

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

HENRY MCMASTER, in his official capacity as  
Governor of the State of South Carolina, and  
SOUTH CAROLINA DEPARTMENT OF LABOR,  
LICENSING & REGULATION,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF LABOR;  
MARTIN J. WALSH, in his official capacity as  
Secretary of Labor; OCCUPATIONAL SAFETY  
AND HEALTH ADMINISTRATION; and DOUGLAS  
PARKER, in his official capacity as Assistant  
Secretary for Occupational Safety and Health,

*Defendants.*

Civil Action No.: 3:22-cv-02603-SAL

**Reply in Support of  
Motion for Preliminary Injunction**

Plaintiffs submit this Reply in Support of their Motion for Preliminary Injunction.

**INTRODUCTION**

Defendants have “required” the State Plan to increase its civil penalties to match recently increased federal penalties. 2022 Adjustment, 87 Fed. Reg. 2328, 2332 (Jan. 14, 2022). This case is fundamentally about whether Defendants have lawfully required the State Plan to do so.

They have not. The 2022 Adjustment was issued under 2015 Federal Penalties Act. *See id.* at 2329. Nowhere, however, have Defendants rebutted Plaintiffs’ detailed statutory analysis explaining how the 2015 *Federal Penalties Act* does not give Defendants the authority to require anything of *state* civil penalties. Nor does the OSH Act itself require the State Plan to have civil penalties that match the federal ones. The plain text of the OSH Act, the plain text of OSHA’s regulation that has been in effect since the OSH Act was enacted 50 years ago, and legislative history from Congress and statements from OSHA make that clear.

Without any good merits arguments, Defendants spend most of their opposition focused on jurisdictional arguments and efforts to redefine the scope of this case. None of these alternative defenses survives scrutiny. As for standing, Defendants have mandated that the State Plan increase its civil penalties, an unlawful directive from the federal government for South Carolina to change its law. This harm to South Carolina's sovereignty is far from speculative, as OSHA has shown an energy to enforce this mandate that it has lacked in previous years.

As for the scope of the claims, no matter how they describe it, Defendants cannot escape the fact that the 2022 Adjustment is a mandate to increase state civil penalties or else face threats to the State Plan's continuing existence. Plaintiffs have plainly challenged Defendants' authority to issue this latest mandate in the 2022 Adjustment.

The Court should therefore grant the Motion for Preliminary Injunction to ensure the State Plan does not suffer an irreparable harm while this case proceeds.

### **ARGUMENT**

#### **I. Defendants misconstrue the scope of Plaintiffs' claims and the relief Plaintiffs seek.**

At the outset, it is important to be clear about the scope of this case. Defendants push off arguments or issues throughout their Response by insisting Plaintiffs have only challenged an inflation-triggered increase to civil penalties in the 2022 Adjustment, so arguments about Defendants' authority to mandate that increase or OSHA's 2016 interim final rule, for example, are irrelevant. *See, e.g.*, ECF No. 19, at 11, 22.<sup>1</sup> Totally missing from Defendants' efforts, however, is any acknowledgement of the scope of Plaintiffs' arguments about the 2022 Adjustment or the scope of relief Plaintiffs seek.

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<sup>1</sup> The page numbers in cites to ECF No. 19 are to the page numbers at the bottom of Defendants' brief, not to the ECF-generated page numbers at the top.

Although Plaintiffs seek declaratory relief related only to the 2022 Adjustment, their arguments about why the 2022 Adjustment’s attempt to force state plans to change their civil penalties encompass the legal reasoning of the 2016 interim final rule because that reasoning is the same as the reasoning of the 2022 Adjustment. *See, e.g.*, ECF No. 1, at 5, 7; ECF No. 8, at 15–17. Additionally, Plaintiffs have expressly sought both preliminary and permanent injunction relief to prevent Defendants from enforcing not only the 2022 Adjustment but also the adjustments from 2017, 2018, 2019, 2020, and 2021, as well as the 2016 interim final rule, against the State Plan.<sup>2</sup> *See* ECF No. 1, at 11–12.

