challenges to any particular rulemaking cannot remedy

the across-the-board harm from that infection: Some rulemakings will not occur because of an agency's inability to offset costs, but identifying a discrete agency inaction that is attributable to the Executive Order and is reviewable under the APA is likely to be exceedingly difficult, if not impossible. Moreover, delays caused by the Executive Order, even if the cause can be identified in a particular instance, cannot be cured after the fact. And the public could challenge an agency's weakening of a rule to reduce the amount of the required offset only if the agency revealed that it had weakened a rule for that reason. Meanwhile, the requirements of the Executive Order—including the annual cost cap, the 1-in, 2-out requirement, and the related cost-offset requirement—are in effect now. “That the ‘executive’s’ action here is essentially that of the President does not insulate the entire executive branch from judicial review.” *Id.* at 1328. “[I]t is now well established that review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.” *Id.* (internal quotation marks, alteration, and citation omitted).

Finally, contrary to defendants' suggestion, the fifth claim for relief—the APA claim with respect to the OMB Guidances—does not indicate that the APA provides an adequate remedy for the third and fourth claims. The fifth claim is directed at the OMB Guidances, whereas the third claim is broadly aimed at implementation of the Executive Order by all the defendant agencies, and the fourth claim seeks broader relief with respect to OMB's implementation of the Executive Order. A ruling in favor of plaintiffs on their APA claim against OMB will provide relief from the mandates of the Guidances and from resulting agency actions, but will not provide plaintiffs an injunction against implementation of the Executive Order by regulatory agencies. *See id.* at 1327. In addition, defendants themselves argue that the fifth claim for relief should be dismissed because, in their view, the OMB Guidances are not reviewable final agency action. *See Mot. to Dismiss* 41–

43. Although that argument is not correct, *see infra* pp. 42–45, defendants cannot properly rely on the APA claim against OMB as a basis for dismissing the non-statutory review claims without conceding that the APA claim will in fact provide a complete basis for relief if plaintiffs’ claims that the Executive Order is unconstitutional and otherwise unlawful are well-founded—a concession they are unwilling to make.. *Cf. Reich II*, 74 F.3d at 1327 (noting that government’s previous position that regulations were necessary to flesh out plaintiffs’ claim was “somewhat in tension” with its position that APA review was unavailable). Finally, to the extent that the claims overlap and state alternative theories, “the pleading is sufficient if any one of them is sufficient.” Fed. R. Civ. P. 8(d)(2); *Croixland Props. Ltd. P’ship v. Corcoran*, 174 F.3d 213, 218 (D.C. Cir. 1999).

D. Defendants’ reliance on statutorily authorized consideration of costs is inapposite.

Arguing that *McAnnulty* review is unavailable because agencies’ consideration of costs is not *ultra vires*, Mot. to Dismiss 38–39, defendants essentially rehash their point that the Executive Order can be implemented consistent with applicable law because some statutes allow consideration of costs. As discussed above, *supra* at III.A., defendants’ argument fails. After stating the question as whether “weigh[ing] the costs of existing rules against the cost of potential new rules is prohibited,” Mot. to Dismiss 38, defendants attempt to defend the Executive Order’s mandates only by stating the unremarkable point that “consideration of the costs of a rulemaking is frequently a relevant factor in regulatory decisions.” *Id.* at 39. Thus, they never actually defend the 1-in, 2-out mandate or the offset requirement. Likewise, defendants state that “agencies have routinely analyzed the costs of key regulatory decisions to provide information to lawmakers,” whether to comply with statutes or as a matter of policy. *Id.* This statement likewise does not address the issues presented here. The requirements of Executive Order 13771 and the OMB

Guidances do much more than require agencies to “analyze” costs of a rule under consideration. None of the executive orders cited by defendants made issuance of new rules contingent on repeal of unrelated rules with offsetting costs, and thus imposed conditions on rulemaking that are completely unrelated to the statutory authorization for particular rules. Defendants, again, point to no statute that authorizes these 1-in, 2-out and cost-offset requirements. Only by divorcing their argument from the requirements of Executive Order 13771 can defendants suggest otherwise.

E. OMB lacks authority to implement an executive order that is itself *ultra vires*.

Defendants briefly argue that OMB’s implementation of Executive Order 13771 cannot be *ultra vires* because it is carrying out a presidential directive. In support of their argument, defendants offer citations setting forth general statements about OMB’s role. Such generalities do not support the action at issue here.

The starting point for defendants’ argument is the general statement that “OMB is permitted to assist the President in implementing Executive Orders that are issued pursuant to his *constitutional* authority to oversee the Executive Branch.” Mot. to Dismiss 40 (emphasis added). That point is undisputed. Here, however, OMB is assisting in implementing an Executive Order that is not pursuant to, but inconsistent with, the President’s constitutional authority. Executive Order 13771 is not simply “a Presidential directive in an Executive Order to oversee the rulemaking process, including the consideration of the costs of that process.” *Id.* at 40. It is a directive that OMB enforce an extra-statutory requirement conditioning issuance of new rules on repeal of two or more existing rules with offsetting costs, and that OMB establish and enforce an annual cost cap. Defendants cite no statute that empowers OMB to impose or assist the President in the imposition of such requirements. Instead, defendants concede that OMB’s authority depends on the Executive Order. Because that Order is unlawful, OMB’s implementation of it is as well.

See Chrysler Corp., 441 U.S. at 304; *Reich II*, 74 F.3d at 1328; *Liberty Mut. Ins. Co.*, 639 F.2d at 169, 172; *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971) (“The fact that the President may have ordered the Director of the [Office of Science and Technology] not to release [a certain] Report does not leave the courts without power to review the legality of withholding the Report, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.” (citing *Youngstown*)).

F. The OMB Guidances are final agency action reviewable under the APA.

Plaintiffs’ fifth claim for relief challenges the OMB Guidances as 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). Defendants, although conceding that OMB is an agency subject to the APA, argue that this APA claim should be dismissed because the OMB Guidances are not final agency action. Defendants are wrong.

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 a written statement of one agency, the Fish and Wildlife Service (FWS), that explained how a proposed action by another agency, the Bureau of Reclamation, would affect endangered species and set forth steps the Bureau should take to minimize the impact on endangered species. *Id.* at 158–59. After the Bureau stated that it would operate the project in compliance with the written statement, a group of plaintiffs sued the FWS officials (not the Bureau or its officers) to challenge the statement, arguing that the FWS statement affected the plaintiffs’ use of the affected waterways for recreational, aesthetic and commercial purposes. *Id.* at 159.

Finding that the written statement was the culmination of FWS's decisionmaking and that the actions it effectively 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, 469 (1994) (holding that Secretary of Defense's recommendation to the President regarding naval base closing did not constitute "final agency action" where the report was "more like a tentative recommendation than a final and binding determination").

