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

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; OKLAHOMA STATE HOME BUILDERS ASSOCIATION; STATE CHAMBER OF OKLAHOMA; NATIONAL CHICKEN COUNCIL; NATIONAL TURKEY FEDERATION; and U.S. POULTRY & EGG ASSOCIATION,

Plaintiffs,

vs.

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, in his official capacity;

LOREN E. SWEATT, DEPUTY ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, in her official capacity;

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; and

UNITED STATES DEPARTMENT OF LABOR,

Defendants.

NO. CIV-17-0009-PRW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Code of Federal Regulations

Miscellaneous

Plaintiffs National Association of Home Builders of the United States, Chamber of Commerce of the United States of America, Oklahoma State Home Builders Association, State Chamber of Oklahoma, National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association ("Plaintiffs"), file this Opposition to Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

As set forth in Plaintiffs' Memorandum in Support of Motion for Summary Judgment, certain provisions of the Occupational Safety and Health Administration's ("OSHA" or the "Agency") final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), 81 Fed. Reg. 31,854 (May 20, 2016) (the "Rule") are unlawful and should be vacated by this Court. Specifically:

- OSHA's new enforcement scheme for issuing Citations and Notifications of Penalty for alleged instances of discrimination exceeds OSHA's statutory authority and contravenes the express scheme established by Congress in Section 11(c) of the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), 29 U.S.C. § 651 et seq., to provide redress for alleged discriminatory actions by employers against employees;

- the promulgation of 29 C.F.R. §§ 1904.35(b)(1)(i) and (iv) and the revision to 29 C.F.R. § 1904.36 are not supported by the rulemaking record and run counter to the evidence before the Agency;

- OSHA failed to provide adequate and fair notice under the Administrative Procedure Act ("APA") by failing to make critical information relied upon by the Agency available for comment and by failing to adequately explain what action the Agency proposed to take; and

- the Rule fails to provide employers adequate notice of their compliance obligations.

In response, the Secretary essentially asks this Court to grant OSHA limitless authority to place obligations on employers without any check on that authority and without judicial review. First, the Secretary contends for the first time in the two-and-a-half years since this case commenced that Plaintiffs do not have standing to bring this facial challenge to the Rule under the APA and, further, that no federal district court would ever have jurisdiction to hear this cause of action under the APA. Second, the Secretary contends that Section 8(g)(2) of the OSH Act gives OSHA unfettered authority to promulgate any regulation that it "deems" necessary. According to the Secretary, this broad delegation of authority automatically bypasses *Chevron* step one, thus requiring this Court to defer to the Agency's interpretation of the Act under *Chevron* step two.

The Secretary is wrong on both accounts. Plaintiffs' members have suffered and are suffering an injury in fact caused by OSHA's promulgation and enforcement of the Rule, which can be redressed by this Court. Further, Plaintiffs are well-positioned to represent their members' interests in this challenge, not requiring direct participation of any one member. With respect to the Secretary's authority to promulgate a new enforcement scheme to address alleged discrimination for reporting injuries and illnesses, the Secretary essentially ignores clear congressional intent regarding how claims of discrimination should be handled by the Agency—through the carefully structured Section 11(c) process. The text and structure of the Act, and its legislative history all point to the

unmistakable conclusion that Congress intended all claims of discrimination to be handled through Section 11(c) and not through citations and notifications of penalties.

The Secretary's responses to Plaintiffs' other arguments fail to explain OSHA's flawed decision-making. The Secretary contends that the administrative record is replete with evidence supporting the requirements at issue. But the Secretary misses the point. The APA requires administrative agencies to fully consider all significant evidence in the record, *including contrary evidence*, and offer a reasoned explanation for its ultimate decision. The Secretary attempts to explain away the contrary evidence through a *post-hoc* justification. But that is not what the APA demands. It is *OSHA's* burden to consider all significant evidence and explain why any contrary evidence does not affect the Agency's rationale for promulgating the Rule. OSHA did not do that.

The Secretary's response to Plaintiffs' argument regarding the lack of notice for the Rule also fails to address the crux of the issue. The Secretary contends that the Rule is "identical" to the "proposals" provided by the Agency. There were no "proposals" given, however. The "Notice of Proposed Rulemaking" simply threw out a handful of ideas and potential issues that the Agency heard from stakeholders and proposed nothing specific in terms of prohibited conduct or practices, even failing to mention the term "safety incentive program" at all. At bottom, as a sister federal district court stated, a "general request for comments is not adequate notice of a proposed rule change." *United Church Bd. for World Ministries v. S.E.C.*, 617 F. Supp. 837, 840 (D.D.C. 1985).

Finally, the Secretary responds to Plaintiffs' vagueness argument by stating—in effect—that OSHA's reference to a judicial decision in a Title VII discrimination case "addressed this issue." Def. Mem., p. 45. Plaintiffs respectfully disagree. Citing an unrelated Title VII decision on one page of a lengthy preamble does not provide adequate notice to employers covered by OSHA's recordkeeping regulations on how to comply with a regulatory text that on its face provides no guidance to employers.

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. This is not a material fact; it is a characterization of the rulemaking record. Plaintiffs refer the Court to the rulemaking record.

2. This is not a material fact; it is a characterization of the rulemaking record. Plaintiffs refer the Court to the rulemaking record.

3. This is not a material fact; it is a characterization of the rulemaking record. Plaintiffs refer the Court to the rulemaking record.