After having tried to narrow Plaintiffs’ claims so much, Defendants at the same time seek to stretch those claims in other ways. Plaintiffs know the Court cannot (and should not) enjoin Defendants from ever seeking to revoke the State Plan’s final approval for any reason, and Plaintiffs have not raised an amorphous pre-enforcement challenge to any potential revocation. *Contra* ECF No. 19, at 18–19.

Thus, any argument premised on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), is misplaced here. Even if Defendants’ argument were not premised on a misreading of Plaintiffs’ theory, *Thunder Basin* would still provide them no support. The Mine Act at issue in *Thunder Basin* included a “detailed structure for reviewing violations” of the Act. *Id.* at 207. For that matter, so too do the Natural Gas Act, *see Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 629 (4th Cir. 2018) (“extensive review framework”), and the Securities Exchange Act of 1934, *Bennett v. U.S. Sec. & Exch. Comm’n*, 844 F.3d 174, 181 (4th Cir. 2016) (“comprehensive scheme”), both

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<sup>2</sup> If, somehow, Plaintiffs need to seek declaratory as well as injunctive relief related to the 2016 interim final rule and previous adjustments, that is not a problem. Rule 15 requires that parties be “freely give[n] leave” to amend. Fed. R. Civ. P. 15(a)(3); *see also Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc) (courts have a policy in “favor of resolving cases on their merits”). A simple amendment of the Complaint would remedy this issue easily.

of which Defendants invoke, *see* ECF No. 19, at 19. The OSH Act contains no such framework. Indeed, the only thing in the OSH Act to which Defendants point is § 667(g). That provision, however, applies only to “review of a decision of the Secretary withdrawing approval of or rejecting” a state plan. It has nothing to do with limiting judicial review of OSHA regulations, nor do Defendants point to any such intent by Congress, which the Supreme Court found significant when reviewing the Mine Act in *Thunder Basin*. *See* 510 U.S. at 209–11.

The goal of this lawsuit is to ensure that Defendants do not use the 2022 Adjustment—or any of the previous annual adjustments based on the same logic and on which Plaintiffs have sought injunctive relief—as the basis to revoke approval of the State Plan. The goal is *not* to protect the State Plan from any independent, non-pretextual attempt to revoke its final approval. In the interim while this case is pending, Plaintiffs have sought the same protection to preserve the status quo and to ensure that Defendants do not use the civil-penalties issue as unacknowledged motivation for such an effort. *Cf.* ECF No. 19, at 20 (admitting that the civil-penalties issue was one of multiple reasons OSHA claimed it is considering revoking Arizona’s state plan).

Finally, there is nothing to Defendants’ argument that Plaintiffs have not challenged 29 U.S.C. § 667(c)(2). Plaintiffs have not. But that is because Plaintiffs do not need to challenge that provision to prevail because, contrary to Defendants’ repeated contentions, that provision of the OSH Act does not require state civil penalties to match federal ones. *See infra* Part III.A.

## **II. Plaintiffs can challenge the 2022 Adjustment.**

### **A. Plaintiffs have a traceable injury this Court can redress.**

Plaintiffs satisfy all three prongs for standing. As for an injury-in-fact and traceability, Defendants insist that Plaintiffs’ harm is simply due to the “operation of the OSH Act” and the fact that the State “opt[ed] to administer a State plan.” ECF No. 19, at 14. This argument, however,

is based entirely on Defendants' misreading of the OSH Act and § 667(c)(2). *See infra* Part III.A.

Such injuries are not speculative, as Defendants contend. *See* ECF No. 19, at 19–21, 29. To be sure, OSHA has taken the position since the 2016 interim final rule that state plans needed to adjust their civil penalties annually and has noted the State Plan's failure to do so in previous FAME reports. Yet through the 2020 FAME report, this failure to increase civil penalties was never a finding, and OSHA did nothing in these years to enforce its previous mandates about increasing civil penalties. With OSHA seemingly content not to enforce its own regulation, the State Plan appeared not to face any threat. But now, for the first time, Defendants are taking active steps to enforce their view that the penalty amounts must be increased. Defendants have issued a *finding* in the 2021 FAME Report based on the fact that the State Plan's has not imposed identical penalties, *see* ECF No. 8-2, at 19, meaning that OSHA has declared the failure to increase civil penalties "warrant[s] corrective action by the State Plan to ensure it is [at least as effective]" as the federal standards, OSHA, *State Plan Policies and Procedures Manual* 74 (May 6, 2020), <https://tinyurl.com/2p93wtfv>. Now, it's forming the basis for OSHA beginning the process of revoking another State's final approval.<sup>3</sup> Arizona Notice, 87 Fed. Reg. 23,783, 23,786–87 (Apr. 21, 2022). Individually and particularly collectively, Plaintiffs' concern that Defendants may act is far from speculative. *Cf. Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) ("there is a credible threat of future enforcement so long as the threat is not 'imaginary or wholly speculative'" (quoting

