UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 17-253 (RDM)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The President issued Executive Order 13771 for the purpose of delaying and deterring regulation, "put[ting] in place a constant deregulatory" regime for the purpose of "deconstruction of the administrative state."[1] The President and the Office of Management and Budget (OMB) have since touted the results of the Executive Order. As the President stated, "We ordered that for every one new regulation, two old regulations must be eliminated.… Within our first 11 months, we cancelled or delayed over 1,500 planned regulatory actions."[2]

In litigation, however, the President, OMB, and the other defendants refuse to acknowledge that the Executive Order has delayed a single rule. At the same time, they refuse directly to state that the Executive Order has *not* done so—although they possess all relevant facts on this point.

The Court should not allow defendants to avoid judicial review by playing coy. Plaintiffs' showing, as well as "the useful tool" of "common sense," *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017), firmly establishes their standing. The Court should promptly grant plaintiffs' motion for partial summary judgment and proceed to address the merits, either on the basis of the existing, thorough merits briefs (which defendants have not contended are insufficient to allow decision on the merits) or through expedited rebriefing.

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[1] 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. (Dkt. 47-2)).

[2] Remarks by President Trump on Deregulation, Dec. 14, 2017, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation/. *See also* Pls. Mem. 4, 6 (Dkt. 71) (citing OMB statements); *see* OMB, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, https://web.archive.org/web/20171215071216/https:/www.reginfo.gov/public/do/eAgendaMain.

ARGUMENT

I. Plaintiffs have standing because Executive Order 13771 delays and prevents rules that would benefit them and their members.

A. Disclosure of airline baggage fees

Plaintiffs have cited several Department of Transportation (DOT) statements substantiating that DOT terminated the rulemaking on disclosure of airline baggage fees in response to Executive Order 13771. *See* Pls. Mem. 9–10 (Dkt. 71). In response, defendants do not aver that the Executive Order had no part in DOT's decision, although they surely could if that were the case. And defendants make no attempt to explain why DOT mentioned the Executive Order in its otherwise terse notice announcing withdrawal of the rulemaking, if not to flag its role. Defendants should not be permitted to manufacture a factual dispute by failing to offer evidence to refute the point—evidence that, if it exists, would be in their sole possession—particularly where, outside of litigation and prior to Executive Order 13771, they unequivocally recognized the need for a baggage-fee rule. *See* 82 Fed. Reg. 7536, 7539, 7540 (2017) (DOT disagreeing with comment that a rule is not needed because "no consumer harm is occurring").

Furthermore, although defendants state that they dispute plaintiffs' statement that "[b]y preventing a rule regarding airline fees for checked bags, Executive Order 13771 and the OMB Guidances are causing injury to Public Citizen members such as Amy Allina," defendants include no citation and no evidence to controvert the statement. *See* Def. Resp. to Pls. Stmt. ¶ 58 (Dkt. 75-1). Because the statement is adequately supported by plaintiffs' evidence, the Court should deem the fact admitted. *See Richardson v. D.C. Dep't of Youth Rehab. Servs.*, 271 F. Supp. 3d 113, 117 (D.D.C. 2017) (stating that court may consider facts undisputed where nonmoving party failed to controvert them with "references to the parts of the record relied on"); *Mencias Avila v. Dailey*, 246 F. Supp. 3d 347, 353 n.2 (D.D.C. 2017) (finding plaintiff's description of police video

"undisputed" at summary judgment stage where defendant police officer objected to the evidence but did not offer the video or other evidence to contradict the description); Fed. R. Civ. P. 56(c)(1).

As to redressability, the rulemaking record prior to Executive Order 13771 shows that DOT thought that a baggage-fee disclosure rule was an important consumer protection. Indeed, it referred to the proposed rule as the "Consumer Protection NPRM." 82 Fed. Reg. at 7536. Here, defendants argue that redressability is speculative because DOT has decided that a rulemaking is not necessary "at this time." Def. Opp. 4 (Dkt. 75) (quoting 82 Fed. Reg. 58778 (2017)). To begin with, if Executive Order 13771 played a part in DOT's decision that the rule is not necessary at this time, and Executive Order 13771 is unconstitutional and invalid, defendants cannot rely on DOT's statement as evidence of how the agency would decide the issue absent the Executive Order.

Moreover, as plaintiffs have previously explained, Pls. Mem. 20, 23, "[w]hen, as here, the party seeking judicial review challenges an agency's regulatory failure, the [party] need not establish that, but for that misstep, the alleged harm certainly would have been averted." *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014). Or as another judge of this Court stated recently in a case challenging a procedural violation, plaintiffs need not demonstrate that correcting the violation "would necessarily remedy the injurious government action, so long as 'there is some possibility' that it would do so." *Nucor Steel-Ark. v. Pruitt*, 246 F. Supp. 3d 288, 304 (D.D.C. 2017) (quoting *Mass. v. EPA*, 549 U.S. 497, 518 (2007)). *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005) (finding standing to challenge agency action where ruling for plaintiff would impact permitting proceedings but would not guarantee plaintiff's desired outcome); *Hawai'i v. Trump*, 859 F.3d 741, 763, 767 n.8 (9th Cir.) (finding standing where

challenged executive order posed a barrier that delayed or prevented issuance of visas, notwithstanding existence of other barriers), *vacated on other grounds*, 138 S. Ct. 377 (2017).[3]