ARGUMENT

I. Plaintiffs Have Standing to Bring This Rulemaking Challenge Under the APA Before This Court.

The Secretary's response contends for the first time that Plaintiffs have not met the Article III standing requirements.[1] Def. Mem., p. 2. An Article III litigant must meet three

[1] It is perhaps telling that OSHA raises these arguments for the first time now—two and one half years into this case. Plaintiffs' brought this cause of action on January 4, 2017. *See* ECF 1. On March 10, 2017, the parties jointly filed a Motion for Leave to File a Proposed Summary Judgment Schedule and for an Extension of Time to Respond to the Complaint. ECF 37. In that filing, the parties stated: "this case—which raises questions

threshold elements: (1) 'an injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan v. Defs. of Wildlife*, 502 U.S. 555, 560-61 (1992)). An association may satisfy these elements by asserting claims that arise from injuries it directly sustains, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n. 11 (1979), or as a representative of its members, *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). An association may sue to redress its members' injuries where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs easily meet these threshold elements.

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of statutory and constitutional law—is best resolved on cross-motions for summary judgment based on the rulemaking record compiled by the Occupational Safety and Health Administration in promulgating the regulation at issue in this case." *Id*. at 2. The Secretary did not contend that Plaintiffs lack standing or that this Court lacked jurisdiction to hear this challenge under the APA. *Id*. On July 10, 2017, the Secretary moved to stay the proceedings due to OSHA's announced intention to undertake additional rulemaking regarding some of the issues in the case. ECF 71. The Secretary again never raised issues of Plaintiffs' standing to bring the suit or the Court's jurisdiction. *Id*. After the parties and this Court have expended significant resources in litigating this matter, the Secretary just now moves for dismissal on standing grounds and contends that this Court would never have jurisdiction to hear this appeal due to the administrative review process set forth in the OSH Act. Def. Mem., pp. 19-21. Although Plaintiffs vigorously dispute this, the Secretary's actions over the two-and-a-half years of this litigation illustrate the argument's infirmity.

A. Plaintiffs Demonstrated that Their Members Would Otherwise Have Standing to Sue.

The Secretary argues that Plaintiffs lack standing to challenge the Rule because Plaintiffs "have not identified a single member who satisfies Article III's standing requirements," and "have not demonstrated that they face a sufficiently imminent injury." Def. Mem., p. 13. The Secretary is incorrect. Plaintiffs have not only demonstrated that their members have suffered an injury in fact, Plaintiffs have sufficiently asserted that the Rule is a direct cause of such injury, and that this Court can easily redress such injury.

1. Plaintiffs have Sufficiently Established an Injury in Fact.

An injury in fact requires "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (1992). As discussed above, associations can demonstrate injury in fact if any of their members have an injury in fact. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Members of trade associations "are directly regulated parties who presumptively have standing to challenge" the regulations to which they are subjected. *Nat'l Fed. of Ind. Business v. Dougherty*, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017) (citing *U.S. Telecomm. Assoc. v. F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016) (holding that Plaintiff's members, as a broadband provider subject to FCC regulations, would naturally have standing to sue)).

In *Chamber of Commerce of U.S. v. Edmondson*, a group of trade association plaintiffs challenged provisions of the Oklahoma Taxpayer and Citizen Protection Act ("OTCPA"), "claim[ing] future injury and seek[ing] relief in the form of a prospective

injunction." *Edmondson*, 594 F.3d 742 (10th Cir. 2010). Defendants moved to dismiss, arguing, in part, that the plaintiffs lacked standing. *Id.* The Tenth Circuit determined that compliance with the OTCPA effectively required the adoption of a program, that would impose "injuries in the form of implementation and training expenses" and "by the same token, the Chambers' membership would also be harmed by non-compliance" due to potential "debarment from public contracts and the attendant economic losses." *Id.* at 756-57. Accordingly, the Tenth Circuit found that "both compliance and non-compliance" injure the Chambers' members and these were "real, immediate, and direct" threats of injury. *Id.* (citation omitted).

Similarly here, Plaintiffs are trade associations collectively consisting of employers covered by the OSH Act who are responsible for providing safe working conditions to all of their employees *and* complying with OSHA standards and regulations, including 29 C.F.R. Part 1904, OSHA's recordkeeping regulations. Plaintiffs' members' interests in the Rule are concrete and particularized and their injuries are not conjectural or hypothetical.

As an initial matter, every employer that is covered by OSHA's recordkeeping regulations is adversely affected by the Rule. The Rule includes requirements that are unconstitutionally vague and it establishes an enforcement scheme that is contrary to the will of Congress and to which Plaintiffs' members are potentially subjected. Every employer that is covered by OSHA's recordkeeping rule must attempt to determine what is a "reasonable" reporting procedure and how the illegal, anti-discrimination enforcement scheme impacts their workplaces. As asserted in Plaintiffs' First Amended Complaint,

many of the Plaintiffs' members have adopted certain procedures for ensuring the safety and welfare of their employees, which may now be prohibited under the Rule, as OSHA may determine that such procedures are not "reasonable." ECF 87, p. 7.[2]

There cannot be any serious dispute that tens of thousands of Plaintiffs' members are covered by OSHA's recordkeeping rules. As just one example, when OSHA promulgated the revision to its recordkeeping rules in 2001, it estimated that over 92,000 employers in the general and special trade contractor industry, including those contractors working in residential construction, were covered by the revisions. *See* Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5,916, 6,113 (Jan. 19, 2001). Plaintiff NAHB represents 140,000 members in the residential construction industry who are involved in home building, remodeling, etc. *See* ECF 87, p. 5. Plaintiff U.S. Poultry & Egg Association represents employers in the poultry processing and egg producing industries. Poultry processing employers are required by OSHA to maintain injury and illness records pursuant to 29 C.F.R. Part 1904. *See* 29 C.F.R. Part 1904, Subpart B (Scope). At bottom, the Rule adversely affects every employer covered by OSHA's recordkeeping rules and Plaintiffs' members are covered by those rules. Plaintiffs have established an injury in fact on this basis alone. *See Hays v. City of Urbana*, 104 F.3d 102, 104 (7th Cir. 1997) (citing *Abbot Labs. v. Garner*, 387 U.S. 136, 153-54 (1967) ("businesses *potentially* affected by a regulation may pursue pre-enforcement challenges

