



Trump Administration Responds to Lawsuit Challenging "Two for One" Executive Order

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Last month we discussed President Trump's recent executive order entitled "Reducing Regulation and Controlling Regulatory Costs," and the legal challenge that followed. The Order called for executive agencies to identify two existing regulations for every one new regulation issued, with the goal being a total incremental cost of "zero" for all new regulations. The Natural Resources Defense Council ("NRDC") and others quickly filed a complaint seeking a declaratory ruling that the Order is an infringement on legislative authority and exceeds the President's powers under the Constitution.

On April 10, the Trump administration filed a motion to dismiss. The motion alleges plaintiffs have no standing to bring the action, the action is not ripe for review, and alternatively plaintiffs have failed to state a claim that would permit them to challenge the Order. In its memorandum supporting the motion, the United States argues the NRDC and other groups have no standing to bring the action. To have standing, plaintiffs must show (1) an "actual or imminent," "concrete and particularized" injury-in-fact, (2) a "causal connection between the injury" and the challenged action, and (3) a likelihood that the "injury will be redressed by a favorable decision." The United States argues the plaintiffs have not identified any member who has been harmed by the Order and contends any allegation of harm is entirely speculative because no agency action has occurred in response to the Order. Similarly, because no agency action has taken place, the United States argues plaintiffs' claims are not ripe for review by the court.

The complaint filed by plaintiffs is based on the premise that consideration of costs in the rulemaking process is an "impermissible and arbitrary" consideration and amounts to a violation of the separation of powers. The United States argues that because the language of the Order requires it be applied only "to the extent permitted by law," this means the Order necessarily can't violate the separation of powers. Plaintiffs also say considering costs would amount to an *ultra vires* (beyond the power) action by agencies. The United States disputes these arguments and says consideration of costs is squarely within the powers of executive agencies and is a relevant factor they should consider.

The district court has yet to consider the Trump administration's motion to dismiss. The outcome of this case will have a significant impact on the regulated community because if the Order is upheld, regulated parties could see a significant reduction in their regulatory burdens. As always, we will keep you updated on developments in the case.

Public Citizen Inc. et al. v. Donald Trump et al., No. 1:17-cv-00253, U.S. District Court for the District of Columbia

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