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<sup>3</sup> On the subject of Arizona, Defendants are quick to note that OSHA has postponed the hearing date and reopened the comment period. *See* ECF No. 19, at 20 (citing 87 Fed. Reg. 50,025). What Defendants omit on this point is that this delay came only *after* the Arizona agency that administers its state plan increased Arizona's civil penalties to the 2021 federal amounts and the Arizona legislature passed and its governor signed legislation for Arizona's civil penalties to adjust along with the federal penalties. *See* 87 Fed. Reg. at 50,026. In other words, the federal government stopped the revocation process only after Arizona gave into OSHA's demands—something OSHA openly acknowledged. *See* Press Release, OSHA (Aug. 10, 2022), <https://tinyurl.com/3pamxwb7>.

*Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979))).

As an additional injury, Defendants continue to show little respect for the State's sovereignty and dignity. *See* ECF No. 19, at 13. Courts have consistently recognized that state sovereignty is important and cannot be infringed by the federal government. *See, e.g., In re Trump*, 958 F.3d 274, 286 (4th Cir. 2020), *cert. granted, judgment vacated sub nom. Trump v. D.C.*, 141 S. Ct. 1262 (2021) (*Munsingwear vacatur*); *Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996). Although Chief Justice Roberts's observation about a State's injury in *Maryland v. King* was in the context of a judicial injunction that changed state law, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), a federal regulation that mandates a change to state law is effectively the same thing: The federal government forcing a State to alter its law, in derogation of the State's sovereignty.

As for redressability, *see* ECF No. 19, at 14–15, Defendants are wrong for at least two reasons. One, Defendants' argument is built on the sandy foundation of their attempts to redefine Plaintiffs' claims. Two, even if relief had to be limited only to the 2022 Adjustment, Plaintiffs' injuries are redressable. South Carolina has not increased its civil penalties from the \$70,000 and \$7,000 amounts that federal civil penalties were in 2015. *See* S.C. Code Ann. § 41-15-320. The 2021 Adjustment required state civil penalties to be \$136,532 and \$13,653. *See* 86 Fed. Reg. 2964, 2972 (Jan. 14, 2021). But the 2022 Adjustment forces those penalties to be increased to \$145,027 and \$14,502. *See* 87 Fed. Reg. at 2336. Thus, even if the Court enjoined only the 2022 Adjustment but the State Plan was required somehow to immediately comply with the 2021 Adjustment, South Carolina would still avoid having to raise its civil penalties by over \$8,000 and \$800 dollars. Defendants fail to acknowledge that this "ability to effectuate a partial remedy satisfies the redressability requirement" *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (cleaned up).

**B. Plaintiffs can assert their APA challenges.**

Defendants' contention that Plaintiffs cannot challenge the 2022 Adjustment under the APA is likewise misguided. They are wrong that this case is like *Independent Equipment Dealers Association v. E.P.A.*, 372 F.3d 420 (D.C. Cir. 2004), or *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 428 (4th Cir. 2010). *See* ECF No. 19, at 15–17. There is no “letter” here, as there was in *Independent Equipment Dealers Association*, 372 F.3d at 421, nor is there some guidance document that is “simply informational,” as there was in *Golden & Zimmerman*, 599 F.3d at 428. Here, by contrast, OSHA has published a final rule in the Federal Register, and Defendants have insisted that state plans must comply with its provisions.