[2] Notwithstanding the fact that it is unnecessary for Plaintiffs to identify members injured by the final Rule in order to establish standing, Plaintiffs provide multiple signed declarations detailing how the final Rule has specifically injured members. *See* Exhibit 1.

to learn whether they must incur the costs of compliance") (emphasis added); *see also Contender Farms, LLP v. U.S. Dept. of Agri.*, 779 F.3d 258, 266 (5th Cir. 2015) (plaintiff had standing to challenge regulation because it would have to take additional measures to avoid being assessed penalties as well as facing potential prosecution). Furthermore, numerous employers submitted comments to the rulemaking record demonstrating that OSHA's proposal would adversely impact them and that they objected to the Agency's proposed approach. *See, e.g.*, OSHA-2013-0023-1477 (Exhibit 2, AR05623); 1492 (Exhibit 2, AR05669); 1556 (ARO5920); 1564 (Exhibit 2, AR05943); 1602 (Exhibit 2, AR06064); 1643 (Exhibit 2, AR06517); 1653 (Exhibit 2, AR06612).

The Secretary suggests Plaintiffs do not meet the standing requirement because they did not identify at the time of filing the initial or amended complaint one member that had been cited under the illegal enforcement scheme and the unconstitutionally vague requirements. That is not the correct legal standard. As the Supreme Court stated in *MedImmune, Inc. v. Genentech, Inc.*, the judicial system "[does] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune*, 549 U.S. 118, 129 (2007); *Warth*, 422 U.S. at 511 ("The association must allege that its members, or any one of them, are suffering immediate *or threatened injury* as a result of the challenged action …. (emphasis added)"). It is uncontroversial that "exposure to liability constitutes injury-in-fact." *Edmondson*, 594 F.3d at 758.

Moreover, OSHA has been actively and aggressively citing employers under the new requirements, using the unlawful enforcement scheme to levy penalties for several

months. The Secretary wants this court to believe that enforcement is "hypothetical." But it is not. Indeed, injury in fact has occurred since the effective date of the regulation.

The threat of injury is particularly present for members of Plaintiff U.S. Poultry & Egg Association, which represents employers in North American Industrial Classification System 311615, Poultry Processing, as set forth above. These members are currently subject to an OSHA enforcement policy that *requires* compliance officers to examine all poultry employers' compliance with recordkeeping and recordkeeping accuracy in *every* inspection that is initiated by the Agency. Under this inspection policy issued in 2015, any inspection of a poultry processing facility "shall" include an inspection of certain hazards and "[i]n all inspections" "workers *shall* be interviewed in order to verify injury and illness records." *Inspection Guidance for Poultry Slaughtering and Poultry Processing Establishments*, OSHA (October 28, 2015), available at https://www.osha.gov/laws-regs/standardinterpretations/2015-10-28 (emphasis added). Because OSHA inspectors must evaluate compliance with the unlawful provisions of the Rule during inspections of poultry processors, enforcement for these members is far from hypothetical.

According to the Secretary, however, even that injury is hypothetical because standing requires employers to demonstrate that they have violated the Rule or intend to violate the Rule, which the Secretary contends that Plaintiffs cannot show. Def. Mem., pp. 17-18. This argument is equally flawed. As an initial matter, the Rule itself is so vague that employers have no idea as to whether or not their procedures are compliant (or not compliant). But more importantly, employers could be fully compliant with the Rule

(whatever that means to the Agency), and still suffer an injury in fact due to the nature of the new enforcement scheme. Under the new enforcement scheme, if an employee chooses to file a complaint with the Secretary pursuant to 29 C.F.R. 1904.35(b)(1)(iv), OSHA must conduct an investigation (either off-site or on-site) of that complaint. *See* https://www.osha.gov/workers/index.html, "Frequently Asked Questions," "What Happens After I File a Complaint?" Even if OSHA ultimately finds the employer did not violate the Rule, the employer is still subject to injury by having to defend itself (sometimes at significant cost) under OSHA's unlawful enforcement scheme.

2. Plaintiffs Have Established Both Causation and Redressability.

Causation and redressability in this case flow directly from the injury caused by OSHA's promulgation of the Rule. Without the promulgation of the Rule, Plaintiffs' members would face none of the injuries discussed above. The Rule is the only reason that Plaintiffs' members now have the increased liability of determining whether certain programs and policies are "reasonable" and if the programs need to be altered or even eliminated. Furthermore, without the Rule, Plaintiffs' members would not be potentially subject to the unlawful enforcement scheme. That scheme is a direct result of the Rule and would be directly addressed by this Court finding in favor of Plaintiffs.