Likewise, OMB's issuance of the Guidances at issue is final agency action. To begin with, defendants do not contest the "well established" point 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.*, 208 F.3d at 1021; *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988); & *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435–38 (D.C. Cir. 1986)). And as in *Bennett*, the directives in the OMB Guidances specify mandatory prerequisites for issuing new rules and, in that way, directly control actions that affect regulated entities. The Guidances provide agencies with specific instructions for implementing Executive Order 13771, including that the Executive Order applies to "significant regulations" 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. Just as in *Bennett*, the agency's directive "alters the legal regime to which the action agenc[ies] [are] subject," 520 U.S. at 169, and has "direct and appreciable legal consequences" for persons whose interests are affected by the agency rulemaking activities it controls, *id.* at 178. Defendants' citations to cases involving non-final agency action that lack such consequences are inapposite. *See, e.g., Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir.

2003) (holding company's challenge to agency's authority to regulate its product did not challenge final agency action, where agency investigation of product was ongoing and agency had not yet made a determination).

Moreover, the Interim Guidance and Guidance "supplement[ing]" it, *see* Guidance 1, are not of a tentative or interlocutory nature; they convey a definitive pronouncement on the requirements for implementing 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 OMB Guidances' repeated use of words like "requirements," "must," and "should" and "should not" evidences that their mandates are not tentative, but now in effect. "[T]he entire Guidance, from beginning to end ... reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power Co.*, 208 F.3d at 1023 (finding guidance constitutes final agency action in this circumstance, despite boilerplate disclaimer). 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).

The final nature of the OMB Guidances is further evidenced by the fact that agencies are complying with them as they implement the Executive Order. *See supra* p. 29 (citing examples);

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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)

PROPOSED ORDER

Upon consideration of defendants' motion to dismiss, the memorandum in support thereof, plaintiffs' opposition, defendants' reply memorandum, and the entire record,

ORDERED that defendants' motion to dismiss is DENIED.

SO ORDERED.

RANDOLPH D. MOSS
United States District Judge

Dated: _____, 2017

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Defendants.

Civil Action No. 17-253 (RDM)

**DECLARATION OF ALLISON ZIEVE IN SUPPORT OF
PLAINTIFFS' OPPOSITON TO DEFENDANTS' MOTION TO DISMISS**

I, Allison M. Zieve, declare as follows:

1. I am an attorney at Public Citizen Litigation Group and counsel for plaintiffs in the above-captioned case.

2. Attached as Exhibit A is a true and correct copy of a screenshot of the article Andrew Soergel, *Trump Executive Order Embraces 'One-In, Two-Out' Regulatory Scheme*, U.S. News & World Report, Jan. 30, 2017, copied from the url <https://www.usnews.com/news/articles/2017-01-30/trump-executive-order-embraces-one-in-two-out-regulatory-scheme>.

3. Attached as Exhibit B is a true and correct copy of the article Aaron Blake, *Stephen Bannon's nationalist call to arms, annotated*, Wash. Post, Feb. 23, 2017, which I downloaded from the url <https://www.washingtonpost.com/news/the-fix/wp/2017/02/23/stephen-bannons-nationalist-call-to-arms-annotated> and, because the resulting PDF was not searchable, saved and formatted in Microsoft Word before converting it to a searchable PDF.

4. Attached as Exhibit C is a true and correct copy of the article Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, The Atlantic, Jan. 30, 2017, which I downloaded

from the url <https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007>.

5. Attached as Exhibit D is a true and correct copy of the article Jacob Pramuk, *Trump signs executive order aiming to slash regulations*, CNBC, Jan. 30, 2017, which I downloaded from the url <http://www.cnbc.com/2017/01/30/trump-set-to-sign-executive-order-aiming-to-slash-regulations.html>.

6. Attached as Exhibit E is a true and correct copy of the article Andrew Velarde, et al., *No Substantive IRS Guidance Coming for a While, Official Says*, Taxnotes, Feb. 14, 2017, which I downloaded from the url <http://www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says>.

7. Attached as Exhibit F is a true and correct copy of the article David Lazarus, *Former officials deride Trump's 'mindless' 2-for-1 deregulation plan*, LA Times, Jan. 30, 2017, which I downloaded from the url <http://www.latimes.com/business/lazarus/la-fi-lazarus-trump-regulations-order-20170131-story.html>.

8. Attached as Exhibit G is a true and correct copy of the editorial *Grenfell Tower Fire: Mindless Deregulation, Senseless Harm*, N.Y. Times (June 22, 2017), which I downloaded from the url <https://www.nytimes.com/2017/06/22/opinion/london-fire-grenfell-tower.html>.

Executed this 26th day of June, 2017, in Washington, DC.

I declare under penalty of perjury that the foregoing is true and correct.



Allison M. Zieve

Exhibit A

Trump Executive Order Embraces 'One-In, Two-Out' Regulatory Scheme

Trump signed a new order Monday aimed at slashing federal regulations.

By [Andrew Soergel](#), Economy Reporter | Jan. 30, 2017, at 12:47 p.m.



President Donald Trump signed an executive order Monday aimed at peeling back regulations. (Drew Angerer/Getty Images)

After a first-week flurry of executive orders covering trade, immigration and the construction of a U.S.-Mexico border wall, President Donald Trump maintained momentum entering his second week in office, signing an executive order aimed at peeling back federal regulations.

"This will be the biggest such act that our country has ever seen. There will be regulation. There will be control. But it will be normalized control where you can open your business and expand your business easily," Trump said Monday morning from the Oval Office.

The executive order appears to embrace a "one-in, two-out" regulatory scheme in which any additional regulation under consideration by the government can only be approved if two existing regulations are stripped away.

"If you have a regulation you want, No. 1, we're not going to approve it because it's already been approved, probably, in 17 different forms," Trump said from the White House. "But if we do, the only way you have a chance is we have to knock out two regulations for every new regulation."

The exact text and details of the order have not yet been released. But [Reuters](#) cited an unnamed official as saying the action will lay groundwork for an annual cap on the cost of new regulations. For the rest of fiscal 2017, the official said, that cap is reportedly \$0.

Trump made regulatory rollback a key facet of his presidential campaign and indicated last week that environmental regulations, especially, had gotten "out of control." He also vowed to peel existing regulations back as much as 75 percent.

Although a handful of Trump's other executive orders have been met with criticism, this latest policy is not unfounded. The U.K. back in 2010 adopted a similar policy, though its implementation did not apply to taxes, certain European Union legislation, non-business regulations and "regulation for civil emergencies," according to the [U.K. government](#).

Exhibit B

[The Fix](#)
Analysis

Stephen Bannon's nationalist call to arms, annotated

By [Aaron Blake](#) February 23

If there is one man believed to be pulling the strings behind the scenes in the White House right now, it's Stephen K. Bannon. The former head of Breitbart News's influence on President Trump is an endless source of fascination in Washington right now.

But Bannon's public comments are pretty few and far between. There was [a speech he gave at the Vatican](#) a few years ago, and then [an interview with the Hollywood Reporter](#) last year. And then, on Thursday, the Trump strategist spoke at the Conservative Political Action Conference in suburban Washington.

Bannon participated in a panel discussion with White House Chief of Staff Reince Priebus and Matt Schlapp, the head of the American Conservative Union. And Bannon's rhetoric was chock-full of the kind of nationalist, anti-news-media rhetoric for which he has become known. He cast the next four years as a constant battle with the media. "If you think they're going to give you your country back without a fight, you're sadly mistaken," he said.

It was a window into the worldview of a man whose worldview very much aligns with Trump's own. Below, we're posting the conversation in full, with our annotations. To see an annotation, click on the yellow, highlighted text.

