IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,

Plaintiffs,

v.

PATRICK PIZZELLA,[1]
ACTING SECRETARY OF LABOR,
in his official capacity, *et al.*,

Defendants.

CIV-17-009-PRW

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Patrick Pizzella is automatically substituted as a defendant for R. Alexander Acosta.

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INTRODUCTION

Organizational plaintiffs are not permitted to harness the power of the federal courts to challenge a regulation with which they merely disagree. But that is precisely what Plaintiffs, seven business and industry groups, are attempting to do in contesting the Occupational Safety and Health Administration's ("OSHA") Recordkeeping Modernization Rule ("the Rule"). *See* Final Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29,624 (May 12, 2016), *as revised at* 81 Fed. Reg. 31,854 (May 20, 2016). Instead of identifying specific members who have been injured by the two requirements that are at issue in this case—the Rule's reasonable-reporting provision, *see* 29 C.F.R. § 1904.35(b)(1)(i), and its anti-retaliation provision, *see* 29 C.F.R. § 1904.35(b)(1)(iv)—five organizations have submitted nearly identical, boilerplate declarations that state the obvious: Plaintiffs' members are "subject to" the Rule's requirements. But being "subject to" or "covered by" a regulation is not the same as being "injured" for purposes of Article III standing, and Plaintiffs' suggestion that *every* regulated entity has standing to challenge the Rule confirms that Plaintiffs have drifted far from the Constitution's limits on justiciability. Because Plaintiffs have not identified any member that 1) wants to engage in conduct prohibited by the Rule and 2) faces a credible threat of enforcement for doing so, their claims must be dismissed. Dismissal is also required because Plaintiffs have raised their claims in federal district court, instead of through the process that Congress created under the Occupational Safety and Health Act ("OSH Act").

Even assuming, *arguendo*, that this Court has jurisdiction over Plaintiffs' claims, those claims fail at the merits. Plaintiffs' principal contention is that the anti-retaliation provision exceeds OSHA's authority under the OSH Act. But Plaintiffs ignore the extensive textual

evidence that Congress delegated broad authority to the Secretary of Labor to determine how best to ensure that employers maintain, and submit, accurate records of work-related injuries and illnesses. After providing clear notice that it was considering amending its recordkeeping regulations to adopt the reasonable-reporting and anti-retaliation provisions, OSHA reasonably exercised its authority in determining that those provisions were necessary. Finally, Plaintiffs' cursory treatment of its remaining claims fails to meet the high bar for invalidating an agency regulation as arbitrary and capricious or for finding that an economic regulation is, on its face, void for vagueness. Accordingly, if the Court reaches the merits, Defendants are entitled to summary judgment.

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' Amended Complaint.

A. Plaintiffs Lack Standing for Each of Their Claims Because They Have Failed to Demonstrate Any Injury in Fact.

In their opening brief, Defendants explained that Plaintiffs lack standing because they have not demonstrated, on behalf of their members, the first of Article III's core requirements—an "injury in fact" that is "certainly impending." *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted). In the wake of Defendants' brief, which highlighted the lack of any evidence at summary judgment to support standing, Plaintiffs introduced declarations on behalf of five of the seven plaintiff organizations.[2] *See* Opp'n & Reply Br., Ex.

[2] Plaintiffs did not submit declarations on behalf of the Oklahoma State Home Builders Association or the State Chamber of Oklahoma. *See* Pls.' Opp'n to Defs.' Mot. to Dismiss & Cross-Mot. Summ. J. & Reply Supp. Pls.' Mot. Summ. J. ("Opp'n & Reply Br."), Ex. 1, ECF No. 106-1. Accordingly, at a minimum, claims by those plaintiffs should be dismissed from this lawsuit.

1. Those declarations, however, do nothing to remedy Plaintiffs' failure to demonstrate standing.[3] They do not identify *any* specific members of those organizations—much less a member with standing—and even if they had, the declarations do not make the showing required to establish standing in a pre-enforcement context.

1. This Is an Appropriate Juncture at Which to Consider Plaintiffs' Standing.

At the outset, Plaintiffs do not dispute that this Court must decide whether they have standing to bring "each claim [they] seek[] to press[.]" *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1647 (2017) (citation omitted). Nor could they; the Federal Rules of Civil Procedure are clear that "the court must dismiss the action" if it "determines at any time that it lacks subject-matter jurisdiction[.]" Fed. R. Civ. P. 12(h)(3). But Plaintiffs repeatedly suggest that it was somehow improper—if not as a matter of law, then as a matter of practice—for Defendants to challenge Plaintiffs' standing at the summary judgment stage. *See* Opp'n & Reply Br. 2, 4 & n.1, 12-13.