Defendants are likewise incorrect that the 2022 Adjustment is not a final agency action. *See* ECF No. 19, at 17–18. The 2022 Adjustment plainly says it is a “*Final* rule.” 87 Fed. Reg. at 2328 (emphasis added). The fact that the OSH Act provides a review procedure in § 667(g) if the Secretary seeks to revoke a state plan’s final approval does not preclude review of the 2022 Adjustment. On its face, the 2022 Adjustment purports to require South Carolina to increase its civil penalties. No State should have to disregard the 2022 Adjustment, wait for Defendants to begin revoking a state plan, and then assert OSHA’s lack of authority as a defense there when the issue here is OSHA’s authority rather than the State Plan’s sufficiency to protect workplaces. *Cf. Hernandez v. Stewart*, No. 1:20-CV-03241-SMJ, 2021 WL 6274440, at \*1 (E.D. Wash. Mar. 1, 2021) (“Defendants cannot cloak the injustices created by the survey with the U.S. government seal of approval, turn away, and say ‘nothing to see here.’ This court will not allow that.”).

Similarly, Defendants are mistaken that the 2022 Adjustment is not a substantive rule that can be challenged under a notice-and-comment theory. *See* ECF No. 19, at 22. “Rules issued through the notice-and-comment process are often referred to as ‘legislative rules’ because they

have the ‘force and effect of law.’” *Children’s Hosp. of the King’s Daughters, Inc. v. Azar*, 896 F.3d 615, 619–20 (4th Cir. 2018). The 2022 Adjustment’s mandate on state plans is just such a rule, to which no exception to § 553 applies. Even if it appears simpler or more straightforward than many federal regulations, the 2022 Adjustment is still a regulation that purports to require States or state plans to take specific action or face legal consequence. Indeed, if it were not, then there would be no reason for OSHA to have included the section on federalism, *see* 87 Fed. Reg. at 2331–32, much less declare that “State Plans are required to increase their penalties in alignment with OSHA’s penalty increases to maintain at least as effective penalty levels,” *id.* at 2332. The fact that OSHA is doing the same thing as it has done in past years does not mean that OSHA is not doing that thing again—mandating the State Plan increase civil penalties.

Ultimately, the logical conclusion of Defendants’ arguments is that no one can challenge the 2022 Adjustment in federal court. That cannot be correct. And in any event, these arguments, if successful, would not eliminate the underlying objections regarding OSHA’s authority to mandate adoption of identical civil penalties. Aside from options available to other aggrieved States, Plaintiffs here could easily amend their complaint (or even file a new lawsuit, if necessary) to seek declaratory relief directly on the 2016 interim final rule in this Court.

### **III. Plaintiffs are right on the merits.**

Defendants’ desire to talk about anything but the merits is telling but not surprising. Neither the OSH Act nor 29 C.F.R. § 1902.4(c)(2)(xi) requires the State Plan to increase its civil penalties to match the federal penalties.

#### **A. The OSH Act does not require the penalties to match.**

Defendants contend the OSH Act (implicitly) mandates<sup>4</sup> matching penalties. *See* ECF No.

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<sup>4</sup> There is a difference between the OSH Act *requiring* identical penalties and *permitting*

19, at 2, 8, 22, 24. For multiple reasons, the OSH Act requires no such thing. Start with the statutory text. Defendants seek refuge in the OSH Act’s requirement that “the enforcement” of state plans’ “safety and health standards” must “be at least as effective” as federal enforcement of its standards is. 29 U.S.C. § 667(c)(2); *see also id.* § 667(c)(1)–(8) (providing the eight subjects that must be part of a state plan). When a court interprets a statute, it “generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption.” *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021). When Congress passed and the President signed the OSH Act, “effective” meant to “attend with result.” I *Compact Edition of the Oxford English Dictionary* 835 (1971). “Attend with result” is not “identical.” There are multiple ways to achieve a result; there is only one way to be identical. In other words, the OSH Act seeks to promote healthy, safe workplaces, and for a State to operate a state plan, Congress required that state plans similarly seek to ensure workplaces are safe and healthy in a manner at least as effective as federal OSHA. The OSH Act does not, however, explicitly require that state plans, to be at least as effective, must have civil penalties that are identical to the federal civil penalties. “[W]hen the meaning of the statute’s terms is plain, [a court’s] job is at an end.”<sup>5</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020). If Congress wants to give OSHA the power to mandate state plans have matching civil penalties, Congress could pass such a law, if there were the political will to do so. But that’s a decision for Congress, not OSHA, to make.