B. Plaintiffs Have Satisfied the Second and Third Prongs for Establishing Associational Standing.

Not only have Plaintiffs demonstrated that their members have an injury in fact and could sue in their own rights, Plaintiffs have also met the two other requirements for establishing associational standing. First, Plaintiffs have demonstrated that the interests

they are seeking to protect are germane to their organizations. Each plaintiff is a trade association representing hundreds of thousands of members in their respective industries. *See* ECF 87, pp. 5-7. These trade associations are responsible for furthering and advancing the interests of their individual members, advocating on behalf of members, and participating in OSHA rulemakings to ensure that OSHA rules are sound and lawful. It is the responsibility and mission of each of the Plaintiffs to protect and represent their members' interests. Plaintiffs' challenge is in furtherance of Plaintiffs' own interests and goals, but more importantly, in furtherance of the interests of their individual members. *See, e.g.*, *W. Energy All. v. Jewell*, 2017 WL 3600740, at *4 (D.N.M. Jan. 13, 2017).

In addition, Plaintiffs have demonstrated that it is unnecessary for Plaintiffs' members to participate individually in this lawsuit, therefore satisfying the third and final prong of the *Hunt* associational standing test. The key question is whether the OSH Act authorizes OSHA to promulgate a regulation allowing OSHA to issue an employer a Citation and Notification of Penalty for discriminatory conduct subject to judicial review not by a United States district court but by an administrative agency created by Congress principally to enforce workplace safety and health standards. The Court's analysis will center on whether OSHA has violated the APA and acted beyond its authority in promulgating the Rule. Such an analysis does not require the participation of individual members of the Plaintiff trade associations. Furthermore, Plaintiffs' arguments regarding the evidence supporting the Rule, the rulemaking process, and the vagueness of the Rule do not require the participation of individual members. As the parties *jointly* stated early

on in this proceeding, this case "is best resolved on cross-motions for summary judgment based on the rulemaking record compiled by the Occupational Safety and Health Administration in promulgating the regulation at issue in this case." ECF 37, p. 2.

II. The OSH Act's Review Process Does Not Preclude This Court from Exercising Jurisdiction Over a Pre-Enforcement Challenge.

The Secretary contends that irrespective of Plaintiffs' standing to challenge the Rule, a challenge to an OSHA rule under the APA in federal district court is never appropriate as the "administrative review process established by the OSH Act is the exclusive means for challenging the Rule's legality."[3] Def. Mem., p. 19. Citing a Supreme Court case interpreting the Mine Safety and Health Act ("Mine Act"), *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Secretary essentially argues that employers must wait to get cited by OSHA for violations of the Rule and then those individual employers could challenge the legality of the Rule before the Occupational Safety and Health Review Commission ("Review Commission") and, if necessary, the U.S. Court of Appeals. *Id*. The Secretary is wrong.

The Secretary's argument turns the question before this Court on its head. Congress explicitly vested federal district courts with the authority to hear discrimination claims under Section 11(c) and not the Review Commission under Section 10(c) and Section 11(a)

[3] As the Secretary notes in Footnote 8 of his Memorandum, the administrative process for challenging a citation begins with the issuance of a citation. Def. Mem., p. 19. Plaintiffs are not challenging the issuance of a citation, they are challenging the legal authority of the Agency to promulgate a rule under the OSH Act and the judicial review mechanism specifically provided for under the APA, 5 U.S.C. § 702.

of the Act. Any citation issued under the scheme suggested by the Secretary would be made pursuant to 29 C.F.R. § 1904.35(b)(1)(iv) and the unlawful enforcement scheme that OSHA has created to address discriminatory conduct without judicial review. It is not this Court that lacks jurisdiction to hear a challenge of the Rule under the APA. In fact, it is the Review Commission that lacks authority altogether to address discriminatory conduct, as Congress vested such authority with federal district courts under Section 11(c).

Furthermore, the case law cited does not support the Secretary's argument. The Secretary principally relies on two cases to support his position: *Thunder Basin* and *Sturm, Ruger & Company v. Chao*, 300 F.3d 867 (D.C. Cir. 2002). Def. Mem., pp. 19-20. In *Thunder Basin*, a mine operator attempted to challenge the application of a Mine Safety and Health Administration ("MSHA") regulation regarding workplace postings through a cause of action for injunctive relief with a United States District Court, rather than through the administrative review process set forth in the Mine Act. *Thunder Basin*, 510 U.S. at 205-06. The operator contended that the particular posting in that instance violated the National Labor Relations Act. *Id*. at 204. The Supreme Court held that the Mine Act's enforcement scheme precluded this type of action. *Id*. at 216.

Thunder Basin is inapposite. The operator was not bringing a pre-enforcement facial challenge to the rule under the APA, as Plaintiffs are doing here. *Id*. at 206-07. Rather, the operator was alleging that the posting requirements violate the "principles of collective bargaining under the NLRA," something that the Mine Safety and Health Review Commission ("MSHRC") had "extensive experience interpreting." *Id*. at 214.

Thus, the claims were not "wholly collateral" to the statute's review provisions and not "outside the Agency's expertise." *Id*. at 212 (internal citations omitted). Here, Plaintiffs' claims are outside of the Review Commission's expertise and the intent of the administrative review provisions in the Act. Plaintiffs claim that (1) OSHA does not have authority to create a separate enforcement scheme directly contrary to congressional intent, (2) that the rulemaking record does not support the "reasonable" reporting procedures and anti-retaliation provisions, (3) that the rulemaking process violated the APA, and (4) that the requirements themselves are unconstitutionally vague. Congress never intended for the OSH Act's administrative review procedures to address these types of claims.

In fact, this is supported by *Sturm*, which the Secretary contends "is particularly on point." Def. Mem., p. 20. *Sturm* involved a challenge to an enforcement action under OSHA's Data Initiative ("ODI"), an annual survey sent by OSHA to collect certain injury and illness information. *Sturm*, 300 F.3d at 869. The court held that the challenge to the enforcement action was premature and precluded by the OSH Act's provisions for administrative review of enforcement actions.