Finally, defendants misconstrue plaintiffs' point that, although DOT has withdrawn the baggage-fee rulemaking, their injury is redressable by a declaration and order from this Court. As plaintiffs explained, if the Court declares the Executive Order unconstitutional, plaintiffs could then petition DOT to recommence the baggage-fee rulemaking, which DOT would then have to consider free from the restraint of the unconstitutional Executive Order. *See* Pls. Mem. 13. Defendants suggest that, if a citizen petition is a possibility, plaintiffs need not pursue this lawsuit, but instead should submit a series of citizen petitions and challenge the application of the Executive Order in each one. Although submitting petitions might provide a way to challenge some actions affected by the Executive Order, submitting citizen petitions *before* obtaining relief in this case would neither avoid nor itself redress the injury caused by the Executive Order: Each agency's consideration of the action sought in each petition would still be infected by the Order's requirements. In any event, defendants' suggestion that plaintiffs replace their facial challenge with a slew of as-applied challenges is not pertinent to standing. And as long as plaintiffs have standing and a cause of action, the choice of approach belongs to them, not defendants.[4]

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[3] While ignoring the other cases cited in plaintiffs' memorandum on this point, Defendants attempt to dismiss *Sierra Club* as addressing causation, not redressability. Def. Opp. 25 n.11. Yet "[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*, 854 F.3d at 6 n.1 (quoting *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)).

[4] Likewise, defendants' suggestion that this suit represents an "unprecedented attempt to use the nonstatutory review doctrine to challenge an Executive Order on its face," Def. Opp. 5, goes to the merits, not standing. The suggestion also ignores *Chamber of Commerce v. Reich*, in which the D.C. Circuit approved the use of nonstatutory review to challenge an executive order and then held the executive order invalid. *See* 74 F.3d 1322 (D.C. Cir. 1996); 57 F.3d 1099, 1100 (D.C. Cir. 1995) ("[W]e are unpersuaded that a 'concrete' prosecution by the Secretary would assist the court

B. Vehicle-to-vehicle communications technology

As plaintiffs have explained, Public Citizen members are injured by DOT's delay of a vehicle-to-vehicle (V2V) communications standard for new vehicles, and that delay is attributable to Executive Order 13771 and the OMB Guidances. Although defendants protest that the Court earlier held that plaintiffs had failed to establish that the delay injured them, defendants' invocation of law of the case doctrine is misplaced. *See* Def. Opp. 5. Federal Rule of Civil Procedure 54(b) expressly provides that a district court may revise its orders "at any time before the entry of judgment." *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 12 (1983) (stating that "every order short of a final decree is subject to reopening at the discretion of the district judge"). Sound reason supports the Rule because "[a]ll too often … a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment." 18B Charles Alan Wright, Arthur Miller, et al., *Federal Practice & Procedure* § 4478.1 (3d ed. 2006). The law of the case doctrine thus presents no impediment to consideration of standing based on DOT's delay of the V2V rule—particularly as the Court in its earlier order did not consider the injury on which plaintiffs rely to show standing.

Turning to plaintiffs' injury, defendants suggest that Executive Order 13771 cannot be causing injury because DOT is still considering the V2V rule. In light of the facts that DOT estimated the rule to cost more than $2 billion in its first year, 82 Fed. Reg. 3854, 3983 (2017), and that pursuant to the Executive Order DOT has a regulatory cost cap of *negative* $35 million in annualized costs for fiscal year 2018, representing a present value of *negative* $500 million, *see* OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, at 1 (Dec. 2017), https://www.reginfo.

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in analyzing appellants' facial challenge based on this issue."); s*ee also Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts ultra vires, courts are normally available to reestablish the limits on his authority.").

gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf, the notion that the Executive Order is not a significant factor in DOT's consideration of a V2V standard that will continue to delay or prevent its issuance defies "common sense." *Carpenters Indus. Council*, 854 F.3d at 6. Indeed, with respect to this specific rulemaking, this Court has noted that "'experience and common sense' suggest that compliance with that mandate will, in fact, cause delay." Mem. Op. 29 (Dkt. 63) (citation omitted). Tellingly, defendants decline to state, or offer any evidence, that Executive Order 13771 has not delayed the rule and is not an ongoing factor in when, if at all, the rule might issue. And defendants offer no explanation of how, operating under the constraints of the Executive Order and OMB Guidances, DOT could issue the rule, given its costs. Evidence that the Executive Order is not a cause of delay, if such evidence existed, would be specifically within defendants' control, and their failure to produce it supports a finding that it does not exist. *Cf. United States v. Vega*, 826 F.3d 514, 532 (D.C. Cir. 2016) ("A missing-evidence instruction 'is appropriate if it is peculiarly within the power of one party to produce the evidence and the evidence would elucidate a disputed transaction.'" (citation omitted)).