Plaintiffs' professed concern about the timing of Defendants' standing challenge is a diversion. Although Plaintiffs make much of the fact that that this case has been pending for two-and-a-half years, the current cross-motions for summary judgment are the first dispositive motions filed in the case. Plaintiffs nonetheless suggest that Defendants' agreement to file

[3] The comments Plaintiffs reference in their Opposition and Reply Brief, *see* Opp'n & Reply Br. 9, fare no better. *See id.*, Ex. 2. They do not purport to be from Plaintiffs' members, they do not allege concrete and particularized injuries stemming from the Rule, and they were submitted before the Rule was finalized and more than two years before Plaintiffs filed suit, which means that the comments cannot support standing. *See* Defs.' Mem. Opp'n to Pls.' Mot. Summ. J. & Supp. Defs.' Mot. to Dismiss & Cross-Mot. Summ. J. ("Defs.' Br.") at 15, ECF No. 105-1.

those cross-motions somehow signaled that standing would not be at issue. *See* Opp'n & Reply Br. 4 n.1. Nonsense. Standing is "an indispensable part of the plaintiff's case" and, as such, "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the summary judgment stage, a plaintiff "must 'set forth' by affidavit or other evidence 'specific facts'" supporting standing. *Id.* (citation omitted). Addressing standing at summary judgment spares this Court the possibility of two rounds of dispositive-motion briefing and is, as Plaintiffs must know, an uncontroversial approach in Administrative Procedure Act ("APA") cases.[4] *See, e.g.*, Opp'n to Pls.' Mot. Summ. J. & Mem. Supp. Mot. to Dismiss & Cross-Mot. Summ. J., *Matson Navigation Co., Inc. v. U.S. Dep't of Transp.*, No. 18-cv-2751 (D.D.C. Apr. 19, 2019), ECF No. 24-1.

Moreover, Plaintiffs ignore that the reason Defendants moved to stay the case was to avoid asking the Court to weigh in on an issue that could become moot. *See* Defs.' Unopposed Mot. to Stay at 3-4, ECF No. 71. That concern proved well founded, as OSHA's 2019 revisions to the Rule rescinded most of the electronic reporting requirements that were at the core of Counts One, Two, and Six of Plaintiffs' original complaint. *See* Final Rule, *Tracking of Workplace Injuries and Illnesses*, 84 Fed. Reg. 380 (Jan. 25, 2019); *see also* Compl. ¶¶ 81-89, 115-

[4] It is particularly implausible that Plaintiffs believed standing would not be at issue given that one of the firms representing Plaintiffs here is the same firm that represents a different set of industry plaintiffs in a challenge to the Rule in the Northern District of Texas. *See generally*, *TEXO ABC/AGC, Inc. v. Perez*, No. 3:16-cv-1998 (N.D. Tex.) ("*TEXO*") (listing Littler Mendelson PC as the only firm representing the plaintiffs). Although that case has been administratively closed since June 2017, *see* Order, *TEXO*, ECF No. 71, prior to that closure, Defendants raised the same standing arguments, in the same posture, as they do here, *see* Mem. Supp. Defs.' Mot. To Dismiss or, in the Alternative, Summ. J. at 10-13, *TEXO*, ECF No. 44.

19, ECF No. 1. Plaintiffs then amended their complaint to remove each of those claims, *see generally* Am. Compl., ECF No. 87, which confirms that staying this case saved the judicial resources that would have been expended on those three claims.

2. Plaintiffs Have Not Offered Any Evidence that the Rule Injures a Specific Member.

As Defendants explained in their opening brief, Plaintiffs—as membership organizations alleging associational standing on behalf of their members—must "establish[] that at least one *identified* member ha[s] suffered or [will] suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added); *see also* Defs.' Br. 15 (citing cases). Plaintiffs have not done so. Although they have now introduced five declarations that purport to establish standing, Plaintiffs have failed to identify a single member *at all*, much less one that has suffered a concrete and particularized injury. *See* Opp'n & Reply Br., Ex. 1. Moreover, Plaintiffs have ignored every case Defendants cited explaining that identification of a specific member is required. Most strikingly, they do not mention, much less engage with, the Supreme Court's decision in *Summers*, which expressly held that there is a "requirement of naming the affected members" of an organization that cannot be "dispensed with in light of statistical probabilities[.]"[5] 555 U.S. at 498-99.