Although the employer in *Sturm* claimed that the ODI was "unlawful under the OSH Act, the APA, and the Fourth Amendment," its claims were brought in the overall context of a contested citation that had not run its course through administrative tribunals. *Id*. at 870. The employer had not lodged a direct challenge to the ODI pursuant to the APA. *Id*. at 875-76. In holding that OSHA's administrative review process for challenging enforcement actions precluded the district court action, the Court explicitly distinguished

the employer's cause of action from a "direct attack on the validity of 'a formal regulation,' issued pursuant to 'notice-and-comment' rulemaking." *Id*. at 875. The Court noted that it had previously approved the district court's jurisdiction to hear a "generic" challenge to regulations issued by the Secretary of Labor, but that was not the type of challenge that Sturm brought. *Id.* (citing *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 856-57 (D.C. Cir. 2002)). Unlike *Sturm*, Plaintiffs here are not challenging a particular enforcement action; they are directly challenging the regulations at issue in a pre-enforcement posture and are not precluded from doing so by the administrative enforcement scheme of the Act.[4]

III. This is a Facial Challenge to the Rule and Not the Final Rule's Preamble.

The Secretary also argues that Plaintiffs are improperly challenging language in the preamble to the Rule, which he claims is non-justiciable because the preamble does not have "independent legal effect." Def. Mem., pp. 21-22. This is a red herring. Plaintiffs are not adjudicating the language in the preamble. Instead, Plaintiffs refer to the preamble to attempt to interpret the ambiguous language of the regulatory text to demonstrate how the requirements themselves are unconstitutionally vague.

[4] Plaintiffs also note that when OSHA promulgated its amendments to the recordkeeping rule in 2001, that rule was challenged by the National Association of Manufacturers on behalf of its members pursuant to the APA in the United District Court for the District of Columbia. *See* Compl., *Nat'l Ass'n of Manufacturers v. Chao*, Civ. No. 1:01CV00575 (D.D.C., March 23, 2001), ECF 1. That court accepted jurisdiction over the case, ultimately accepting a settlement of the action by the parties. *See* Settlement Agmt. (Revised), *Nat'l Ass'n of Manufacturers v. Chao*, Civ. No. 1:01CV00575 (D.D.C., November 29, 2001), ECF 29.

The Secretary relies on *NRDC v. EPA*, 559 F.3d 561 (D.C. Cir. 2009). There, the court found that "[t]he balance of the NRDC's case deals not with the rules EPA promulgated but with its statements in the preamble to the rules." *Id.* at 564. The same cannot be said here. Plaintiffs' opening Memorandum lays out arguments against OSHA's ambiguous rules related to "reasonable" reporting procedures and anti-discrimination. Plt. Mem., pp. 38-44. And Plaintiffs' arguments regarding the illegality of the new discrimination enforcement scheme does not at all depend upon the preamble.

Unlike *NRDC*, Plaintiffs are not asking the court to overturn the language in the preamble. But the Plaintiffs instead (obviously) reviewed the language of the preamble to attempt to understand the Agency's intent and its own contemporaneous understanding of the ambiguous regulation. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 (10th Cir. 2000) ("'[W]hile language in the preamble of a regulation is not controlling over the language of the regulation itself … the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules,' and therefore provides guidance in evaluating whether the agency's interpretation of its regulation is consistent with the structure and language of the rule.") (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)). Because the Plaintiffs are not challenging the preamble itself and are simply referring to it to *try* to understand what the ambiguous regulatory text could possibly mean, the Secretary's argument regarding whether the language in the preamble is judiciable should be rejected.

The Secretary also claims that any challenge to its prohibition on safety incentive programs and post-incident drug testing is not ripe. A challenge to agency regulation is ripe for judicial review if the challenge presents "purely legal" questions, the complained-of regulation is a final agency action, and additional facts would not "significantly advance [the court's] ability to deal with the legal issues presented." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003). Again, the Secretary misunderstands the basis for Plaintiffs' lawsuit. Plaintiffs do not contend that particular safety incentive programs or post-incident drug testing programs that have been implemented are lawful or not lawful. Quite the opposite. The regulation is so vague that there is no way for Plaintiffs to make such an assertion. The regulations have a direct and immediate impact on Plaintiffs' members who are attempting to comply with it. And given the frequent and contradictory guidance given by the Agency regarding appropriate and inappropriate programs it would be impossible to do so. Plaintiffs' facial challenge to the Rule is ripe.

IV. OSHA's New Enforcement Scheme for Addressing Alleged Discriminatory Conduct is Unlawful.

A. The Secretary's Argument that the OSH Act Grants Authority to Issue the Rule Effectively Eliminates Step One of *Chevron*.

Plaintiffs' opening Memorandum argues very simply and clearly that OSHA lacks statutory authority for its new enforcement scheme because the statute as a whole, reading each section in harmony with others, and read in context with the legislative history makes clear that Congress did not either directly or implicitly leave OSHA the authority to regulate employers in this manner. When you step away from the smoke and mirrors the

Secretary conjures up, it is simply unbelievable that retaliation, even retaliation for recordkeeping, is a subject which Congress would have intended, and expected to leave to the agency as part of its "gap-filling" authority. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

When government agencies interpret their own authority, they may not do so "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotations omitted). And, "[a]t times, 'more intense scrutiny' of agency action is appropriate such as where 'the agency interprets its own authority' due to "'the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.'" *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778, 785-86 (D.S.C. 2012) (citing *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981)).