Moreover, the case law contradicts defendants' insistence that, because V2V technology is a safety feature, plaintiffs must establish that their members would experience improved safety if DOT issued a V2V standard. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 13638 (D.C. Cir. 2005) (finding organization had standing based on desire to purchase mutual funds with fewer than 75% independent directors, without delving into organization's reason for the preference); *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) (holding plaintiff had standing to challenge a DOT rule that impacted availability of large vehicles that its members preferred based on "safety, comfort, and convenience," without requiring proof that larger vehicles would appreciably reduce any individual's risk of being injured in an accident, or that comfortable

cars were not already available). For example, in *Public Citizen v. Foreman*, 631 F.2d 969 (D.C. Cir. 1980), the D.C. Circuit found standing to seek a declaration that nitrites in bacon were unsafe food additives, although some nitrite-free bacon was available on the market. *Id.* at 974 n.12. Defendants attempt to distinguish *Foreman* on the basis that, there, the relief requested would have given the plaintiff the benefit it sought—a declaration that nitrites had not been shown to be safe in bacon, leading to the product being pulled from the market—whereas here it is uncertain whether plaintiffs' members will benefit from an increase in safety afforded by V2V technology. The D.C. Circuit in *Foreman* did not, however, require the plaintiffs to show that that relief would actually decrease their risk of disease or other adverse health impacts, only that it would increase the availability of the product they desired. The passage excerpted by defendants explains how the relief the plaintiffs sought would redress that injury (by requiring that bacon-containing nitrites be replaced in the market by nitrite-free bacon); it does not suggest that the court's ruling rested on a finding that the plaintiffs had shown that that relief would alleviate a probable injury to their health:

> Plaintiffs allege that the nitrite-free bacon they seek is not available at a reasonable price. Although this injury may not be overly burdensome (they could abstain from eating bacon entirely or seek out the nitrite-free bacon that may be available), it is an injury nonetheless. Moreover, there is a substantial likelihood that a favorable result in this litigation, i.e., a declaration that nitrites are a food additive subject to FDA clearance, would redress this injury, for such a declaration would mean an immediate temporary ban on nitrites in bacon and a permanent ban unless the FDA affirmatively finds the use of nitrites acceptable, nitrites being presumed unsafe until proven otherwise.

Id. (citations omitted).

Defendants' theory also ignores the other precedents cited by plaintiffs, including *Competitive Enterprise Institute*, where the court found standing without requiring the plaintiffs to prove that a member would benefit from the increase in safety afforded by an increased choice of larger vehicles. *See* 901 F.2d at 113. Rather, for standing purposes, the relevant showing was the rule's effect on "the availability of large passenger vehicles for [the plaintiff's] members," as the

impact on product choice was "the injury alleged." *Id*. at 116. And the court looked to the agency's rulemaking record to establish that the challenged action would decrease the availability of larger vehicles. *Id.*; *id.* at 114 (stating that "we can look to the evidence in the administrative record itself as supporting the causal link"). Here, DOT's own statement leaves no doubt that a V2V rule will increase availability by mandating that an increasing percentage of all new vehicles have the V2V technology and that, absent a rule, "a critical mass of equipped vehicles would take many years to develop, if ever." 82 Fed. Reg. 3854 (2017).

Competitive Enterprise Institute cannot reasonably be read to suggest that plaintiffs must document that they will suffer a quantifiable decreased risk of accident. *See* 901 F.2d at 116 (citing DOT's statement that the larger vehicles plaintiffs desired were "safer," although the challenged standard "need not have a significant effect on safety"). Although the decision suggests that the plaintiffs' preferred vehicles were somewhat safer, *see id.*, its finding of standing did not rest on that fact. And the rulemaking record here provides an even stronger showing that consumers have a valid safety reason to prefer vehicles with V2V technology, even if—as in *Competitive Enterprise Institute*—they have not demonstrated the degree of risk they will suffer without it. *See* 82 Fed. Reg. at 3858 (stating that V2V technology "could potentially prevent 424,901–594,569 crashes and save 955–1,321 lives" annually). Thus, even some showing that plaintiffs' members "would actually be able to benefit from any increase in safety that V2V technology allegedly offers" were required, Def. Opp. 8, DOT has itself provided a record at least as strong as that on which the D.C. Circuit found similar injury in *Competitive Enterprise Institute*.

In addition, that three automakers (including two luxury automakers) may include V2V technology in their vehicles within the next several years does not eliminate plaintiffs' members' injuries. Even if the three automakers proceed with their voluntary plans, the choice of vehicles

will be far more limited than if DOT issued a federal motor vehicle safety standard requiring V2V technology, as it had intended to do prior to Executive Order 13771. In contrast to the limited choices potentially provided by three automakers, DOT's proposal to phase in the final rule by requiring 50 percent of new cars to have V2V communications in the first year and 100 percent in the third year, *see* 82 Fed. Reg. at 4006, would provide plaintiffs' members with a meaningful opportunity to purchase vehicles with this technology—an opportunity that the agency has determined they will not otherwise have. *See id*. at 3854. As the D.C. Circuit has repeatedly held, "reduced opportunity to purchase" vehicles of choice is "a cognizable constitutional injury." *Competitive Enterprise Institute*, 901 F.2d at 113 (citing *Public Citizen v. NHTSA*, 848 F.2d 256 (D.C. Cir. 1988), and *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986)).