Perhaps Plaintiffs are attempting to wedge themselves into *Summers'* narrow exception—that naming a specific member is not required "only where *all* the members of the

[5] Plaintiffs attempt something of a rhetorical sleight-of-hand on this point. Instead of providing declarations that identify specific members, they describe their declarations as demonstrating that the Rule has "specifically injured members" (who are not otherwise identified). Opp'n & Reply Br. 8 n.2. Plaintiffs do not explain, however, what it means to suffer a "specific[] injur[y]" if that injury is divorced from any specific member.

organization are affected by the challenged activity." 555 U.S. at 499 (emphasis in original). If so, then their own declarations fall short of this bar. *See* Matuga Decl. ¶ 6 (claiming only that "OSHA's recordkeeping rules cover *many* NAHB members" (emphasis added)); *see also* Freedman Decl. ¶ 6; Brown Decl. ¶ 4; Brandenberger Decl. ¶ 4; Spencer Decl. ¶ 6 (all of which are attached as Ex. 1, ECF No. 106-1, to Plaintiffs' Opposition and Reply Brief). Moreover, the only cases Plaintiffs cite on this point either do not address the question of whether an organizational plaintiff must identify a specific member or confirm that the requirement of naming a member exists. *See* Opp'n & Reply Br. 6, 9; *see also Nat'l Fed'n of Indep. Bus. v. Dougherty*, No. 3:16-CV-2568, 2017 WL 1194666, at *5 (N.D. Tex. Feb. 3, 2017) (holding that the organizational plaintiff had standing in light of the allegations of an identified member, "PJS").

3. Plaintiffs Have Not Established A Credible Threat of Enforcement Against Conduct They Claim the Rule Prohibits.

That Plaintiffs have failed to name any member that has standing is, for the reasons outlined above, dispositive. But that failure is also emblematic of Plaintiffs' broader shortcoming on the issue of standing. In order to demonstrate injury-in-fact in a pre-enforcement setting, Plaintiffs must, at a minimum, make two showings: first, that they would like to do what the challenged provision proscribes, and second, that there is a "credible threat of enforcement" if they do. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016) (confirming that *Driehaus* establishes a two-part test for pre-enforcement challenges).[6] But Plaintiffs cannot make the

[6] The two-part test from *Driehaus* is the *minimum* showing Plaintiffs must make because that case involved two considerations that are not present here—namely "a criminal statute" and

showing required for either prong because they have not provided the Court with evidence that any members have tried to, or would like to, engage in prohibited conduct or that enforcement from OSHA against such conduct remains more than a speculative possibility.

First, Plaintiffs do not claim that the Recordkeeping Modernization Rule prohibits conduct their members want to engage in. To be sure, they claim members must *determine* whether the Rule prohibits any of their desired conduct, *see* Opp'n & Reply Br. 7, but they never dispute that the Rule imposes no new substantive requirements. *See TEXO ABC/AGC, Inc. v. Perez*, No. 3:16-CV-1998, 2016 WL 6947911, at *8 (N.D. Tex. Nov. 28, 2016) ("[T]he Rule simply incorporates the existing prohibition on employer retaliation . . . and employer procedures that would discourage a reasonable employee from reporting an injury."); *see also* Defs.' Br. 17 (citing 81 Fed. Reg. at 29,670-71). In other words, any uncertainty that exists under the Rule existed under OSHA's prior statutory and regulatory scheme—including any uncertainty over drug testing or safety incentive programs (though Plaintiffs now concede that they cannot challenge statements from the Rule's preamble about such programs, *see* Opp'n & Reply Br. 16-18).[7] Accordingly, for Plaintiffs' members to demonstrate that they want "to

"a course of conduct arguably affected with a constitutional interest[.]" *Colo. Outfitters*, 823 F.3d at 545 (citation omitted). Courts have been particularly willing to entertain pre-enforcement challenges when a criminal statute implicates First Amendment interests, *see Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (noting the risk of self-censorship), which is not the case here.

[7] Even if the Rule created *new* uncertainty, and even if Plaintiffs had identified a member who explained how that uncertainty inflicted a concrete and particularized industry, such a showing could only establish standing for Plaintiffs' claim that the Rule is unconstitutionally vague—the only one of Plaintiffs' claims that targets that alleged uncertainty. *See Town of Chester*, 137 S. Ct. at 1647 (requiring standing for each of a plaintiff's claims).

engage in a course of conduct . . . proscribed by" the Rule, *Driehaus*, 573 U.S. at 159, they must show that they want to engage in conduct that would violate Section 11(c)'s prohibition on retaliation[8] or OSHA's pre-existing prohibition on unreasonable reporting procedures.