This agency action is nothing more than an attempt to swell OSHA's authority. In short, the Secretary argues that any regulation that the Agency reasonably believes is necessary to ensure accurate recordkeeping fits within the confines of its authority. Yet, the Secretary seems to misunderstand the *Chevron* principles—principles that require this Court to ask whether Congress actually delegated such authority to OSHA to regulate alleged retaliation for reporting a work-related injury or illness.

The Secretary incorrectly asserts that Plaintiffs started their *Chevron* analysis in the wrong place. Plaintiffs started with the question whether Congress either explicitly or

implicitly delegated such authority to OSHA. *See Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (*before* applying *Chevron* deference under step two, the court must ask whether "Congress either explicitly or implicitly delegated authority to cure that ambiguity") (emphasis added). Plaintiffs' position is quite simple—when "devices of judicial construction have been tried … [they] yield … [a] clear sense of congressional intent" and in this case, the "clear sense" is that there is no delegation of authority to promulgate a regulation addressing retaliation for recordkeeping. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 583 (2004) (holding "that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern").

The Secretary attempts to skip *Chevron* step one by alleging that "[b]ecause the OSH Act broadly delegates authority to OSHA, the agency's exercise of that authority should be evaluated at *Chevron* step two." Def. Mem., p. 26. The Secretary would like this Court to hold that *Chevron* step two deference is required any time a statute does not expressly "negate the existence of a claimed administrative power (i.e. when the statute is not written in "thou shalt not terms")." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). Such a construction is incorrect and "is both flatly unfaithful to the principles of administrative law … and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* (internal citations omitted) (emphasis in

original). The Secretary's basis of authority rests on his belief that there is no express withholding of the power to regulate retaliation for recordkeeping, and, therefore, OSHA has no bounds so long as the regulation is reasonable. As Plaintiffs previously stated—not every silence is pregnant—no matter how badly the Agency wishes it were.[5]

The Secretary attempts to rely on the broad rulemaking authority Congress granted the Agency in Section 8(g)(2) in support of his position. The OSH Act, like many other statutes,[6] grants OSHA authority to promulgate regulations that are necessary to carry out responsibilities under the Act. 29 U.S.C § 657(g)(2). The Secretary then attempts to tie this authority to Section 8(c)(2), which requires OSHA to prescribe regulations for employers to maintain accurate records. Def. Mem., p. 26. Section 8(c)(2) tells OSHA that it must establish regulations for employers to maintain such work-related injury and illness records—it does not give OSHA *carte blanche*, even when coupled with authority in Section (g)(2) to regulate recordkeeping in any way it deems necessary. Such an exercise of authority would be without limits. *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d

[5] Indeed, the Supreme Court recently made clear that before applying deference to an agency's interpretation, a court must go through *all* of the ordinary canons of construction—including constitutional avoidance. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). To construe the OSH Act as authorizing this delegation of authority as broadly as the Secretary suggests would create, rather than avoid, a serious constitutional issue. *See Gundy v. U.S.*, 139 S.Ct. 2116, 2123 (2019) (plurality opinion); 139 S.Ct. at 2144-45 (Gorsuch, N., dissenting).

[6] *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778, 785-86 n. 6 (citing Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Conversation, 116 HARV. L. REV. 467, 471 n.8 (2002)) ("According to one report, by January 1, 1935, more than 190 federal statutes included rulemaking grants that gave agencies power to 'make any and all regulations 'to carry out the purposes of the Act.'") (citation omitted)).

796, 806 (D.C. Cir. 2002) (holding the FCC acted without delegation in promulgating the rule at issue). Further, "an agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 144 (D.D.C. 2005), *aff'd.*, 466 F.3d 134 (D.C. Cir. 2006). OSHA "may not disregard restrictions Congress has imposed on its authority in other sections of the governing statute" such as relying on Section 8 "in isolation to [such] substantive provisions." *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d at 790. When Sections 8(c)(2), 8(g)(2) and Section 11(c) are all read in context, as one harmonious whole, and read in light of the statutory context it is clear Congress did not delegate such authority. *See State of Oklahoma ex rel. Pruitt v. Burwell*, 51 F. Supp. 3d 1080 (E.D. Okla. 2014), *rev'd on other grounds* ("an agency's rule-making power is not 'the power to make law,' it is only the 'power to adopt regulations to carry into effect the will of Congress as expressed by the statute'") (citation omitted).

In addition, where Congress intended a specific desired result or objective be obtained by the Secretary, Congress stated so explicitly. For example, Section 8(c)(3) grants OSHA the authority to issue regulations "requiring employers to maintain accurate records of employee exposure to potentially toxic materials or harmful physical agents." 29 U.S.C. § 657(c)(3). In contrast to Section 8(c)(2), Congress did not stop there in Section 8(c)(3). Rather, Congress specified that those regulations for exposure records for toxic materials address various objectives, such as employees having an opportunity to observe such monitoring and employees and former employees having access to the records. *Id.*

Had Congress intended to delegate authority to OSHA to address retaliation occurring as the result of maintaining work-related injury and illness records it would have done so explicitly (in Section 8(c)(2) or otherwise). Congress's failure to do so is intentional because it never intended OSHA to have such authority.

The Secretary argues that while Section 11(c) addresses retaliation, it does not specifically address retaliation for recordkeeping. And since Congress has provided the Agency authority to promulgate regulations it deems reasonably necessary in carrying out its responsibilities under the Act, the Secretary argues the only inquiry is whether the regulation is reasonably necessary. Under the Secretary's logic, OSHA's authority is essentially limitless.

