Missouri v. Biden—Eighth Circuit affirms dismissal on standing grounds of States' suit challenging re-establishment of federal greenhouse gas interagency working group

In Executive Order 13990 issued on the first day of his administration, President Biden reconstituted the Interagency Working Group on the Social Cost of Greenhouse Gases. President Obama had established the IWG by executive order, but President Trump disbanded it in Executive Order 13783 (Mar. 28, 2017). E.O. 13990 directed the IWG, inter alia, to "publish an interim [social cost of carbon], [social cost of nitrous oxide], and [social cost of methane] within 30 days of the date of this order, which agencies shall use when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published" and to "publish a final SCC, SCN, and SCM by no later than January 2022[.]" 86 Fed. Reg. 7037, 7040 (Jan. 20, 2021). Shortly after the interim cost estimates were published, thirteen States, led by Missouri, sued the President, Executive Branch departments and officials, alleging "(1) 'Violation of the Separation of Powers;' (2) 'Violation of Agency Statutes;' (3) 'Procedural Violation of the APA'; and (4) 'Substantive Violation of the APA.'" The federal defendants then successfully moved to dismiss without prejudice on Article III standing and prudential ripeness grounds. *Missouri v. Biden*, 558 F. Supp. 3d 734 (E.D. Mo. 2021).

A unanimous Eighth Circuit panel affirmed. *Missouri v. Biden*, No. 21-3013, 2022 WL 12230261 (8th Cir. Oct. 21, 2022). The panel began by "reject[ing] the States' broad contention that the IWG's SC-GHG estimates are invalid because the IWG possesses 'no delegation of any legislative authority' by Congress. The IWG was formed by the President to communicate his policies to agencies in exercising their delegated legislative authority. We may not prohibit this sensible exercise of the President's executive power." It added that "[t]he policies here at issue affect the manner in which agencies engage in quantified cost-benefit analysis before adopting regulations or implementing agency actions, an analysis that is now universally recognized as critical to the proper exercise of executive power."

Turning to the Article III standing issue, the panel methodically worked through the States' arguments. First, it rejected the contention "that direct monetary injury will result from federal agencies' future use of the interim SC-GHG estimates." Quoting from the district court decision, the panel identified as "[t]he problem with this contention" the fact "that the alleged economic injuries are 'concrete' only if we 'assume that at some point in the future, one or more agencies will "inevitably" issue one or more regulations that rely in some way upon the Interim Estimates; that such agency will "inevitably" disregard any objections to the methodology by which the Interim SC-GHG estimates were calculated; and that this yet-to-be-identified regulation will then harm Plaintiffs in a concrete and particularized way.'" Such a "highly attenuated theory of injury does not satisfy the States' burden to show the requisite causation."

No more persuasive was the assertion that the lower court "erred by failing to take into account the past and ongoing *sovereign* injury caused by the interim SC-GHG estimates' intrusion into the States' role as regulators in cooperative federalism programs such as those mandated by the National Environmental Policy Act (NEPA), Clean Air Act state implementation plans, and federal highway administration actions." The difficulty here was that "even if the States as sovereigns are entitled to some undefined 'special solicitude' in the standing analysis, they still must satisfy the

basic requirements of Article III standing." But "neither the interim SC-GHG estimates nor EO 13990 impose obligations on the States." The mere preference "that their federal agency partners not use these estimates in future program planning or decision-making" did not amount to the requisite "concrete harm" to the States.

The States' challenge to the district court's conclusion "'that Article III standing could never exist until a future agency action based on the [interim SC-GHG estimates] is finalized'" foundered on their inability to trace "alleged future regulatory costs" back to the interim IWG estimates "'because agencies consider a great number of other factors in determining when, what, and how to regulate or take agency action (and the Plaintiff States do not challenge a specific regulation or action)'" (quoting from *Louisiana ex rel. Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *2 (5th Cir. Mar. 16, 2022) (unreported)).

The last basis for reversal—procedural harm from the interim estimates' publication "without APA notice and comment procedures"—fell prey the absence of such alleged injury being "[]tethered to any specific harm. By challenging all uses of the interim SC-GHG estimates, rather than their use in a specific agency action, the States are asserting only 'a procedural right *in vacuo*.'" This claim also incorrectly assumed that the IWG constituted an "agency" for APA purposes:

> The Supreme Court has never held that the President's interagency working groups are [5 U.S.C.] § 551(1) "agencies" and therefore their "actions" are subject to APA notice and comment requirements. We doubt it would do so, because such a ruling would encourage constant judicial interference with the President's exercise of his executive power. ... We certainly will not be the first to make this extraordinary leap.

Decision link: https://ecf.ca8.uscourts.gov/opndir/22/10/213013P.pdf