Instead of making that showing, Plaintiffs paint with a broad brush; they claim that the Rule "affects *every* employer covered by OSHA's recordkeeping rules[.]" Opp'n & Reply Br. 8 (emphasis added). But that contention conflates the concept of being "*covered* by" a regulation, *id.* (emphasis added), with wanting to engage in conduct that likely *violates* a regulation. Only the latter is sufficient for standing. If the rule were otherwise, then every person in the United States would have standing to challenge every law that regulates an individual's conduct. After all, every person is "potentially subjected" to the country's criminal laws and "must attempt to determine" whether their conduct conforms to the law's requirements. *Id.* at 7. Article III, however, does not permit such a limitless approach to standing. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016) (holding that "seek[ing] pre-enforcement review" of a rule "raises the question of whether [the plaintiff] has demonstrated that the rule[] inflict[s] a sufficiently concrete and actual injury").

Second, Plaintiffs have not demonstrated any—much less a "credible"—"threat of enforcement" from OSHA against their members. *Driehaus*, 573 U.S. at 159. Instead, they describe the prospect of enforcement in purely speculative terms. *See, e.g.*, Opp'n & Reply Br.

[8] Plaintiffs additionally claim they may be injured because, under the Rule, an employee can file a complaint for alleged violations of the anti-retaliation provision, which can result in an investigation. *See* Opp'n & Reply Br. 11. But a complaint, followed by an OSHA investigation, is the same process that exists for violations of Section 11(c) of the OSH Act. *See* 29 U.S.C. § 660(c)(2). And in any event, Plaintiffs have not provided any evidence that an OSHA investigation against one of their members is somehow imminent.

7 (expressing concern about "an enforcement scheme . . . to which Plaintiffs' members are *potentially* subjected" (emphasis added)). In their opening brief, Defendants provided several examples of what Plaintiffs might point to in order to establish a credible threat of enforcement, like "past enforcement against the same conduct" or a warning to stop ongoing conduct. Defs.' Br. 18 (citing cases). But Plaintiffs have not alleged any of those circumstances in their brief or their declarations.

Plaintiffs do describe OSHA as "actively and aggressively citing employers under new requirements," and they contrast that enforcement record with Defendants' characterization of their injury as "hypothetical." Opp'n & Br. 9-10. But Plaintiffs misunderstand. Defendants of course acknowledge that OSHA has been enforcing the Rule's requirements (even if Plaintiff's description of those enforcement efforts is overblown), which have been in place for more than two years. That fact, however, hurts Plaintiffs' cause because they have not identified a single instance of OSHA's enforcement that supports their theory of standing here. The question is not whether OSHA has been enforcing the Rule *in general*; it is whether that enforcement has "targeted . . . the conduct [Plaintiffs] claim is prohibited." Defs.' Br. 18. If OSHA has been "aggressively citing employers," Opp'n & Reply Br. 9, but not citing or threatening Plaintiffs' members or the particular conduct in which they intend to engage, then that confirms Plaintiffs' alleged injuries are "'conjectural' or 'hypothetical,'" rather than "actual or imminent[.]"[9] *Lujan*, 504 U.S. at 560.

[9] Plaintiffs' allegations about injuries to members of the U.S. Poultry & Egg Association are no more concrete or imminent. As an initial matter, the allegations are set forth in Plaintiffs' brief, not a declaration admissible at summary judgment. *Compare* Opp'n & Reply Br. 10, *with*

That Plaintiffs have not established standing here does not mean that standing is an insurmountable hurdle. If Plaintiffs had identified a specific member; if that member had, in a declaration, articulated a desire to engage in specific conduct that plausibly violates the Rule; and if that member had also been subject to prior enforcement or threats of enforcement from OSHA for that conduct, then perhaps the standing analysis would be trickier. On this record, however, the question is not a close one. Plaintiffs lack standing, and their amended complaint should be dismissed.