For example, applying the Secretary's rationale, the Secretary could promulgate an entirely new penalty structure for recordkeeping violations if such a structure ensures accurate recordkeeping. Section 17 of the Act addresses penalties broadly, but it does not address penalties specific to recordkeeping violations. *See* 29 U.S.C. § 666. Therefore, if OSHA were to find it "reasonably necessary" to ensure accurate recordkeeping it could promulgate a regulation establishing a "Notice of Recordkeeping Violation" with an assessed penalty of $25,000.00 for each recordkeeping violation, all in the name of ensuring accurate records. Under the Secretary's position, OSHA has unfettered authority under Section 8(g)(2). Similar to the argument he makes here, Section 17, which addresses penalties, says nothing about penalties specific for recordkeeping violations. Indeed, taking the Secretary's position here would mean that when it pertains to recordkeeping

regulations, unless another section of the Act expressly prohibits the Agency action, OSHA can regulate in any way it deems necessary, including creating an entirely separate penalty structure for recordkeeping.

Moreover, according to the Secretary "the agency is particularly well positioned to know which remedial tactics will, and will not, work." Def. Mem., p. 29. Therefore, "[t]he Court … should not disturb OSHA's judgment about the best means for ensuring accurate injury and illness records." *Id*. Simply put, in OSHA's eyes it has such broad authority to determine what remedial measures are necessary to ensure accurate recordkeeping and its judgment is far superior to that of any Court and should not be disturbed. Such a construction of the Act cannot be permissible.

B. Section 11(c)'s Plain Language, Coupled with the Legislative History and Read in Context with the Statute as a Whole Makes Clear Congress did not Delegate OSHA Authority.

The Secretary contends that Plaintiffs' statutory analysis begins, and ends, with Section 11(c) of the OSH Act. Def. Mem., p. 29. But Plaintiffs rely on Section 11(c) to provide context to the statute as a whole evidencing that Congress has addressed *all* retaliation and there is no gap to fill. The Secretary instead turns the argument on its head to claim that Section 11(c)'s silence with respect to recordkeeping suggests that Section 11(c) does not limit OSHA's enforcement authority as long as it ties that authority to recordkeeping. *Id*. Put another way, the Secretary's position is that the Court should infer or presume Congress delegated such authority to OSHA because Congress did not expressly state, "OSHA shalt not issue regulations governing retaliation for

recordkeeping." This view of agency authority has been clearly rejected by the courts. *See NLRB*, 856 F. Supp. 2d at 791 (citing *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact there is not an express withholding of such power.")).

Further, the Secretary cannot keep his position straight. The Secretary argues in his brief that "[i]t makes sense, then, that OSHA would choose (and that Congress would permit) a remedial scheme with different constraints to address a problem that is different from the one Section 11(c) seeks to address." Def. Mem., p. 32. The Secretary claims that the regulation "merely overlaps" with Section 11(c). *Id*. at 33. Yet in the preamble to the final rule, OSHA states "Discriminating against an employee who reports a fatality, injury, or illness is a violation of section 11(c) (*see* 29 CFR 1904.36), so *the conduct prohibited by § 1904.35(b)(1)(iv) of the final rule is already proscribed by section 11(c).*" 81 Fed. Reg. at 29,627 (emphasis added). More importantly, OSHA also asserts the remedies under this regulation are similar in nature to remedies provided under Section 11(c), including reinstatement and back pay. *Id*. at 29,671 ("the goal of abatement would be to … make whole any employees treated adversely as a result of the retaliation.").

The Secretary's argument might hold more water if OSHA did not grant itself authority to both issue an employer a citation and right the wrong done to the employee by permitting reinstatement with back pay under this regulation. *Id*. However, by doing so, the regulation does not merely overlap, it prohibits the very conduct already proscribed by Section 11(c) and provides essentially the exact same remedies afforded to employees

under Section 11(c), just without 11(c)'s procedural protections and judicial review. Contrary to the Secretary's argument, the remedial scheme of this regulation is no different than that of Section 11(c) and the arguments conjured up by the Secretary are nothing more than an attempt to overcome the limitations and constraints that exist under Section 11(c).

The Secretary is correct that Plaintiffs do not contest that the OSH Act allows OSHA to promulgate regulations necessary to carry out its statutory responsibilities. Nor do Plaintiffs contest that OSHA apparently deemed this regulation necessary. But, whether OSHA was (1) delegated such authority and (2) correct in that such a rule is necessary is debatable and Plaintiffs contend that even under step two the Agency is not entitled to *Chevron* deference. A regulation cannot be necessary where it frustrates congressional intent. *Kaiser Alum. & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848-49 (9th Cir. 2001) (court may reject a construction inconsistent with statutory mandates).

In very simple terms, Plaintiffs' brief outlined that the regulation frustrates congressional intent, creates inconsistent and absurd results by permitting the exact same remedies—and potentially inconsistent outcomes—under both Section 11(c) and the anti-retaliation regulation, and turns a regulation, which is intended to be administrative in nature, into a remedial tool thereby creating a *de facto* standard. As such, the Agency is not entitled to deference. The Court should reject the Secretary's arguments.

V. OSHA Failed to Properly Promulgate the Final Rule Pursuant to the APA.

In its Motion for Summary Judgment, Plaintiffs set forth the substantive and procedural flaws in OSHA's rulemaking. First, the Agency ignored significant, contrary

evidence in the rulemaking record regarding the need for, and the effectiveness of, the requirements in the Rule. Plt. Mem., pp. 26-32. Second, the procedure undertaken by the Agency in promulgating the Rule was fundamentally flawed and provided no real notice and opportunity for comment on the substance of what would ultimately become the final rule. *Id*. at 34-38. The Secretary's response to these arguments are unavailing.