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OSHA to requiring identical penalties by regulation. Defendants’ argument here is that the OSH Act itself requires the civil penalties to match.

<sup>5</sup> While it is clear that “effective” does not mean “identical,” OSHA has had a hard time defining what “effective” does mean. “OSHA has not designed a method to determine that State Plans are at least as effective as Federal OHSA in reducing injuries and illnesses.” Office of Inspector General—Office of Audit, U.S. Dep’t of Labor, Report No. 02-11-201-10-105, *OSHA Has Not Determined if State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health as Federal OSHA’s Programs*, at 2, <https://tinyurl.com/vakvx366>. This issue was raised as early as 1988, yet OSHA has still not resolved it. *Id.* at 4.

But if somehow more were needed on this point, there is plenty. For example, both the OSH Act and the legislative history make clear that Congress intended for States to have flexibility in developing state plans, which would necessarily include how to enforce those plans. *See, e.g.*, 29 U.S.C. § 651(b)(11); Sen. Rep. 91-1282, at 18 (1970), 1970 U.S.C.C.A.N. 5177, 5194–95; H.R. Rep. No. 91-1291, at 32–33 (1970). In fact, even OSHA has recognized the need for state plans to have flexibility: “OSHA agrees that the principle that State plan requirements are not required to be identical” to the federal rules and regulations “is an important statutory feature of the State plans program.” OSHA’s Department of Labor Changes to State Plans: Revision of Process for Submission, Review and Approval of State Plan Changes, 67 Fed. Reg. 60,122, 60,123 (Sept. 25, 2002). OSHA “acknowledge[d] the important principle that State plan requirements need not be identical” to federal ones, and “OSHA has repeatedly acknowledged the latitude of States to develop ‘at least as effective’ requirements.” *Id.* To now mandate that state plans have identical civil penalties conflicts with the OSH Act’s “important statutory feature” and undermines the “important principle” of flexibility.

Then there is the difference in the penalty structures of OSHA and the State Plan. Beyond simply the maximum amounts, there are differences, for example, in determining what fines should be in a particular case and whether initial fines should later be reduced. *Compare* OSHA-Approved S.C. OSHA Field Operations Manual, chapter VI, <https://tinyurl.com/5fs786hb>, with Federal OSHA Field Operations Manual, chapter 6, <https://tinyurl.com/4vd5mae7>.

**B. Section 1902.4(c)(2)(xi) does not require the penalties to match.**

Just as the OSH Act does not require state civil penalties to match federal ones, neither does the regulation. Defendants cursorily assert that the “plain text” of § 1902.4(c)(2)(xi) “validates OSHA’s reading.” ECF No. 19, at 23. It does not. One of Plaintiffs’ primary arguments

was that “such as” in 29 C.F.R. § 1902.4(c)(2)(xi) means that the federal penalty amounts are a nonexclusive example of an effective sanction. *See* ECF No. 8, at 15–16. Defendants have no response to the long list of authority—including from the Supreme Court—that leaves no doubt that “such as” indicates the examples to follow are part of a “nonexclusive” list. *Stewart v. Abend*, 495 U.S. 207, 236–37 (1990).

Rather than a textual argument, Defendants actually make a historical one. They observe that, for most of the time since the OSH Act was enacted and state plans have existed, federal and state civil penalties have matched. *See* ECF No. 19, at 23. So they have. But that does not mean state penalties matched federal ones because state penalties *had* to match federal penalties. *Cf. Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (rejecting a *post hoc ergo propter hoc* argument). There has never been a provision of federal law that mandates state civil penalties match federal ones. That fact is fatal to Defendants’ argument.