SCHLAPP: CPAC is known for having important moments, and I think it's safe to say by a full room and just a couple of cameras that this is one of those moments.

(APPLAUSE)

And I — I think the first thing that would be appropriate after 30 days of running a continual sprint is to thank these two guys for what they've been doing.

(APPLAUSE)

(UNKNOWN): Thank you, thank you, well...

SCHLAPP: On that front — on that front, I also think it's a perfect moment to thank all of you for helping us elect what will be one of the greatest presidents that ever served this country. It's because of your work...

(APPLAUSE)

... that he made it happen.

BANNON: And Matt, I want to thank you for finally inviting me to CPAC.

(LAUGHTER)

SCHLAPP: Yeah, there's no — the — what was the name of the — the...

BANNON: The uninvited.

SCHLAPP: The uninvited.

BANNON: I know there are many alumni out here in the audience.

PRIEBUS: I didn't like the uninvited.

SCHLAPP: Here's what we decided to do at CPAC with the uninvited. We decided to say that everybody's a part of our conservative family.

PRIEBUS: That's right.

SCHLAPP: And that's what Donald Trump has done to so many of us around the country politically. And you guys have put together an amazing operation. You know, I know you all know this, but the last time a president came to CPAC in his first year, it was Ronald Reagan.

(APPLAUSE)

Saint Ronald in 1981. And you've put together this — the president has put together the most conservative Cabinet we've ever seen according to our CPAC ratings, and I think a few of us are pretty happy about what looks like is going to happen on the Supreme Court too, so it's a...

(APPLAUSE)

Now, let me ask you two. I'm looking in the back of the room as well, but let me ask you two.

PRIEBUS: Is that the opposition party?

(LAUGHTER)

SCHLAPP: Let me ask you two, we read a lot about you two.

BANNON: It's all good.

SCHLAPP: But I bet not all of it's accurate — I bet not all of it's accurate. I bet there's some things that don't get written correctly. Let me ask each one of you, what's the biggest misconception about what's going on in the Donald Trump White House?

PRIEBUS: Well, in regard to us two, I think the biggest misconception is everything that you're reading.

(LAUGHTER)

We — we share an office suite together. We're basically together from 6:30 in the morning until about 11:00 at night.

BANNON: I have a little thing called the war room; he has a fireplace with nice sofas.

PRIEBUS: And it's — it's actually something that you all have helped build, which is, when you bring together — and what this election showed and what President Trump showed, and let's not kid ourselves, I mean I can talk about data and ground game and Steve can talk about big ideas, but the truth of the matter is Donald Trump — President Trump brought together the party and the conservative movement.

And I've got to tell you, if the party and the conservative movement are together, similar to Steve and I, it can't be stopped. And President Trump...

(APPLAUSE)

... was the one guy — he was the one person, and I can say it after overseeing 16 people kill each other, it was Donald Trump that was able to bring this — this party and this movement together. And Steve and I know that and we live it every day. Our job is to get the agenda of President Trump through the door and on pen and paper.

BANNON: You know, but we've known it since August 15th, and I think if you look at the opposition party and how they portray the campaign, how they portrayed the transition and now they're portraying the administration, it's always wrong. I mean, on — on the very first day that Kellyanne and I started, we reached out to Reince, Sean Spicer, Katie.

It's the same team that, you know, every day was grinding away on the campaign, the same team that did the transition, and if you remember, you know, the campaign was the most chaotic — by the media's description, most chaotic, most disorganized, most unprofessional, had no earthly idea what they were doing and then you saw them all crying and weeping that night on — on the 8th when...

(APPLAUSE)

... when — and the reason it worked — the reason it worked is President Trump. I mean, Trump had those ideas, had that energy, had that vision that could galvanize a team around him of disparate — look, we're a coalition. You know, a lot of people think — have strong beliefs about different things, but we understand that you can come together to win, and we understood that from August 15th and — and we never had a doubt and Donald Trump never had a doubt that he was going to win. And — and I think that that is the power of this movement.

PRIEBUS: And — and on top of that — first of all, President Trump laid out his vision — what was it? -- four or five years ago here at CPAC.

SCHLAPP: That's right.

PRIEBUS: And it was that vision — it's nothing different. If you go back and watch the tape of President Trump four or five years ago, that was the Trump agenda.

One of the things that I used to say all the time — and Governor Walker and everyone gets sick of me saying it, but I think that President Trump found it — which is what this country, what all of us, were starving for the whole time because we're so sick of politics and politicians.

In spite of the fact that we love being here, we — we actually hate politics. But what we were starving for was somebody real, somebody genuine, somebody that was actually who he said he was.

(APPLAUSE)

BANNON: Yep — yep.

PRIEBUS: And the — the — the media attacked us on the campaign; remember, attacked me, you can't spend the money on Trump, go give it to the Senate. Attacked us on the transition, we — President Trump put in the best Cabinet in the history of Cabinets I think.

Now — feed ridiculous stories and all we do every day and all President Trump does every day, is hit his agenda every single day, whether it's TPP, whether it's deregulation, whether it's Neil Gorsuch, whatever it is, his promise is coming through every day.

SCHLAPP: He's even — he's even leaving bathrooms alone, that's kind of a nice, refreshing thing for a lot of people as well.

BANNON: They happen to think it's a state issue.

SCHLAPP: Of course.

BANNON: But — but — I think — let's go back to the point that Reince made for a second. President Trump, when he was running, he made a — and this is the other thing that the — the mainstream media or opposition party never caught is that if you want to see the Trump agenda it's very simple.

It was all in the speeches. He went around to these rallies, but those speeches had a tremendous amount of content in them, right? I happen to believe, and I think many others do, he's probably the great public speaker in those large arenas since William Jennings Bryan. This was galvanized.

And remember, we didn't have money. Hillary Clinton and these guys had over \$2 billion. We had a couple hundred million dollars. It was those rallies and those speeches, all he's doing right now is, he's laid out an agenda with those speeches for the promises he made. And our job every day is just to execute on that. It's to simply get a path to how those get executed.

And he's maniacally focused on that, and I think that's one of the powers of the transition where many, many people try to come in and try to convince President Trump, hey, you won on this but this is what you want to do.

And he's like, no, I promised the American people this, and this is the plan we're going to execute on. And Reince said — and by the way that's what you've seen; the executive orders, what the Supreme Court — the way he's gone through the Supreme Court. And by the way the other 102 judges that we're eventually going to pick, it's just a methodical — and that's what the mainstream media won't report.

Just like they were dead wrong on the chaos of the campaign and just like they were dead wrong in the chaos of the transition, they are absolutely dead wrong about what's going on today because we have a team that's just grinding it through on President Donald Trump promised the American people. And the mainstream media better understand something, all of those promises are going to be implemented.

SCHLAPP: That's awesome. It's been a...

(APPLAUSE)

You know, Steve you're a really likable guy. You should do this more often.

PRIEBUS: He's not so bad.

SCHLAPP: He's not so bad.

BANNON: Yes, exactly.

SCHLAPP: So, what are 30 days of action, and you guys have touched on some of that action. Each one of you, tell me the one or two things that have happened the last 30 days that you think are the most critical. And what is the one thing that you just — like you said Steve — maniacally focused, that has just got to happen early in the administration to really turn this country around? Start first with the first 30 days and then what's that focus after that.