B. Plaintiffs Must Raise Their Challenge to the Rule Through the OSH Act's Comprehensive Review Process.

Plaintiffs' position is that any citation they could receive for violating the Recordkeeping Modernization Rule's reasonable-reporting or anti-retaliation provisions would be invalid. But that challenge falls squarely within the review process that Congress created in enacting the OSH Act. Accordingly, Plaintiffs must bring their challenge through that process—which culminates in review in the Courts of Appeals, *see* 29 U.S.C. § 660(a)—rather than through this action in district court.

As an initial matter, Plaintiffs do not contest that the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), supplies the appropriate framework for

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Spencer Decl. Moreover, Plaintiffs claim only that OSHA inspections must "verify injury and illness records." Opp'n & Reply Br. 10 (citation omitted). But they do not explain how inspecting *records* would reveal noncompliance with the anti-retaliation and reasonable-reporting requirements of the Rule. More to the point, Plaintiffs never explain why members of the U.S. Poultry & Egg Association face a credible threat of being cited for non-compliance with the Rule because of the inspections they describe. That threat would only exist if the members are engaged in conduct that could plausibly violate the Rule, but Plaintiffs do not claim their members are engaged in any such conduct.

determining whether Congress has channeled a claim through a statutory mechanism for review, rather than through the courts. *See id.* at 202, 207 (holding that when Congress "has allocated initial review to an administrative body," that choice "prevents a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the [statute]"). Nor do they dispute the D.C. Circuit's holding in *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867 (D.C. Cir. 2002), that, "in every relevant respect the statutory review provisions of the OSH Act parallel those of the Mine Act," which was the statute at issue in *Thunder Basin*. *Id.* at 873.

The only question, then, is whether Plaintiffs' claims here "are of the type Congress intended to be reviewed within [the OSH Act's] statutory structure." *Sturm, Ruger & Co.*, 300 F.3d at 873 (quoting *Thunder Basin,* 510 U.S. at 212). On that point, Plaintiffs again do not contest the key holding in *Sturm, Ruger & Co.*: that when OSHA relies on its recordkeeping authorities, challenges to OSHA actions that arise "under the OSH Act, the APA, and the [Constitution]" are not "wholly collateral to [the OSH Act's] review provisions and outside the agency's expertise." *Id.* at 870, 874 (citation omitted); *see also id.* at 874 (explaining that a claim that OSHA action violated the OSH Act "'require[s] interpretation of the parties' rights and duties'" under the Act and its regulations, and therefore "fall[s] squarely within the [Occupational Safety and Health Review] Commission's expertise'" (citation omitted)).

Instead of addressing this holding, Plaintiffs rely on the fact that, when the plaintiff in *Sturm, Ruger &Co.* launched a broad attack on OSHA's data collection initiative, the plaintiff *also* had "a contested citation that had not run its course through the administrative tribunals." Opp'n & Reply Br. 15. Plaintiffs provide no reason, however, why the simultaneous existence of an administrative proceeding should dictate a district court's jurisdiction over a facial

challenge to an agency rule or action. *Cf. Sturm, Ruger & Co. v. OSHA*, 186 F.3d 63, 64 (1st Cir. 1999) (holding that plaintiff had to proceed under the OSH Act's review process even though it purported to raise "a 'purely legal' issue consisting of a 'facial' challenge to an agency policy"). Under either circumstance, the legal arguments in the facial challenge are best resolved in a concrete factual setting through the process that Congress entrusted with review under the OSH Act.[10]

At bottom, Plaintiffs' suit here is as much an end run around the OSH Act as what was attempted in *Sturm, Ruger & Co.*—just at an earlier point in time. The Court, accordingly, may not exercise jurisdiction over Plaintiffs' claims.

II. The Anti-Retaliation Provision Does Not Conflict with the OSH Act and Is a Reasonable Exercise of the Agency's Authority Under the Statute.

The sole question of statutory interpretation at issue in this case is whether OSHA had authority, under the OSH Act, to issue the anti-retaliation provision. The parties agree on the framework for resolving that question. At step one of the analysis, the Court must determine "whether Congress has directly spoken to the precise question at issue." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Then, "if the statute is silent or ambiguous with respect to the specific

[10] To be sure, the D.C. Circuit highlighted that the plaintiff in *Sturm, Ruger & Co.* was attempting to "make an end run around" the OSH Act's review process. 300 F.3d at 876. But the D.C. Circuit did not hold that a pending (or even imminent) administrative proceeding was required to invoke the *Thunder Basin* doctrine. To the contrary, the court emphasized that, in the two cases where the D.C. Circuit had suggested "that pre-enforcement review of [OSHA] regulations was appropriate in the district court[,]" neither case "mentioned *Thunder Basin* or considered its impact on district court jurisdiction." *Id.* at 873 n.5. That clarification would have been unnecessary if pre-enforcement challenges to OSHA regulations belong in district courts.

issue, the question for the court" at step two "is whether the agency's answer is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843). Plaintiffs devote the lion's share of their argument to step one of the *Chevron* inquiry. *Compare* Opp'n & Reply Br. 18-26, *with id.* at 26. But not only have they failed to demonstrate that the OSH Act "unambiguously forecloses" the anti-retaliation provision, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017), Plaintiffs have not rebutted the extensive evidence that Defendants have the better reading of the OSH Act.