Defendants’ remaining arguments rely, however implicitly, on the 2015 Federal Penalties Act. But before getting to what Defendants say on that front, it is critical to note what they do *not* say about the 2015 Federal Penalties Act: Defendants have no response to Plaintiffs’ detailed statutory analysis explaining (1) how the 2015 Federal Penalties Act amended only parts of the 1990 Federal Penalties Act, (2) how the 1990 Federal Penalties Act listed what civil penalties were subject to inflation adjustments, (3) how OMB did not include state civil penalties in the list of penalties covered by the 1990 Federal Penalties Act, and (4) how the 2015 Federal Penalties Act did not amend the list of civil penalties subject to inflation adjustments, all of which means Defendants lacked the authority to use the 2015 Federal Penalties Act as a basis, in the 2022 Adjustment, to push down federal civil penalty increases onto state plans. *See* ECF No. 8, at 12–13. Defendants do not respond to this point, much less rebut it. In other words, they concede it.

Defendants maintain that in 2015, Congress “merely relocated” the source of the fines that each State must match, from the OSH Act to OSHA’s annual adjustments, and therefore OSHA merely “added an additional cite” to § 1902.4(c)(2)(xi) by adding the cross-reference to 29 C.F.R. § 1903.15(d). ECF No. 19, at 24. This addition is seemingly critical to Defendants’ argument here, as it is the only thing in any provision of federal law they cite that includes the federal penalty amounts that OSHA insists the State Plan must adopt. But as explained in the Motion for Preliminary Injunction, this change was not clerical and was not done through notice-and-comment rulemaking. *See* ECF No. 8, at 16–17. If Congress had decided in the 2015 Federal Penalties Act to relocate mandated penalty amounts for state plans, as Defendants contend, why would OSHA not strike the reference to the penalty amounts in the OSH Act when it added the new citation, and why would OSHA not delete “such as”? That OSHA did not do so strongly suggests that OSHA realized the 2015 Federal Penalties Act did not give the agency the authority to revise this regulation outside of the notice-and-comment process for anything other than federal penalties.

Confirming the limited authority Defendants have under the 2015 Federal Penalties Act is Congress’s recent attempt to change the statutory penalties in § 666. In the original Build Back Better Act (which passed the House but not the Senate), Congress sought to increase those penalties from \$70,000 and \$7,000 to \$700,000 and \$70,000. *See* H.R. 5736, 117th Cong., § 21004(a) (as passed by the House on Nov. 18, 2021). If Congress is still debating changing the statutory penalties, that indicates that the statutory penalties are a distinct alternative of an effective penalty, not a regulatory redundancy. And the current statutory penalty amounts are the same amounts as the state civil penalties. *See* S.C. Code Ann. § 41-15-320.

**C. Defendants’ merits arguments on the APA fall flat.**

Defendants spend little time addressing the merits of Plaintiffs’ APA arguments. When

they do, Defendants can muster nothing more than “we didn’t have to do what Plaintiffs said we did because we are just doing what we’ve done in years past.” *See* ECF No. 19, at 26–27. Indeed, Defendants admit that the 2022 Adjustment “merely repeats” what a previous adjustment says. *Id.* at 27. But nothing Defendants said in past years justifies the mandate in the 2022 Adjustment. For example, the 2016 interim final rule never explained why state civil penalties had to match the federal civil penalties or discussed the full federalism implications of the rule. Such explanations are fundamental requirements for administrative law. *See* ECF No. 8, at 19–26. Perhaps Defendants’ predecessors recognized these flaws and decided to keep the paper tiger in its cage.

#### **IV. The other factors weigh in favor of issuing a preliminary injunction.**

Defendants start their analysis of the other factors by claiming Plaintiffs’ delay is a sufficient basis for denying the Motion. *See* ECF No. 19, at 28–29. Defendants are wrong for two reasons. First, the 2022 Adjustment is a new mandate on the State Plan. There is not—indeed, there cannot possibly be—a six-year delay in challenging a final rule that was not issued until January 2022. Second, and even if the Court were to credit Defendants’ contention that the real challenge here is to the 2016 interim final rule, Plaintiffs’ failure to challenge it until now cannot be held against them. Only in the most recent FAME Report did OSHA make the fact that the State Plan has not increased its civil penalties a *finding*. Defendants cannot credibly contend—when for the first time they seek to enforce the penalty increase after their own six-year delay—that they may go back six years to cite the State Plan for not increasing its civil penalties, but that Plaintiffs are unable to challenge a rule that Defendants are only now seeking to enforce.