Finally, defendants again suggest that plaintiffs cannot establish redressability because they cannot prove that, if DOT undertakes the rulemaking without the constraint of Executive Order 13771 and the OMB Guidances, DOT necessarily will issue the rule. Yet "[a] district court order setting aside [the Executive Order] doubtless would significantly affect the[] ongoing proceedings." *Nat'l Parks Conservation Ass'n*, 414 F.3d at 7. Plaintiffs "need not establish that, but for" the agency's unlawful consideration of matters required by Executive Order 13771, the injury "certainly would have been averted," *Sierra Club*, 755 F.3d at 973; they can meet their burden as to redressability by showing "some possibility" that removing the unlawful consideration would do so. *Nucor Steel-Ark.*, 246 F. Supp. 3d at 304 (quoting *Mass. v. EPA*, 549 U.S. at 518). Defendants' argument also ignores the many cases, *see* Pls. Mem. 35, adjudicating agency action unreasonably delayed, notwithstanding the "uncertainty" whether the delayed agency action, once taken, would be to the plaintiffs' liking. As all these cases establish, where causation is shown, "[g]enerally, courts will find 'standing exists where the challenged

government action authorized conduct that would otherwise have been illegal.'… 'In such cases, if the authorization is removed, the conduct will become illegal and therefore very likely cease.'" *Stewart v. Azar*, __ F. Supp. 3d __, 2018 WL 3203384 at *9 (D.D.C. 2018) (quoting *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1275 (D.C. Cir. 2007)).

C. Prevention of workplace violence in healthcare

As plaintiffs have explained, before the President issued Executive Order 13771, OSHA granted citizen petitions requesting a standard on preventing workplace violence in healthcare; the head of OSHA stated, including to a member of Congress, that OSHA was going to issue such a standard; and OSHA issued a "request for information" discussing a standard and seeking input. Pls. Mem. 21. Then, after the Executive Order and OMB Guidances, OSHA moved the rulemaking on its regulatory agenda to "long term actions," listing the next action as "Undetermined" on a date "To Be Determined." *Id.* 21–22. After plaintiffs discussed the rulemaking in their second amended complaint and an accompanying declaration, DOL's Spring 2018 regulatory agenda listed the next action as "Initiate SBREFA" on "01/00/2019." *Id.* 22. "This combination of factors—Executive Branch statements regarding the Executive Order, a common-sense understanding of the effect of the offset requirement, *see* [*Ashcroft v.*] *Iqbal*, 556 U.S. [662,] 679 [2009], and the actual delay of the … regulatory actions at issue here—belie the government's suggestion that" the delay is "too speculative." Mem. Opp. 30.

Defendants correctly point out that the initiation of a rulemaking does not guarantee that an agency will finalize a rule. Def. Opp. 12. That point, however, is subject to the important caveat that the agency's ultimate decision whether to issue a final rule, like agency action generally, must be for a reason that is not arbitrary, capricious, an abuse of discretion, or contrary to law. *See Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989); *see also* Mem. Op. 23.

Here, OSHA granted the citizen petitions and stated its intent publicly. And far from denying that OSHA intended or intends to issue a rule, OSHA has now restated its intent to take the next step—initiation of the SBREFA process. These undisputed facts counter the suggestion (offered without evidence) that OSHA, in the exercise of reasoned decisionmaking, may be reconsidering whether to issue a standard at all, much less that it is doing so for reasons unrelated to Executive Order 13771.

Importantly, defendants have *not* stated that the Executive Order and OMB Guidances have not contributed to and are not contributing to the delay in proceeding with the rulemaking. Defendants could have presented such evidence, if it exists; that they have not done so supports a finding that such evidence does not exist. *Cf. Vega*, 826 F.3d at 532. At the same time, the evidence that is before this Court supports the commonsense conclusion that the Executive Order and OMB Guidance present a barrier to issuance of the rule. *See* Pls. Mem. 21–22; Michael Decl. ¶ 36 (Dkt. 16-16) (former Administrator of OSHA stating that "an executive order that requires OSHA to revoke two rules for the purpose of offsetting costs when it issues one new one would force delays"); OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf (stating a regulatory cost cap for DOL of negative $137 million, with a present value of negative $1.957 billion). Defendants have thus failed to rebut plaintiffs' showing that Executive Order 13771 has delayed and will inevitably continue to delay the OSHA standard by requiring the agency to consider a factor (the requirement to repeal two or more existing rules to offset the rule's costs) that is impermissible under the Occupational Safety and Health Act and to make issuance of a new standard contingent on repeal of two or more existing rules, to offset costs.