PRIEBUS: So, I mean, there's a lot that — that's happened...

SCHLAPP: A lot.

PRIEBUS: ... in the — in the first 30 days. Whether, you know — and you look at the our — the world — our world order and — and some of the things that are going on that I think are — will be dealt with soon, but the first thing I think is Neil Gorsuch, for a couple things.

Number one, we're not talking about a change over a four-year period. We're talking about a change of potentially 40 years of law, number one. But more important than that — more important to that, it established trust. It established that President Trump is a man of his word. We always knew that. But when he said here's 20 names on a piece of paper back in July, remember? And he said I'm going to pick my judge out of these 20 people that are on this piece of paper and he did it, that's number one.

PRIEBUS: Because Neil Gorsuch represents a conservative — represents the type of judge that has the vision of Donald Trump and it fulfills the promise that he made to all of you and to all Americans across the country. Second thing, deregulation, what hasn't been talked about a lot is that President Trump signed an order that puts in place a constant deregulatory form within the federal government. And what it says is, for every regulation presented for passage that Cabinet secretary has to identify two that person would eliminate. And that's a big deal.

(APPLAUSE)

And then lastly, immigration: protecting the sovereignty of the United States, putting a wall on the southern border, making sure that criminals are not part of our process. These are all things that 80 percent of Americans agree with, and these are all things that President Trump is doing within 30 days.

SCHLAPP: Steve?

(APPLAUSE)

BANNON: I think the — I think the same thing; I think if you look at the lines of work, I kind of break it up into three verticals of three buckets. The first is kind of national security and sovereignty, and that's your intelligence, the Defense Department, Homeland Security.

The second line of work is what I refer to as economic nationalism, and that is Wilbur Ross at Commerce, Steven Mnuchin at Treasury, Lighthizer at — at Trade, Peter Navarro, Stephen Miller, these people that are rethinking how we're gonna reconstruct the — our trade arrangements around

the world.

The third, broadly, line of work is what is deconstruction of the administrative state. And if you...

(APPLAUSE)

So I think — I think the three most important things, I think one of the most pivotal moments in modern American history was his immediate withdraw from TPP. That got us out of a...

(APPLAUSE)

... got us out of a trade deal and let our sovereignty come back to ourselves, the people. The mainstream media don't get this, but we're already working in consultation with the Hill. People are starting to think through a whole raft of amazing and innovative, bilateral relationships — bilateral trading relationships with people that will reposition America in the world as a — as a fair trading nation and start to bring jobs. High-value-added manufacturing jobs back to the United States of America.

On the — on the national security part, it was certainly the first — I think the first two E.O.s that you start to see implemented here of the last couple of days under General Kelly. And that is, do rule of law is going to exist when you talk about our sovereignty and you talk about immigration. General Kelly...

(APPLAUSE)

... and Attorney General Sessions are adamant — you know, that and you're gonna start to see I think with the defense budget we're going to talk about next week when we bring the budget out and also with certain things about the plan on ISIS and what General Mattis and these guys think I think you'll start to see the other part of that.

But the third, this regulation...

SCHLAPP: Yeah.

BANNON: ... every business leader we've had in is saying not just taxes, but it is — it is also the regulation. I think the consistent, if you look at these Cabinet appointees, they were selected for a reason and that is the deconstruction, the way the progressive left runs, is if they can't get it passed, they're just gonna put in some sort of regulation in — in an agency.

That's all gonna be deconstructed and I think that that's why this regulatory thing is so important.

SCHLAPP: We had Dr. Larry Arnn (ph) on the...

(APPLAUSE)

... stage earlier today. And he brought up the fact that we're promulgating more laws and regulations that we ever had before. And most of that are from these independent agencies that are just on autopilot. You guys can stop that.

And also, coming from the federal bunch as conservatives, we know that a lot of times we fight out the political wars over issues we care about, and then all of a sudden, liberals on the bench, like a lightning bolt out of the sky, just change things.

And so what you guys are saying about changing that order is amazing. You know, we all — we all consume a lot of news; we watch and read a lot of things, there's been a great democratization in news. People get their news now from literally hundreds and thousands of sites.

What — what would each of you say, what is the — there's all these polls that are being put out again, is Donald Trump doing a good job, is Donald Trump doing a bad job. I know what you all think. We've been hearing it all — all day.

What is it that they keep getting wrong? And do you think it ever gets fixed? What does the media keep getting wrong about this Trump phenomena and what's happening out there in the country? And is there any hope that this changes?

PRIEBUS: I think there's hope that it's going to change. I mean we — we sit here, every day and — and the president pumps out all of this work and — and the executive orders and the punching through of the promises that he made to the American people.

So we're hoping that the media would catch up eventually. But we're so conditioned to it, I'm personally so conditioned to hearing about why President Trump isn't going to win the election. Why one — why a controversy in the primaries going to take down President Trump.

I lived through it, as chairman of the party. And — and it really hit me because it was maybe the summer of 2015, and you remember, the media was constantly pounding President Trump. And the polling kept getting better and better and better for President Trump.

But it was when I went home and got out of this town. And I went back to Kenosha and I talked to my neighbor and I said, "Bob, what do you think?" And he goes, "Man, I really love that Trump."

(LAUGHTER)

PRIEBUS: And I said, "Sandy — Sandy, what do you think?" She says, "We're for Trump."

And it was, as you all lived through it too, because you all had different people you were for, but you kept running into your neighbors and you kept running into people that you know. And what did they keep telling you? They kept telling you "Trump, Trump, Trump."

And so...

AUDIENCE: Trump, Trump, Trump...

SCHLAPP: So tomorrow — tomorrow, okay? Just be patient.

PRIEBUS: But I knew, and so it was back then, with my family and my sister, who is a doctor out in San Diego. And it just kept — everyone around me — that nothing — it was impenetrable. Because it goes back to what I said before, which is that the country was hungry for something far more — far bigger than one story or on-off issue. It was something that people wanted in this country, that was real, something that was going to change the direction that we were heading. And it was President Trump that was the answer.

BANNON: The reason Reince and I are good partners is that we can disagree: It's not only not going to get better. It's going to get worse every day.

(LAUGHTER)

And here's why. By the way, the internal logic makes sense. They're corporatist, globalist media that are adamantly opposed — adamantly opposed to an economic nationalist agenda like Donald Trump has. President Trump really laid this out, as Reince said, many years ago at CPAC. It's really CPAC that really originally gave him the springboard. It's the first time at Breitbart, we start seeing him, and saw how people, you know, his speeches resonated with people.

And then he would go out to these smaller town halls later and really he got traction with the same message he's bringing today. Here's the only — here's why it's going to get worse: Because he's going to continue to press his agenda. And as economic conditions get better, as more jobs get better, they're going to continue to fight. If you think they're going to give you your country back without a fight, you are sadly mistaken. Every day — every day, it is going to be a fight. And that is what I'm proudest about Donald Trump. All the opportunities he had to waver off this; all the people who have come to him and said, “oh, you've got to moderate.” Every day in the Oval Office, he tells Reince and I, “I committed this to the American people; I promised this when I ran; and I'm going to deliver on this.”