At the outset, Defendants do not endorse "skip[ping] *Chevron* step one[.]" Opp'n & Reply Br. 20. To the contrary, nearly all of the analysis in Defendants' opening brief on this issue was dedicated to "applying the ordinary tools of statutory construction" to explain why the OSH Act authorizes the anti-retaliation provision. *City of Arlington*, 569 U.S. at 296; *see* Defs.' Br. 23-33. Defendants simply acknowledged that, given the breadth of the congressional delegation on which they rely (*i.e.*, 29 U.S.C. § 657(g)(2)), a decision upholding OSHA's interpretation would likely be at step two of the *Chevron* analysis. Because the statutory provision at issue authorizes the Secretary of Labor to prescribe the regulations that he "deem[s] necessary," OSHA "recognize[d] that the Congress's intent is not plain from the statute's face" and that, instead, this is a case where the agency "must bring its experience and expertise to bear in light of competing interests at stake." *Am. Fed'n of Gov't Emps., Local 1592 v. Fed. Labor Relations Auth.*, 836 F.3d 1291, 1296 (10th Cir. 2016) (citation omitted). Put differently, because the answer to the *specific* question of whether the OSH Act authorizes the anti-retaliation provision turns on what OSHA, in its experience, deems necessary, that question is not well suited to resolution at *Chevron* step one. But the relevant threshold

questions—*i.e.*, whether § 657(g)(2) broadly delegates authority to ensure accurate injury and illness records and whether that delegation conflicts with Section 11(c) of the OSH Act—are straightforward questions of statutory interpretation that do have clear answers.

Turning to the first of those questions, Plaintiffs suggest that it is entirely implausible for Congress to have delegated to OSHA the authority to promulgate "any regulation that the Agency reasonably believes is necessary to ensure accurate recordkeeping[.]" Opp'n & Reply Br. 19. But that is precisely what Congress did in § 657(g)(2), as evidenced by the fact that Congress used language that closely parallels Plaintiffs'. In a section of the OSH Act titled "Inspections, investigations, and *recordkeeping*[,]" Congress included a provision that delegates to the Secretary of Labor the authority to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this chapter[.]" 29 U.S.C. § 657(g)(2) (emphasis added). Reading that provision broadly does not require this Court to break any new ground; for decades, courts have recognized that § 657(g)(2) "give[s] OSHA almost unlimited discretion to devise means to achieve the congressionally mandated goal." *United Steelworkers v. Marshall*, 647 F.2d 1189, 1230 (D.C. Cir. 1980).

Moreover, Plaintiffs ignore every argument Defendants advanced in their opening brief as to why the words Congress chose, in this particular statutory context, confirm a broad delegation of authority. *See* Defs.' Br. 26-28 (discussing "deem," "may," and "necessary"). Of particular relevance, Plaintiffs never contest that the language in § 657(g)(2) is broad enough to encompass the reasonable-reporting requirement. *See* Defs.' Br. 28. If the plain language of § 657(g)(2) permits OSHA to deem the reasonable-reporting requirement necessary, then

it is difficult to imagine what textual limitation in that provision could carve out the anti-retaliation provision from OSHA's authority.

Plaintiffs, presumably, would point to a separate provision of the OSH Act, Section 11(c), as the reason the statute does not authorize the anti-retaliation provision. But the question of whether Section 11(c) *conflicts* with § 657(g)(2) is separate from the question of what § 657(g)(2) authorizes in the first place. And on that point, Plaintiffs offer nothing more than high-level concerns about a delegation "without limits" to counter Defendants' reading of § 657(g)(2). *See* Opp'n & Reply Br. 21-22. They cite no cases, however, interpreting the provision in the narrow manner they prefer.[11] And as the Tenth Circuit recently recognized, when Congress gives an agency "very broad powers to 'prescribe regulations to carry out the purposes' of the Act," courts should give effect to that delegation when it is in service of "a specific statutory duty[.]" *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017) (quoting *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 361-62 (1973)).