As for the injury caused by the delay, defendants have little to say. In a footnote, they suggest that a delay in receiving education and training on prevention of workplace violence is the same as the risk of exposure to workplace violence. Education and training about "potential safety hazards and how to protect themselves, their coworkers and patients," 81 Fed. Reg. 88147, 88160 (2016), however, are benefits in themselves. Defendants also say vaguely that no one knows precisely what protections a standard will provide. The content of OSHA's request for information, including its acknowledgement that education and training are "essential element[s]" of any such standard, *id*. at 88160, and that emergency departments are "high-risk areas" for workplace violence, *id.* at 88158, as well as the requirement that an OSHA standard "substantially reduce" a "significant risk of material harm," 58 Fed. Reg. 16612, 16613 (1993), leave no room for doubt that a standard would benefit emergency room nurses such as CWA member Denise Abbott. *See* 81 Fed. Reg. at 88158 ("Assault rates for nurses, physicians and other staff working in EDs [emergency departments] have been shown to be among the highest."). "For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *Competitive Enter. Inst*., 901 F.2d at 113 (citing *Duke Power Co. v. Carolina Enviro. Study Group*, 438 U.S. 59, 75 n.20 (1978)). Plaintiffs have met that test for the delayed standard on prevention of healthcare-workplace violence.[5]

D. Energy efficiency

The Executive Order has also delayed two Department of Energy (DOE) energy-efficiency standards, one for residential cooking products and one for commercial water heaters. Defendants do not contest that these standards are subject to Executive Order 13771, and DOE agrees that they

[5] Defendants also reprise the same redressability argument discussed above. *See supra* pp. 3, 9–10.

are.[6] Further, under the Executive Order, DOE cannot issue a new rule unless the costs of the rule are *more than* offset by repeal of at least two existing rules. *See* OMB, Regulatory Reform: Cost Caps Fiscal Year 2018, https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf (stating annualized cost cap of *negative* $80 million for FY2018, *negative* $1142.9 million in present value). Nonetheless, defendants suggest that reasons aside from the Executive Order "may" explain why DOE did not adhere to the statutory deadlines to issue the rules. Def. Opp. 17. Yet defendants do *not* state, let alone provide evidence, that other reasons *did* cause the delay or that the Executive Order did *not.* Although defendants purport to dispute the statements that "By requiring DOE to identify deregulatory actions to offset the incremental costs of new energy-efficiency standards, Executive Order 13771 and the OMB Guidances erect practical barriers to prompt issuance by DOE of new, more stringent standards," Pls. Stmt. of Facts ¶ 82 (Dkt. 71-1) (citations omitted), and that "A halt or delay in issuance of more stringent energy-efficiency standards will impair the ability of NRDC, Public Citizen, and their members to upgrade their existing appliances with more energy-efficient appliances," *id.* ¶ 83 (citations omitted), they neither cite evidence nor claim a need for discovery on these points. Def. Resp. to Stmt. ¶¶ 82, 83. Because plaintiffs' statements are properly supported by record evidence, the Court should deem them admitted. *See Richardson*, 271 F. Supp. 3d at 117; *Mencias Avila*, 246 F. Supp. 3d at 353 n.2. And together, the statements establish plaintiffs' standing.

Defendants also purport to lack knowledge sufficient to assess the statement that energy-efficient stoves and ovens are not widely available and come in a limited selection of features,

[6] *See* DOE/EE, Energy Conservation Standards for Residential Conventional Cooking Products, RegInfo.gov (Spring 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD34 ("EO 13771 Designation: Regulatory"); DOE/EE, Energy Conservation Standards for Commercial Water Heating Equipment, RegInfo.gov (Spring 2018), www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1904-AD34 (same).

sizes, and brands, but defendants neither identify a defect in the evidence submitted nor request discovery on these points. *See* Def. Resp. to Stmt. ¶ 95; Second Bensing Decl. (Dkt. 75-2); *cf. Heller v. Dist. of Col.*, 952 F. Supp. 2d 133, 140 (D.D.C. 2013) (explaining that "[r]ejection of an expert's testimony is the exception rather than the rule," generally appropriate only "where [the expert's] assumptions amount to 'rampant speculation'" (citations omitted)); Fed. R. Evid. 403(a)(1)(B) (providing that, to preserve an evidentiary objection, a party must, on the record, state the specific ground). And they do not dispute plaintiffs' evidence-based averment that a cooking appliance standard would make ovens and stoves that are more energy-efficient widely available and would save money over the lifetime of the product. *See* Def. Resp. to Stmt. ¶ 98. These facts therefore also should be deemed admitted. *See supra* pp. 2–3.[7]

Arguing that plaintiffs cannot be injured as long as *some* energy-efficient cooking products or commercial water heaters are available, defendants decline to discuss the D.C. Circuit cases that directly contradict their argument (and were cited in plaintiffs' memorandum). *See Public Citizen v. NHTSA*, 848 F.2d at 262–63 (finding standing to challenge NHTSA action that "will diminish the types of fuel-efficient vehicles and options available") (citation omitted); *Center for Auto Safety v. NHTSA*, 793 F.2d at 1331–35 (finding organization had standing to challenge NHTSA's failure to adopt a meaningful fuel-efficiency standard, based on reduced consumer choice of fuel-efficient vehicles). Having failed to address these cases or to refute the evidence submitted, defendants have failed to rebut plaintiffs' showing of injury.