(APPLAUSE)

How novel.

SCHLAPP: How interesting. I remember I was being asked by some reports — they were like, “Why is Trump doing X, Y or Z?” And I said, “Because he said he would do it on the campaign trail.”

(LAUGHTER)

It's really not that complicated, is it? But no, there are — there are...

(CROSSTALK)

SCHLAPP: ... Okay, I like that one. There are some — there are some parts of this, though, that are fitful. The American Conservative Union, which puts on CPAC, was created after Barry Goldwater lost in 1964, in an effort to take all different kinds of voices from the right in the conservative movement and bring them together.

So there is this question. There are those folks that consider themselves, you know, classical liberals or conservatives or Reagan conservatives. There are other folks that consider themselves libertarians. There are other folks that are part of this new Trump movement. And Trump brought a lot of new people. There's probably in this — people in this crowd that wouldn't have been in this crowd before.

So there's a lot of diversity here. We all know it when we're at the bar at the end of the day. And can this Trump movement be combined with what's happening at CPAC and other conservative movements for 50 years? Can this be brought together? And is — this is going to save the country?

PRIEBUS: Well, first of all, it has to, and we have to stick together as a team. I think that what you've got is an incredible opportunity. We've got an incredible opportunity to use this victory that President Trump and all of us, and you, and everyone that made this happen, put together.

And work together. Continue to communicate. It's very similar. Some of the core principles of President Trump are very similar to those of Ronald Reagan. When you look at peace through strength and building up the military, I mean, how many times have you heard President Trump say, “I'm going to build up the military; I'm going to take care of the vets; I'm going to make sure that we

don't have a Navy that's decimated, and planes that are nowhere to be found.”

Peace through strength, deregulation. You think about the economy, the economic boom that was created. And some of it is going to take a little time, I mean, to get the jobs back; to get more money in people's pockets. Those things are going to happen.

And in the meantime, we have to stick together and make sure that we've got President Trump for eight years. And he's somebody that we know that we're going to be very proud of as these things get done. But it's going to take all of us working together to make it happen.

BANNON: You know, I've said that there's a new political order that's being formed out of this. And it's still being formed. But if you look at the wide degree of opinions in this room — whether you're a populist; whether you're a limited government conservative; whether you're libertarian; whether you're an economic nationalist — we have wide and sometimes divergent opinions.

But I think we — the center core of what we believe, that we're a nation with an economy, not an economy just in some global marketplace with open borders, but we are a nation with a culture and a — and a reason for being.

And I think that is what unites us and I think that is what is going to unite this movement going forward. President Trump tomorrow is coming, I think, really to express his appreciation.

SCHLAPP: Absolutely. The vice president's coming tonight.

BANNON: The vice president's coming tonight, and the reason he understands in CPAC, there are many, many, many voices, but he's here to say appreciation and to drive this movement forward. This is really where he got his launch, you know, with his ideas in the conservative movement...

SCHLAPP: Absolutely.

BANNON: ... what seven, six years ago — five years ago, and he wanted to show his appreciation.

We're at the top of the first inning of this. And it's going to take just as much fight, just as much focus and just as much determination. And that one thing I'd like to leave you guys today with is that, we want you to have our back. But more importantly...

(APPLAUSE)

We know — by the way, President Trump — we never doubted that for a second, but also and more importantly, hold us accountable. Hold us accountable to what we promised, hold us accountable for delivering on what we promised.

SCHLAPP: Let me just ask as we — as we close this out. It's time for — you know you guys have been so sort of Kumbaya here, it's kind of time for a little bit of a group hug.

(LAUGHTER)

Let me ask you — okay, I'm sorry I'm going to do the Barbara Walter's thing for those of you who remember Barbara Walters. Let me ask you, what do you — you've worked really closely with Steve.

PRIEBUS: Right.

SCHLAPP: You say your offices — I know what two offices they are, they are really close to each other. What do you like the most about him?

(LAUGHTER)

Hold on, let him think.

PRIEBUS: I love how many collars he wears, interesting look.

(LAUGHTER)

One thing — we're different, but where we're very similar is that I think that he is very dogged in making sure that every day the promises that President Trump has made are the promises that we're working on every day, number one.

Number two, he's incredibly loyal. And number three, which I think is a really important quality as we were working together to see to it that President Trump's vision is enacted is that, he's extremely consistent.

That, as you can imagine, there are many things hitting the president's ear and desk every day. Different things that come to the president that want to move him off of his agenda and Steve is very consistent and very loyal to the agenda and is a presence that I think is very important to have in the White House and I consider him...

(APPLAUSE)

... but — and secondly — and a very dear friend — a very dear friend and someone that we — that I work with every second of the day in — and actually we cherish — I cherish his friendship.

BANNON: Yeah, you know, I can run a little hot on occasions.

(LAUGHTER)

And — and Reince is indefatigable; I mean, it's low key, but it's determination. The thing I respect most and the only way this thing works is Reince is always kind of steady, he's got Katie and some other people around him, it's very steady.

But his job is, by far, one of the toughest jobs I've ever seen in my life. To make it run every day, and to make the trains, and you only see the surface. What's going on underneath it, planning what's three weeks down the road to the — to the degree that we're planning it, of all these E.O.s and legislation and — you know, whether it's the tax reform bill, Reince is indefatigable in saying, we've got to drive this forward, we've got to drive this forward.

And I think it's one of the reasons we have such a — and by the way this started back in August when we had this campaign where we were outgunned, outmanned, you know, outspent. And it was because President Trump had a message, he had this charisma, and he had people like here at CPAC and we just put our heads down and that when we — and Reince has been unwavering since the very first moment I met him.

SCHLAPP: Well it's a great honor to have you both here.

(APPLAUSE)

I think — I think the best thing we could do is to let these two guys get back to work, what do you think?

PRIEBUS: That's right.

SCHLAPP: Thanks for being here. PRIEBUS: Thank you, Matt.

Aaron Blake is senior political reporter for The Fix.  Follow @aaronblake

Exhibit C

Trump's 'Two-for-One' Regulation Executive Order

Will the president's plan to reduce the cost and burden of rules work? And is it even necessary?



President Donald Trump signs an executive order aimed at reducing federal regulations at the White House on January 30, 2017.

Carlo Barria / Reuters

BOURREE LAM | JAN 30, 2017 | BUSINESS

Like *The Atlantic*? Subscribe to [The Atlantic Daily](#), our free weekday email newsletter.

On Monday morning, President Donald Trump signed yet another executive

order, following the [17 wide-ranging executive actions](#) enacted during his first week in office. This latest order tackles yet another one of Trump's campaign talking points and will require federal agencies to cut two existing regulations for every new regulation they implement.

“If there's a new regulation, they have to knock out two. But it goes far beyond that, we're cutting regulations massively for small business and for large business,” Trump said during the signing of the order, while surrounded by small-business leaders. He stressed that the new measure is meant to ease the opening and expansion of small businesses, and said that America's small businesses “have been treated very badly” and that it was “virtually impossible to expand your existing business because of regulations.”