Here, Congress paired a broad grant of authority—the text of § 657(g)(2)—with OSHA's specific statutory responsibilities to "compile accurate statistics on work injuries and illnesses," 29 U.S.C. § 673(a), and to "prescribe regulations requiring employers to maintain accurate records" of work-related injuries and illnesses, *id.* § 657(c)(2). OSHA reasonably determined that, in light of the specific threat to the accuracy of injury-and-illness records that

[11] Additionally, Plaintiffs do not acknowledge that any regulation promulgated pursuant to § 657(g)(2) must still comply with the APA's prohibition on arbitrary-and-capricious decision-making. *See* Defs.' Br. 27 n.12. That fact addresses the parade of horribles Plaintiffs claim will ensue if OSHA's authority to issue the anti-retaliation provision is upheld here. *See* Opp'n & Reply Br. 23-24.

the Rule's electronic reporting requirement posed, the anti-retaliation provision was necessary to carry out those responsibilities. Accordingly, Defendants are not—contrary to Plaintiffs' representations—asking this Court to "*presume* a delegation of power absent an express *withholding* of such power[.]" Opp'n & Reply Br. 20. Rather, Defendants have identified a statutory provision that expressly, albeit broadly, delegates the authority that OSHA invoked in promulgating the anti-retaliation provision.

The only remaining question, then, is whether Section 11(c) of the OSH Act, which prohibits discrimination against employees for exercising "any right afforded by this chapter," 29 U.S.C. § 660(c)(1), circumvents the authority Congress delegated to OSHA under § 657(g)(2). It does not. Plaintiffs do not dispute that neither Section 11(c)'s text nor its legislative history addresses a) whether it is the exclusive mechanism for addressing retaliation under the OSH Act or b) whether it in any way limits OSHA's recordkeeping authorities under the Act. *See, e.g.*, *City of Arlington*, 569 U.S. at 296 ("Congress knows to speak in plain terms when it wishes to circumscribe . . . agency discretion."). That implicit concession settles the *Chevron* step one analysis because it confirms that Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

Plaintiffs' only remaining argument on this point is their contention that Defendants have adopted an inconsistent position. *See* Opp'n & Reply Br. 25. But in leveling that charge, Plaintiffs conflate the *substantive* scope of Section 11(c) with the provision's *remedial* scope. *See id.* Defendants have been clear that the Rule's anti-retaliation provision and Section 11(c) both prohibit retaliatory actions taken against employees who report injuries and illnesses. *See* Defs.' Br. 7, 17. The provisions differ, however, in their remedial schemes—differences that

Plaintiffs ignore in their Opposition and Reply Brief. *Compare* Defs.' Br. 31 (noting "the broader range of equitable relief and punitive damages available under" Section 11(c)), *with* Opp'n & Reply Br. 26 ("[T]he remedial scheme of this regulation is no different than that of Section 11(c)[.]"). Those differences reflect the different purposes of the two provisions: Section 11(c) gives *workers* more remedial options, whereas the anti-retaliation provision enables *OSHA* to target more systemic retaliatory conduct that may go unreported—*i.e.*, the kind of conduct most likely to endanger the accuracy of injury and illness records. *See* Defs.' Br. 31-32. That difference confirms that the anti-retaliation provision is a reasonable application of OSHA's broad authority to ensure accurate records. Absent any evidence that Congress intended to intrude on that authority in enacting Section 11(c), the Court should reject Plaintiffs' claim that the anti-retaliation provision runs afoul of the OSH Act.

III. Plaintiffs' Remaining APA Challenges Are Unavailing.

Plaintiffs have not made the showing required to maintain any of their remaining APA challenges. First, Plaintiffs do not dispute that they bear a heavy burden in arguing that OSHA's decision to issue the Recordkeeping Modernization Rule was arbitrary and capricious. Specifically, they must demonstrate that OSHA "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (citation omitted). But in their Opposition and Reply Brief, Plaintiffs do not argue that any of these conditions have been met. The closest Plaintiffs come is their claim that OSHA failed to

consider evidence that "cast[s] doubt on the need for the new requirements in the Rule[.]" Opp'n & Reply Br. 27. But even though Defendants carefully walked through OSHA's evaluation of the record in their opening brief, *see* Defs.' Br. 36-42, Plaintiffs do not cite a single excerpt from the Rule's preamble or from the underlying record in response, *see* Opp'n & Reply Br. 26-28.