[7] In addition to the statements discussed above and elsewhere in this reply, defendants purport to dispute but neither cite contrary evidence nor seek discovery regarding statements 89, 96, 102, and 107. Defendants also characterize plaintiffs' expert analysis as "speculation … without any evidentiary foundation," Def. Resp. to Stmt. ¶ 98, but the expert lays out the bases for her conclusions, as well as her qualifications, in considerable detail, *see* Mauer Decl. ¶¶ 1-4, 8–14 (Dkt. 64-8).

Although diminished availability suffices to show injury, *Public Citizen v. NHTSA*, 848 F.2d at 262–63, plaintiffs also explained that, without an energy-efficiency standard in place, they and their members cannot easily identify which existing products are energy-efficient. *See* Pls. Mem. 28 (citing 42 U.S.C. §§ 6292(a), 6294(a)(1)); Mauer Decl. ¶ 7; *see also* Rivero Decl. ¶ 5 ((Dkt. 64-10) (describing difficulty identifying an energy-efficient oven); Blau Decl. ¶ 4 (Dkt. 64-6) (same). Because defendants point to no contrary evidence, *see* Def. Resp. to Stmt. ¶ 94, this fact also should be deemed admitted. And with a standard in place, that hurdle would disappear, because all of the products would then have to meet the energy-efficiency standard, thus enabling plaintiffs buy products that *must* be energy efficient. Defendants' description of this point as an assertion of informational injury, *see* Def. Opp. 20*,* not an access injury, misunderstands the point.

With respect to the injury actually asserted by plaintiffs, defendants respond that injury a few years in the future is too uncertain to support standing. *See id.* at 21. The case law, however, rejects defendants' argument. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (stating that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and *even though the dam will not be completed for many years*" (emphasis added)). "[W]here, as here, a plaintiff's assertion of injury depends on the plaintiff's own future plans, courts examine whether the injury is imminent from two angles: the firmness of the plaintiff's future plans, and the likelihood that the challenged government action will implicate those plans." *Nucor Steel-Ark.*, 246 F. Supp. 3d at 304 (finding standing where plaintiff alleged that it would undertake future projects that would be negatively impacted by the challenged action); *cf. La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (allowing suit

based on increased competition predicted to result from challenged agency action, without waiting for the increased competition to occur). Plaintiffs' declarations attesting to a desire and intent to purchase new products in the next two-to-five years establish the firmness of their plans. *See* Bain Decl. ¶¶ 6–7 (Dkt. 64-5); Blau Decl. ¶¶ 7–8; Pontoriero Decl. ¶¶ 7–11 (Dkt. 64-9); Rivero Decl. ¶¶ 4–5; Second R. Weissman Decl. ¶¶ 4, 7 (Dkt. 64-12); *see also* Mastic Decl. ¶ 3 (Dkt. 64-7) (attesting to plans to utilize commercial water heaters in client projects "on a yearly basis"). And the continued delay caused by the Executive Order not only has a "likelihood" of "implicat[ing] those plans"; it has already done so and continues to do so.

Contrary to defendants' suggestion, the declarants' interest in purchasing energy-efficient cooking products that include other features, primarily affordability, supports their showing. Plaintiffs have offered evidence that a cooking-appliance standard would make available "a broader selection of energy-efficient products with lifecycle-cost savings," thereby benefiting their members. Pls. Stmt. of Facts ¶ 96 (Dkt. 71-1) (citing Mauer Decl. ¶¶ 4, 10–13); DOE, Saving Energy and Money with Appliance and Equipment Standards in the U.S., Jan. 2017, https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf. That evidence includes a statement of defendant DOE itself, and defendants offer no evidence to dispute it. *See* Def. Resp. to Pls. Stmt. ¶ 96. Defendants also declined to respond to the statements that energy-efficiency standards "saved consumers money," *see id.* ¶ 76; that "[i]n early 2017, the Department of Energy (DOE) projected that national energy-efficiency standards completed through 2016 would, by 2030, save more energy than the entire United States uses in a year and would save consumers $2 trillion on their utility bills during that time," *see id.* ¶ 77; and that DOE's "efficiency standards have pushed manufacturers to develop high-efficiency equipment for cost-competitive prices," *see id.* ¶ 98; Pls. Stmt. of Facts

¶ 98 (Dkt. 71-1) (citing Berkeley Energy & Resource Collaboration, DOE Appliance Standards Program, Nov. 18, 2017, http://berc.berkeley.edu/doe-appliance-standards-program/). And although they characterize it as speculation, defendants do not dispute that "[t]he $2 trillion dollars in consumer utility bill savings benefits that DOE has projected will be achieved under existing energy-efficiency standards by 2030 would not be possible if the Department had been required to offset the costs of each new or amended energy-efficiency standard by rescinding its own rules or somehow persuading other agencies to rescind their rules." Def. Resp. to Stmt. ¶ 79. These facts, too, should be deemed admitted. *See supra* pp. 2–3.