Trump has long [stated](#) that overregulation is hampering America's economic growth, and plans for decreasing regulation [got top billing in his 100-day action plan](#), released in November. In [past remarks](#), Trump has targeted specific regulations which he believes are hampering job growth, including the Waters of the U.S. Rule (which [protects rivers and wetlands](#)) and the EPA's [Clean Power Plan](#)—which limits carbon pollution from power plants and is [currently on hold](#) under a Supreme Court stay.

Last week, Trump met with business executives from some of America's largest companies and [promised to cut regulation by 75 percent](#). He also ordered a freeze on all new and pending regulation at the federal level via [a memorandum](#)—save for emergencies relating to “health, safety, financial, or national security matters,”—until a Trump-appointed department head could review prospective regulations.

But the details of Monday's executive action aimed at reducing federal regulation are still vague. In [the official language of the executive order](#), the reduction of regulation is tied to controlling costs, and excludes many regulations including: those concerning “a military, national security, or foreign affairs function of the United States”; regulations related to an agency's

organization, management or personnel; or “other category of regulations exempted by the Director.” Trump’s executive order specifies that the incremental cost for new regulations for 2017 will be \$0, and that agencies will be tasked with identifying which two regulations would be repealed if they choose to issue a new one.

In a [working paper](#) released in December, Marcus Peacock, a research professor at George Washington University’s Regulatory Studies Center, explored what the ramifications of a “two-for-one” regulatory requirement might look like. Peacock states in the paper that such a measure raises a number of issues, including the definition of a “new” regulation, how offsets should be measure, the workload and enforcement involved, and how likely it is that this policy would survive in future administrations. It’s also questionable whether regulation has really hampered small businesses, or whether it stems from [popular political rhetoric in times of economic uncertainty](#).

Already, the action has raised questions, with some [speculating](#) that this regulation reduction might just result in regulations that are longer and more complex. Some have questioned the logic of the “two-for-one” approach, and still others have taken to social media to suggest that the measure is reminiscent of [tidy-guru Marie Kondo’s minimalist philosophy](#).

ABOUT THE AUTHOR



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Exhibit D

Trump signs executive order aiming to slash regulations

www.cnn.com/2017/01/30/trump-set-to-sign-executive-order-aiming-to-slash-regulations.html

Jacob Pramuk

[show chapters](#)



[Trump to sign executive orders to reduce business regulations](#) Monday, 30 Jan 2017 | 10:01 AM ET | 01:48

President [Donald Trump](#) signed an executive order Monday aiming to kickstart campaign pledges to slash regulations.

The measure will expand regulatory review with the goal of revoking two regulations for every new one put forward, according to a senior administration official. Under the order, federal agencies will propose rules they want to drop and the White House will review them.

With the order, Trump followed through on repeated campaign promises to cut rules that he said hold back the economy. In meetings with business leaders since his election, [Trump has touted his efforts to reduce regulations and cut corporate taxes](#).

While signing the order surrounded by small business owners, Trump called it "the largest ever cut by far in terms of regulation." It sets a budget each year for what new regulations would cost the economy, companies and employers.

For fiscal 2017, it gives a budget of \$0 for new regulations.

Critics of Trump's economic and regulatory agenda have raised concerns that his administration will reduce protections for consumers and the environment in an effort to help businesses. Many of the specific regulations Trump has criticized relate to environmental protection.

"There will be regulation, there will be control, but it will be a normalized control," Trump told reporters at the White House.

The administration said the rules would not affect independent agencies such as the Securities and Exchange Commission.

The White House has already put a temporary regulatory freeze in place, but the order establishes the process for when the freeze ends, according to the official.

The Office of Management and Budget, which Trump has tapped budget hawk Mick Mulvaney to lead, will have discretion to give the agencies guidance.

— *CNBC's Eamon Javers contributed to this report*

Exhibit E

No Substantive IRS Guidance Coming for a While, Official Says

POSTED ON FEB. 14, 2017

By

 ANDREW VELARDE

 EMILY L. FOSTER

Because of two Trump administration policy changes restricting new regulations, the IRS will not be releasing any guidance -- including revenue procedures and revenue rulings -- beyond the most routine items for "a while," an official said February 13.

"The chief counsel's office has been in communication with Treasury about how this kind of regime might affect the tax regulatory process," said Robert Wellen, IRS associate chief counsel (corporate), about the policy changes. The first is the administration's unusual "one-in, two-out" executive order [□](#), which generally requires agencies to eliminate two regs for every new one issued. The second is a January 20 memorandum [□](#) that calls for a regulatory freeze pending administrative review.

"Discussions continue. Read your newspaper. I don't know how this is going to come out," Wellen said in New York at a conference sponsored by the Practising Law Institute.

Wellen added that the restriction on new guidance is "very broad" and that the IRS is no longer submitting guidance to the *Federal Register* or to the Internal Revenue Bulletin beyond the most routine administrative guidance, such as updates to interest rates or mileage allowances. However, the agency will continue to release private letter rulings and chief counsel advice memoranda, he said.

Wellen also said he was hopeful that the Senate's confirmation of Treasury Secretary Steven Mnuchin would be the beginning of the process of "a tax team taking shape." He added that he hopes it would also allow guidance from the IRS to be reviewed, in accordance with the terms of the January 20 memorandum.

Under the 2-for-1 executive order, if a new regulation imposes a "cost," a term not defined within the order, that cost must be offset. Wellen said he was uncertain if cost meant administrative cost or tax dollars, but added that in speculating how the order worked, one theory within the IRS is that if a regulation raised raises revenue, that may count as a cost. An Office of Management and Budget memo [□](#) from February 2 clarified that the executive order applies only to regs that are significant regulatory actions, and that cost is measured as the opportunity cost to society as defined by OMB Circular A-4.

Practitioners had previously speculated about the extent to which Trump's executive order applied to tax guidance, which historically has been viewed as interpretive and has not usually been included as a significant regulatory action. Under a 1983 memorandum of agreement [□](#) between Treasury and the OMB, the two agencies agreed on types of Treasury regs not subject to review under a predecessor to Executive Order 12866, granting a waiver from review procedures except for legislative regs designated as major. EO 12866 requires that significant regulatory actions be subject to increased scrutiny by the OMB. Regs will be considered significant if they produce an annual effect on the economy of \$100 million or more, adversely

affect materially the economy or a sector of the economy, or raise novel legal or policy issues. Wellen described the \$100 million baseline as a low threshold. (Prior analysis [□](#). Prior coverage [□](#).)

"What's going to happen with that memorandum of understanding, whether it will remain in place, be changed, or revoked altogether . . . I have no idea," Wellen said.

Bandwidth for Tax Reform

Speaking on an earlier panel, Krishna Vallabhaneni, Treasury deputy tax legislative counsel, said he won't be reviewing the projects on the priority guidance plan as he typically does every year. It's not entirely clear whether Treasury will issue any guidance soon, which is typical whenever a transition occurs, he said, adding that it would be pure speculation on what the priorities will be until a new team has a chance to assess what's in the pipeline.

The lack of substantive guidance is not just because of the new team's desire to review what's in the pipeline and perhaps shift priorities, but also because "there's a lot of interest in pushing tax reform, and so at least in the Office of Tax Policy, that's going to be taking a lot more bandwidth than in prior years," he explained. If there's "going to be a significant change to the tax law, it doesn't make a whole lot of sense to throw resources at putting out new regulations based on the old tax rules," Vallabhaneni said, adding that the Office of Tax Policy has been engaged in tax reform efforts.