Defendants next contend Plaintiffs will not suffer irreparable harm because, essentially, the process to revoke final approval is long and involves a hearing. *See id.* at 29–30. For one thing, that process, at least if OSHA has its way, would not give Plaintiffs the chance to raise the

arguments they have raised here. In the Arizona Notice, OSHA declared that it would consider “comments addressing matters other than the proposed revocation to be beyond the scope of the proposal” and even went so far as to include a “non-exhaustive list of matters” that it considered outside the scope of the revocation hearing, including “any comment criticizing the regulatory and statutory requirements imposed on state plans.” 87 Fed. Reg. at 23,788.

Additionally, and even if this process takes a while and leads only initially to concurrent jurisdiction<sup>6</sup> (and surely Defendants would revoke all approval of the State Plan if South Carolina still did not increase its civil penalties), the State Plan is still stuck between the proverbial rock and a hard place, being told “change your penalties or else.” This year, both Utah and Arizona have increased their penalties due to this increased pressure. This coercion constitutes irreparable harm. As another district court recently put it, “An injury to a state’s sovereign interest is necessarily irreparable. And a state’s interest in not being pressured to change its law is sufficiently related to its sovereignty for these purposes. Indeed, irreparable harm exists when a federal regulation prevents a state from enforcing its duly enacted laws.” *Texas v. Becerra*, 577 F. Supp. 3d 527, 557 (N.D. Tex. 2021) (cleaned up) (citing Supreme Court and circuit precedent).

As for the equities, Defendants never refute Plaintiffs’ explanation that Defendants will suffer no harm from a preliminary injunction. Given that Defendants did not try to enforce any civil-penalty mandate on the State Plan for six years, it makes sense that Defendants have not tried to argue this point. *See* ECF No. 8, at 27–28.

Sticking with the subject of burdens, Defendants’ assertion about relative burdens both

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<sup>6</sup> This is not to downplay concurrent jurisdiction. After decades of LLR administering the State Plan without federal interference, having OSHA step in would be a serious disruption and would submit South Carolina employers to OSHA’s administration of work and health standards and penalty amounts.

misunderstands the facts and implicitly gives away Defendants’ standing argument. Defendants note that 2022 Adjustment deals with maximum penalties and that, although a violator does not have to be fined the maximum amount, an extra \$849 or \$607 in fines “hardly tips the balance of equities in the State’s favor.” ECF No. 19, at 31. This argument appears to assume that South Carolina’s civil penalties are at the levels from the 2021 Adjustment. They are not. South Carolina’s civil penalties are what the federal ones were in 2015—before the 2015 Federal Penalties Act led to annual increases to federal penalties. *See* S.C. Code Ann. § 41-15-320. At the same time, Defendants’ argument here recognizes that the 2022 Adjustment purports to require a change to the State Plan’s civil penalties from the previous year’s adjustment. Thus, Defendants’ argument acknowledges Plaintiffs’ injury from the 2022 Adjustment. *See supra* Part II.A.

Instead, Defendants point out the fact that Congress established the public interest in the OSH Act. *See* ECF No. 19, at 30. So Congress did. But that interest is in “safe and healthful working conditions.” OSH Act, § 2, Pub. L. 91-596, 84 Stat. 1590, 1590 (Dec. 29, 1970). That interest is not in specific penalty amounts. Thus, South Carolina is not, as Defendants claim, “arrogating to itself” any “unilateral” authority. ECF No. 19, at 30. All Plaintiffs are doing here is ensuring that Defendants cannot force the State Plan to do something that Congress has not given Defendants the authority to force the State Plan to do. All the while, South Carolina workplaces remain safe,<sup>7</sup> just as Congress intended in the OSH Act.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Plaintiffs’ Motion for Preliminary Injunction.

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<sup>7</sup> Defendants do not dispute Plaintiffs’ data from the Bureau of Labor Statistics showing that South Carolina workplaces are safer than the national average. *See* ECF No. 8, at 21–22.

Respectfully submitted,

s/Wm. Grayson Lambert

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