Focusing on the delay of the energy-efficiency standard for commercial water heaters, defendants question the injury shown by NRDC member R.J. Mastic. *See* Def. Opp. 23. Mr. Mastic is amply qualified to provide evidence about how energy-efficiency standards benefit his business, which he has run for ten years and is based on a "business model [that] depends on being able to source cost-effective energy efficient equipment for [his] clients." Mastic Decl. ¶¶ 2, 4; *see D.C. Redevelopment Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337, 339 (D.C. Cir. 1976) (stating that landowner is "deemed qualified by reason of his relationship as owner to give estimates of the value of what he owns"); *cf. Heller*, 952 F. Supp. 2d at 142 (noting that opinion evidence based on "professional judgment obtained through long experience in the field" is a "methodology precisely contemplated" by Federal Rule of Evidence 702); *Groobert v. President of Georgetown College*, 219 F. Supp. 2d 1, 7 (D.D.C. 2002) (stating that "personal experience can be a reliable and valid basis for expert testimony"). Although defendants continue to profess doubt about whether a new standard will increase the availability of energy-efficient products, DOE (outside of litigation) has made the same point, *see supra* p. 16, which follows necessarily from the fact that compliance with an energy-efficiency standard would be required for "all" commercial

water heating equipment manufactured in or imported into the United States. *See* 81 Fed. Reg. 34440, 34443 (2016).

Finally, defendants again argue that plaintiffs' injury is not redressable because the agency might change its mind and not issue the standards for reasons other than the Executive Order and OMB Guidances. Again, this argument is contrary to numerous cases from this Circuit establishing that, in circumstances like those here, plaintiffs need not demonstrate that eliminating an agency's unlawful consideration would necessarily change the government's ultimate decision, where there is a possibility that it would do so. *See supra* pp. 3, 9–10.

II. Plaintiffs have standing because Executive Order 13771 substantively conflicts with their missions and injures their advocacy activities.

Plaintiffs submitted a declaration from plaintiff NRDC's Mae Wu to establish the fact that the Executive Order is having a negative impact on NRDC's advocacy. Defendants do not challenge plaintiffs' factual showing, but they argue that it does not satisfy the concerns stated in the Court's earlier memorandum opinion. As plaintiffs have explained, they recognize that the Court ruled against them on a legal question related to causation with respect to this basis for standing, *see* Mem. Op. 48–51 (Dkt. 63), but they renew their argument to narrow the basis of the Court's ruling on the issue while preserving the legal questions for possible appeal.

III. Defendants' request to delay resolution of this case through discovery should be denied.

Through the Second Declaration of Daniel Bensing, defendants state that they need discovery to dispute plaintiffs' showing that the Executive Order will affect pending rulemakings and injure plaintiffs' members. The request for discovery appears to be an effort to delay the Court's consideration of the merits of this action. The scope of the pending rules, their benefits to members of the public, and the impact of Executive Order 13771 are matters known best to

defendants themselves. Because defendants have not carried their burden to show "with sufficient particularity" the necessity of discovery, *U.S. ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 26 (D.C. Cir. 2014), this Court should deny their Rule 56(d) request.

A. A party opposing summary judgment under Federal Rule of Civil Procedure 56(d) must, through a declaration, describe "the particular facts" the non-movant intends to discover, "why those facts are necessary," and "why [the non-movant] could not produce the facts in opposition to the motion for summary judgment." *Id.* (internal quote marks omitted). The declaration "cannot be a generalized, speculative request to conduct discovery." *Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 35 (D.D.C. 2010) (internal quotation marks omitted). And a "vague," "boilerplate'" request does not satisfy Rule 56(d). *Jeffries v. Lynch*, 217 F. Supp. 3d 214, 227 (D.D.C. 2016) (quoting *Folliard*, 764 F.3d at 29). An inadequate Rule 56(d) request can be denied even if no discovery has yet occurred. *See, e.g.*, *Dunning v. Quander*, 508 F.3d 8, 10-11 (D.C. Cir. 2007); *Little v. Commercial Audio Assocs.*, 81 F. Supp. 3d 58, 63 (D.D.C. 2015).

Here, defendants contend that they need discovery to dispute assertions "that Executive Order 13,771 has caused the delay or withdrawal of certain rulemakings, resulting in harm to the declarants." Second Bensing Decl. ¶¶ 6–7. Whether the Executive Order has caused delays or withdrawals of certain rulemakings is information within defendants' knowledge; they do not need discovery into their own decisionmaking. Because, with respect to the causes of each delay, defendants could themselves "produce the facts in opposition to the motion for summary judgment," they cannot rely on Rule 56(d) to forestall summary judgment. *Jeffries*, 217 F. Supp. at 227 (quoting *Convertino v. Dep't of Justice*, 684 F.3d 93, 99–100 (D.C. Cir. 2012)). Likewise, Mr. Bensing's "generalized" statements about the need for discovery, *see* Second Bensing Decl. ¶¶ 7, 13, are inadequate under Rule 56(d). *See Jeffries*, 217 F. Supp. 3d at 227.