In response to a question about the 2-for-1 executive order, Vallabhaneni said the "default stance is that any regulation that we put out is subject to the recent executive orders and presidential memoranda." He said the February 2 OMB memo answered some of the IRS's questions and that "it's an ongoing effort as more questions percolate up to OMB" and it makes determinations on the IRS's guidance. But there's "no reason to believe that there's going to be any distinction for regulations from any particular agency," Vallabhaneni said.

In response to a question about the status of efforts to withdraw any tax regulations such as the [section 385 debt-equity regs](#), Vallabhaneni stressed that the Treasury secretary is not in place and that the new team will need to be installed before Treasury can take action.

Lawmakers have differing views on the future of the debt-equity regs. House Ways and Means Committee Democrats sent a memo February 8 urging fellow members to oppose a resolution repealing the documentation requirements in the rules. Treasury last year finalized the section 385 regs (T.D. 9790 [□](#)), which provide documentation requirements for some related-party interests in a corporation to be treated as indebtedness and to treat as stock some related-party interests that otherwise would be treated as indebtedness. Several Republican taxwriters strongly opposed the regulations. (Prior coverage [□](#).)

The documentation rules require taxpayers to provide (1) evidence of an unconditional and binding obligation to make interest and principal payments on specific fixed dates; (2) evidence that the holder of the loan has the rights of a creditor, including superior rights to shareholders for dissolution; (3) a reasonable expectation

of the borrower's ability to repay the loan; and (4) evidence of conduct consistent with a debtor-creditor relationship.

Practitioners previously offered differing views on whether the debt-equity regs would be withdrawn but also suggested that the documentation rules may have some bearing on the IRS's review of debt transactions within a group even if the regs are withdrawn. (Prior coverage [📄](#).)

For applying the 2-for-1 executive order, practitioners at the session offered one suggestion – issue guidance to address the consolidated return circular basis issues under [reg. section 1.1502-11](#) and remove the section 385 debt-equity regs and [reg. section 1.1502-36](#) governing the consolidated returns unified loss rule.

Vallabhaneni emphasized that just because Treasury is not issuing guidance imminently doesn't mean practitioners and taxpayers can't submit comments and suggestions.

Opening Up the Letter Ruling Process

Speaking on the letter ruling program, Wellen said that generally the IRS would be looking to open up the process. For several years now, restrictions on letter rulings have been in place that limit them to a significant issue rather than a transaction generally. That limitation was implemented because of resource constraints, Wellen said. He added that in seeking to open up the program, he requested input from practitioners, regarding both the most useful subject matters and processes to pursue. (Prior coverage [📄](#), [📄](#).)

"We're trying to come up with ways we can issue rulings on full transactions," Wellen said, adding that the IRS was attempting to design a program with that goal in mind that would "regularize the process." There is no timeline yet on when the new process will be implemented, he said, although he added that a significant amount of work remains to be done on the project.

Wellen said the IRS was thinking of starting with section 355 and divisive D reorgs and related transactions under the program because of the large amount of letter rulings dedicated to these topics. The IRS was also examining new ways to process ruling requests that would take less time for the IRS and put more of the burden on taxpayers, he said.

"A [letter ruling] dealing with a spinoff that has any complexity at all is going to have . . . 50, 100, 200 separate factual representations that the taxpayer makes," Wellen said. "Believe it or not, we've really never standardized those representations even though this practice has been around longer than I have been practicing law."

Wellen added that while there was logic to the IRS's flexibility toward the forms of taxpayer representations to account for differences in deals, the burden this imposed on the IRS was considerable. A new process might require taxpayers to make representations in a prescribed form or, failing that, explain why such a prescribed form could not be used, he added. He also requested that practitioners "exercise a high level of quality

control" when making ruling requests. The IRS may find itself more frequently returning requests that fail to meet a specific level of quality in the future, he said.

Exhibit F

Column Former officials deride Trump's 'mindless' 2-for-1 deregulation plan



President Trump signed an executive order Monday requiring government agencies to cut two regulations for every new one they add. (Getty Images)



By **David Lazarus**

JANUARY 30, 2017, 3:10 PM

Joan Claybrook, head of the National Highway Traffic Safety Administration during the Carter administration, had an immediate reaction when informed Monday of President Trump's executive order requiring that federal agencies scrap two existing regulations for every new one adopted.

She burst out laughing.

"That's a completely illogical way of doing things," Claybrook told me. "It's going to harm the public. People are going to die if you start eliminating safety standards."

I reached out to a number of former federal regulators after Trump's order was announced. I wanted to

know how such an arbitrary approach to rule-making squared with their real-world experience of keeping the public safe and monitoring businesses.

Every one of them, Republican and Democrat, said Trump's approach to the highly complicated task of official oversight is reckless and irresponsible.

"I can't think of a single regulation that has no basis in fact," said Christine Todd Whitman, head of the [Environmental Protection Agency](#) under former President George W. Bush. "It's going to be hard to find regulations that aren't important to protecting human health."

She called Trump's executive order "mindless."

In signing his order, Trump called it "a big one" and said his goal is "the largest-ever cut by far in terms of regulations."

"There will be regulation, there will be control, but it will be a normalized control where you can open your business and expand your business very easily and that's what our country has been all about," he said.

Trump's order specifically requires that the cost of any new regulation be offset by eliminating existing rules with the same costs to businesses. Military regulations are excluded.

Inez Tenenbaum, head of the Consumer Product Safety Commission under former [President Obama](#), said Trump doesn't seem care which regulations are abandoned, as long as there are significantly fewer rules for businesses to follow.

"That's not a formula for rule-making," she said. "That's a formula for just pulling things out of the air."

As with many of Trump's pronouncements, details are a work in progress. But the order suggests a sweeping emphasis on deregulation affecting numerous aspects of peoples lives, from environmental protection and healthcare to banking practices and workplace safety.

"What the president is talking about is reducing public health protection," said David Michaels, who oversaw the Occupational Safety and Health Administration under Obama.

Even so, he pointed out that getting rid of regulations can be just as hard as implementing new ones. It's not a matter of simply crossing out rules in some regulatory ledger book.

To scrap a regulation, a federal department or agency needs to notify the public, businesses, unions and others of its intentions, explain the rationale for the move, receive comments, and undergo the horse trading that typically surrounds decisions with potentially far-reaching ramifications. This can take years.

"Responsible companies want regulations," Michaels said. "They want a level playing field with rules that everyone has to follow."

As with his ban on travel from some predominantly Muslim countries, Trump's 2-for-1 approach to deregulation represents fulfillment of a campaign promise. His position prior to the election was that businesses are burdened by too many rules and we can easily get rid of most of them.

He's said his objective is to eliminate 75% of existing regulations.

That might work as a sound bite, but in reality he's tackling a highly complex, deeply nuanced process that cuts across virtually all aspects of society and commerce, with trillions of dollars in economic activity on the line.

For example, Trump said Monday that he intends to "do a big number" on Dodd-Frank financial regulations that have become part of the corporate DNA of financial-services companies and created the [Consumer Financial Protection Bureau](#).