Instead, Plaintiffs claim that Defendants' opening brief relied only on "*post hoc* arguments" to justify OSHA's review of the evidence. Opp'n & Reply Br. 27. That is false. Defendants repeatedly pointed to OSHA's consideration of the record, including on the key points that served as the basis for OSHA's conclusion that the anti-retaliation provision was necessary to ensure accurate injury and illness records. *See, e.g.*, Defs.' Br. 41. To be sure, Defendants' opening brief also examined parts of the record in depth, but that was only in response to Plaintiffs' inaccurate or misleading characterizations of those portions of the record. For instance, Plaintiffs had argued that OSHA's Recordkeeping National Emphasis Program ("NEP") did not find "pervasive, widespread under-recording of injuries and illnesses." Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' MSJ Br.") at 29, ECF No. 92-1. But as Defendants noted (and Plaintiffs do not now contest), there were errors for more than *half* of the recordable injuries and illnesses that were, or should have been, reported by establishments in that study. *See* Defs.' Br. 38 (citing AR00897 (ECF No. 92-7)). In any event, even if each of Plaintiffs' quibbles were well substantiated—and to be clear, they are not—Plaintiffs have not pointed to the kind of evidence that would allow this Court to conclude that OSHA made "a clear error of judgment" in promulgating the Rule. *Licon v. Ledezma*, 638 F.3d 1303, 1307-08 (10th Cir. 2011) (citation omitted).

Second, Plaintiffs maintain that the Supplemental Notice of Proposed Rulemaking ("Supplemental NPRM"), which preceded OSHA's adoption of the anti-retaliation and reasonable-reporting provisions, failed to comply with the APA's notice-and-comment requirement. *See* 5 U.S.C. § 553(c). But Plaintiffs ignore the key question in leveling that charge: whether "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject[.]" *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1154 (10th Cir. 2016). And on that point, the language of the Supplemental NPRM, which expressly proposed the same three regulatory changes OSHA ultimately adopted, speaks for itself:

> The Agency is seeking comment on whether to amend the proposed rule to (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit employers from taking adverse action against employees for reporting injuries and illnesses.

Supplemental Notice of Proposed Rulemaking, *Improve Tracking of Workplace Injuries and Illnesses*, 79 Fed. Reg. 47,605, 47,606 (Aug. 14, 2014). In light of the clarity of that language, it is difficult to discern what Plaintiffs mean when they claim that "the language cited by the Secretary was never meaningfully proposed[.]" Opp'n & Reply Br. 29.

Finally, Plaintiffs claim (for the first time) that they "were harmed" by the fact that an analysis of NEP data was not made public until after the close of the comment period. Opp'n & Reply Br. 29. But Plaintiffs cannot be "harmed" by OSHA's decision to include in the record evidence *that Plaintiffs consider favorable*. If Plaintiffs had been denied the opportunity to *criticize* a central piece of evidence on which OSHA relied, then perhaps that omission could

have had an effect "on the agency's disposition." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). But Plaintiffs provide no reason to believe that their weighing in to voice *agreement* with the NEP analysis could have changed the outcome here.

IV. The Recordkeeping Modernization Rule Is Not Unconstitutionally Vague.

Plaintiffs all but concede they cannot successfully mount a facial vagueness challenge. They do not claim to satisfy the relevant standards. *See, e.g.*, *Dias v. City & Cty. Of Denver*, 567 F.3d 1169, 1180 (10th Cir. 2009) (holding that a regulation must be "impermissibly vague in *all* of its applications" to be invalid on its face). They ignore the relevant context. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498 (1982) (explaining that "economic regulation is subject to a less strict vagueness test"). And they misapprehend Defendants' citation to *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). The point is *not* that "the *reference* to *Burlington Northern*" in the Rule's preamble "solves the vagueness issue." Opp'n & Reply Br. 30 (emphasis added). Rather, the point is that the Rule and *Burlington Northern* require businesses to make the same judgment—*i.e.*, they each require businesses to determine what policies would deter or discourage a reasonable person. *See* Defs.' Br. 45. If that requirement is not unconstitutionally vague in the Title VII context, then it is not unconstitutionally vague here.

CONCLUSION

For the foregoing reasons, together with the reasons in their opening brief, Defendants respectfully request that the Court dismiss Plaintiffs' amended complaint. In the alternative, Defendants request that the Court deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

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Respectfully submitted,

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