Furthermore, the specific discovery that Mr. Bensing describes would not elucidate the basis for the rulemaking delays and cannot be justified on other grounds. For example, Mr. Bensing says that he would seek discovery into which airlines declarant Amy Allina flies, which websites she visits, and how long she spends on searches. *Id*. ¶ 8. But Ms. Allina has already declared that she flies "on different carriers, with the decision between airlines depending in significant part on the total cost of the travel," and that she uses websites including Kayak, Hipmunk, and Google. Allina Decl. ¶ 3 (Dkt. 64-4). Although she does not state the amount of time she needs to find baggage-fee information, defendants do not need discovery to explore the self-evident fact that finding such information requires more time than it would if the information were available on the initial fare page. In fact, DOT has itself made that finding. *See* 82 Fed. Reg. at 7540–41 (stating "we believe the additional time spent searching to find the total cost of travel and the additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front are the harms suffered by consumers when basic ancillary service fees are not adequately disclosed"); 79 Fed. Reg. 29970, 29977 (2014) (stating "there is a need for rulemaking because we believe that consumers continue to have difficulty finding ancillary fee information").

Similarly, Mr. Bensing says that defendants may want discovery concerning why two Public Citizen members want to purchase vehicles with V2V technology and the certainty of their plans to purchase new vehicles within the timeframes stated in their declarations. *See* Second Bensing Decl. ¶ 9. But as explained in plaintiffs' opening memorandum, *see* Pls. Mem. 17, and above, *supra* pp. 6–8, D.C. Circuit case law does not tie consumers' reasons for preferring a particular product to the determination of standing. And defendants offer no reason to second-guess the timeframes stated in declarations sworn under penalty of perjury. The Second Bensing

Declaration thus fails to "establish a 'reasonable basis' to suggest that the requested discovery will reveal triable issues of fact." *Dunning v. Ware*, 253 F. Supp. 3d 290, 293 n.1 (D.D.C. May 22, 2017) (quoting *Carpenter v. Fed. Nat'l Mortg. Ass'n*, 174 F.3d 231, 237 (D.C. Cir. 1999)).

Likewise, defendants cannot need discovery to probe "the circumstances underlying Denise Abbott's claim that '[b]ecause OSHA is no longer actively pursuing the safety standard for preventing workplace violence in healthcare,'" her access to education and training is delayed. Second Bensing Decl. ¶ 11. Defendants DOL, OSHA, and OMB can explain those circumstances; defendants do not need discovery to obtain evidence about their own conduct. Moreover, discovery concerning Ms. Abbott's beliefs about what should or will be included in an OSHA standard, *id.*, is not necessary to ascertain her injury: OSHA itself has explained the nature of a standard on the subject, and Ms. Abbott's understanding of the content of a standard is, as stated in her declaration, Second Abbott Decl. ¶ 6 (Dkt. 64-11), based on OSHA's statement. *See* 81 Fed. Reg. 88147.

With respect to the energy-efficiency rules, defendants' claim that the nature of the products the declarants seek to buy is not "explicitly defined" is incorrect. *See* Bain Decl. ¶¶ 5–6 (oven and stove top); Blau Decl. ¶ 5 (appliances for new kitchen); Mastic Decl. ¶ 3 (commercial water heaters); Pontoriero Decl. ¶¶ 6–8 (oven and stove top); Rivero Decl. ¶ 5 (ovens and stoves); Second R. Weissman Decl. ¶ 7 (range). And information about when and the business or personal reasons why each declarant plans to make purchases is stated in each of the six declarations; defendants have offered no reason to doubt the veracity of this sworn testimony.

Finally, because only one plaintiff need establish standing for this facial challenge to proceed, *see Nat'l Fed'n of Fed. Emps. v. United States*, 905 F.2d 400, 402 (D.C. Cir. 1990), *Stewart v. Azar*, 2018 WL 3203384, at *9, defendants' request to conduct discovery, and to delay summary judgment in the meantime, should be denied if any one of the ten declarations is

sufficient. Given the content of the agencies' statements with respect to each delayed or withdrawn rulemaking and the absence of any reason to doubt the veracity of the declarants' sworn statements, defendants' explanation of the basis for discovery regarding the declarants' statements concerning defendants' own activities is insufficient under Rule 56(d).

B. Because the material facts on which plaintiffs rely are unrebutted, the Court can grant summary judgment to plaintiffs now. If, however, the Court permits defendants to take discovery, such discovery should be mutual.

Defendants' public statements tout more than 1,500 delayed or withdrawn rules. *See supra* n.2. Nonetheless, defendants argue that plaintiffs cannot establish that Executive Order 13771 is delaying, weakening, or preventing issuance of any *particular* new rule, while they also admit that the role of Executive Order 13771 in delaying any particular rule "will not be public." Transcript at 64–65 (Dkt. 56). Therefore, if defendants are permitted jurisdictional discovery, plaintiffs should be allowed to take discovery of OMB and the regulatory agencies to develop additional evidence that the Executive Order is delaying, weakening, and preventing rules that would benefit plaintiffs and their members. The notion that none of these 1,500 rules impacts plaintiffs defies common sense. Nonetheless, if the Court believes that there are genuine issues of material fact concerning the impact of the Executive Order that preclude summary judgment for plaintiffs at this time, plaintiffs would seek discovery into the agencies' implementation of the Executive Order.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion for partial summary judgment and hold that plaintiffs have standing to pursue this action and that the Court has subject matter jurisdiction over plaintiffs' claims. In the interest of efficiency and judicial economy, the

Court should then expeditiously consider the merits on the 2017 briefing or, in the alternative, order expedited briefing on the merits.

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Respectfully submitted,

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