Gerald Sachs, a former senior attorney with the CFPB, said banks have spent millions figuring out how to comply with Dodd-Frank. They'd have to spend just as much, he said, figuring out any significant changes to the law.

"Having no regulation is just not practical," Sachs said. "What we can't have is a race to the bottom."

Trump lacks the power to demand specific changes from independent government agencies such as the CFPB and the Federal Communications Commission that operate outside the control of Cabinet secretaries. However, he can sack agency leaders under certain circumstances or use the Republican-controlled Congress to slash their budgets.

"There are lots of ways presidents can take action against an agency that doesn't follow an executive order," said Lisa Heinzerling, who served as associate administrator of the Environmental Protection Agency's Office of Policy under Obama. "It's very unsettling."

Whitman, the former EPA administrator and New Jersey governor, told me that "everyone is scared" at the agency as a result of Trump nominating Oklahoma Atty. Gen. [Scott Pruitt](#) to take charge. Pruitt, a strong supporter of the oil and gas industries, has described himself as a "leading advocate against the EPA's activist agenda."

Whitman said a likely scenario is that the EPA and other agencies will stop seeking new regulations so they can protect existing rules. "I think people will go to extremes to avoid running afoul of this administration," she said.

There's always room for revisiting regulations once their true impact on businesses or the public becomes known. Some might be discarded. Most simply need to be improved.

Trump's 2-for-1 deal is governing by foolishness, treating the public interest like a cheesy offer on late-night

TV.

He might just as well offer free steak knives to the regulator who does the most cutting.

David Lazarus' column runs Tuesdays and Fridays. He also can be seen daily on KTLA-TV Channel 5 and followed on Twitter @Davidlaz. Send your tips or feedback to david.lazarus@latimes.com.

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This article is related to: [U.S. Environmental Protection Agency](#), [Barack Obama](#), [Scott Pruitt](#)

Exhibit G

The Opinion Pages | EDITORIAL

Grenfell Tower Fire: Mindless Deregulation, Senseless Harm

By THE EDITORIAL BOARD JUNE 22, 2017

The fire that destroyed a London apartment building, killing at least 79 people, provides a grim warning about the dangers of a regulatory approach President Trump has made official policy in Washington.

One of the safety failures under investigation in the fire is the lack of sprinklers in the 24-story Grenfell Tower. High-rises built in England since 2007 must have sprinklers, but older ones, like Grenfell Tower, built in 1974, do not have to be retrofitted with them.

Why not? Arbitrary deregulation, said Ronnie King, a former chief fire officer and honorary secretary of a parliamentary group on fire safety and rescue.

“It’s one of those that if you bring in a new regulation, you have got to give three up to get it,” Mr. King said in a BBC report, referring to a British law first passed in 2011 that requires the elimination of regulations as each new one is enacted. At first, one rule had to be ended for every new rule passed. That was later expanded to “one in, two out,” a standard President Trump put forth in an executive order he signed in January. In 2015, British law became “one in, three out.”

Such a pat formula could force officials to reject crucial new rules to avoid eliminating other important protections, or to eliminate such existing protections to make room for a new one.

“The government’s mania for deregulation means our current safety standards just aren’t good enough,” said Sam Webb, an architect and fire expert, in the BBC report.

Mr. Trump’s order is similarly likely to lead to dangerous elimination of safety rules, including those for food, drugs, water, air, autos and toys, partly because many obsolete or duplicative federal rules were already purged under the Obama era’s “look back” program to systematically revise, end and update existing rules.

Supporters of Mr. Trump’s mechanistic two-for-one deregulation pretend that public health and safety would take care of themselves as business is freed of what they say are undue burdens. But this approach is not about safety or business burdens, it’s about increasing profits by reducing compliance costs.

Speaking in February 2014 during Fire Sprinkler Week, some of the members of the British House of Commons were all for sprinklers, but not for regulations to require them.

“We believe that it is the responsibility of the fire industry, rather than the government, to market fire sprinkler systems effectively and to encourage their wider installation,” Brandon Lewis, who would later become housing minister for the Conservative government, said after praising the one-in, two-out formula then in use.

After the Grenfell Tower fire, the dangers of reflexive rejections of regulation, like Mr. Trump’s executive order, are clearer.

A version of this editorial appears in print on June 22, 2017, on Page A26 of the New York edition with the headline: Mindless Deregulation, Senseless Harm.

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)

DECLARATION OF MICHAEL HEIMBINDER

I, MICHAEL HEIMBINDER, declare as follows:

1. I have been a member of the Natural Resources Defense Council (NRDC) since 2008. I live in Brooklyn, New York, and support NRDC's efforts to promote sustainability, environmental justice, and environmental health.

2. I am the Founder and Executive Director of HabitatMap, a nonprofit organization that works to raise awareness about the impacts of the environment on human health. For example, we created a community mapping platform that allows individuals and community groups to identify and map environmental health hazards, such as chemical plumes.

3. I am concerned about the health impacts of environmental pollution. I feel like we are playing Russian roulette with our health; we are putting many toxic pollutants into the environment, often without knowing exactly how or when any pollutant will affect us as individuals.

4. I am concerned about mercury contamination in the environment. I am aware that once mercury, a neurotoxin, enters the environment, it is concentrated up the food chain through

biomagnification and can negatively impact human health when people consume food like predatory fish. I am aware that mercury can be particularly harmful to young children.

5. I have two young children: a two-year-old and a five-year-old.

6. My children and I eat fish about once a week. I take precautions to prevent my family from eating fish that may expose us to accumulated toxins, such as mercury or PCBs. For example, we eat black sea bass, wild salmon, and tilapia, which generally have low levels of mercury, but avoid fish with high levels of mercury, like tuna. I find tuna to be one of the tastiest fish, but I am too concerned about the potential negative health impacts from mercury to feed it to my family.

7. While I have researched which fish to eat to avoid mercury, I believe the fish I buy or order at restaurants is sometimes mislabeled, making it almost impossible to avoid eating fish containing mercury. Furthermore, just because certain types of fish contain less mercury does not mean they contain no mercury. It is impossible for a consumer like me to look at any fish and know whether or not it is contaminated with mercury. I remain concerned that, despite my efforts, it is not fully possible to know whether the fish that my children and I eat contain mercury and could be harmful to our health.

8. I am aware that mercury enters the environment through dental office effluent. I am also aware that the U.S. Environmental Protection Agency (EPA) had finalized a regulation requiring dental offices to take steps that would have significantly reduced their discharges of mercury-containing waste, but that the EPA has delayed implementation of the rule due to an executive order issued by President Trump, which requires federal agencies to identify two existing rules for repeal before issuing a new regulation and to offset the costs of the new regulation.

9. I consider any preventable release of mercury into the environment very dangerous, and I am concerned that the mercury from dental-office waste may contaminate the fish that my children and I eat. EPA's mercury rule would have significantly reduced this waste, partly alleviating my concerns about the health risks to my family from mercury exposure. I am concerned that President Trump's executive order has delayed the implementation of EPA's rule, and I support NRDC's efforts to challenge the executive order as unconstitutional.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 05, 2017

A handwritten signature in black ink, appearing to read "Michael Heimbinder", written over a horizontal line.

Michael Heimbinder