The Secretary argues first that "OSHA reasonably evaluated the relevant evidence" in promulgating the Rule and that Plaintiffs simply allude to "cherry-picked" examples in a large record casting doubt on the need for and effectiveness of the Rule. Def. Mem., p. 37. Plaintiffs disagree that OSHA reasonably evaluated the relevant evidence as set forth in their opening Memorandum. Plt. Mem., pp. 36-32. In fact, the preamble to the rule demonstrates that the Agency relied only on a handful of comments—largely from organized labor—and a few quotes from the public hearing in justifying the Rule. *Id*.

More importantly, however, the Secretary does not address the larger point set forth in Plaintiffs' Memorandum—that OSHA did not consider and address key evidence contrary to the Secretary's position when promulgating the Rule. *Id*. Plaintiffs identified important evidence that was submitted to the rulemaking record casting doubt on the need for the new requirements in the Rule that was never addressed, discussed, or even cited in the preamble. *Id*. at 27-32. In the Secretary's Opposition, he attempts to explain why the evidence identified by the Plaintiffs does not undercut the basis for the Rule. Def. Mem., pp. 37-40. However, *post hoc* arguments cannot substitute for an Agency's responsibility under the APA to consider relevant evidence and explain a decision that runs counter to

the evidence before the Agency. *See Martin v. OSHRC*, 499 U.S. 144, 156 (1991) ("agency litigating positions are not entitled to deference when they are merely appellate counsel's *post hoc* rationalizations for agency action, advanced for the first time in the reviewing court") (internal quotations and citations omitted).

It is incumbent upon this Court to review the preamble to the Rule and the evidence relied upon and discussed by the Agency—or in this case not discussed—when assessing whether the Agency has fulfilled its responsibilities under the APA. Here, the Agency ignores critical evidence in the record casting doubt on the Agency's views and when discussing other pieces of evidence that it contends support its position, does not mention contrary data included in the evidence. The APA requires more.

The Secretary next claims that OSHA's Supplemental Notice provided "ample" "opportunity to participate in the rule making" and that the Rule is a "logical outgrowth" of the proposal and (presumably) the Supplemental Notice. Def. Mem., p. 42. The Secretary appears to base his argument on the fact that some of the language in the Rule is similar to some of the language that OSHA indicated it would potentially address in a final rule. *Id*. at 42 (the Secretary describes the language as "identical.")

Plaintiffs note that the Secretary does not address the case law cited in Plaintiffs' opening Memorandum or the several deficiencies in the Supplemental Notice itself. *Id*. at 42-44. The Supplemental Notice was five pages in length, contained no regulatory text, and only mentioned a handful of potentially "problematic" practices, a far cry from "the range of alternatives being considered with reasonable specificity." *Prometheus Radio*

Project v. F.C.C., 652 F.3d 431, 450 (3d Cir. 2011). The Secretary's argument that there is similarity in language used between the Supplemental Notice and the Rule does not solve the Secretary's notice problem. In fact, the language cited by the Secretary was never meaningfully proposed, nor was the full scope of the potential meaning of the language.

Finally, the Secretary dismisses in a footnote the procedural error caused by OSHA's reliance on data and information entered into the record long after the close of the comment period. Def. Mem., p. 38. The Secretary states that Plaintiffs do not allege that "OSHA hid or disguised the information it used, or otherwise conducted the rulemaking in bad faith," and even so, that Plaintiffs could not contend that the failure to disclose created actual harm. *Id*. It is true that Plaintiffs cannot speak to OSHA's intent and motives behind when and how it made the ERG report public. The fact is that it was not placed into the record until almost 13 months *after* the close of the comment period. Contrary to the Secretary's position, Plaintiffs were harmed by the failure to disclose this information as it contained significant information contradicting the Agency's view of the need for the Rule that would have been useful to make public and include in comments to the record.

VI. Plaintiffs Have Established that the Final Rule is Void for Vagueness and Must Be Held Unconstitutional.

In response to Plaintiffs' claim that the Rule is void for vagueness, the Secretary again urges this Court to grant OSHA supreme deference. The Secretary suggests that Plaintiffs improperly focus on safety incentive and drug testing programs and that the only vagueness argument that addresses the text of the new regulation concerns the use of the word "reasonable" in the "reasonable" reporting requirement. Def. Mem., p. 44. That, the

Secretary argues, is easily defined by reference to *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). *Id*. at 45.

The Secretary misses the point. Plaintiffs contend that the "reasonable" reporting procedures and the anti-retaliation procedures are so vague that a reasonable employer picking up the Code of Federal Regulations would have no idea as to how to comply. Plt. Mem., pp. 38-44. Forced to look elsewhere for Agency guidance, that employer would be hit with a combination of disturbing, conflicting, or ambiguous guidance on what compliance means, including inconsistent information on safety incentive programs and drug testing programs. *Id*. At bottom, though, it is the Rule itself that fails to provide employers notice of their compliance obligations.

Finally, Plaintiffs do not agree that the reference to *Burlington Northern* solves the vagueness issue. Citation to a case concerning Title VII buried in the Agency preamble does not at all address the ambiguity in the Rule or help employers understand their compliance obligations. Of course it is true that the concept of "reasonableness" is not a new one. But that does not solve all vagueness issues. An employer must be given notice of how to comply with a Rule on its face and this Rule does not come close to meeting that test. *See, e.g., L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 677 (D.C. Cir. 1982).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 12, 2019, a true, correct, and exact copy of the foregoing document was served via electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

/s/ Bradford T. Hammock

Bradford Hammock (*Pro Hac*)