IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

HENRY MCMASTER, in his official capacity as Governor of South Carolina, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	Case No. 3:22-cv-2603-SAL

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants U.S. Department of Labor; Martin J. Walsh, in his official capacity as the Secretary of Labor; the Occupational Safety and Health Administration ("OSHA"); and Douglas Parker, in his official capacity as Assistant Secretary for Occupational Safety and Health (collectively "Defendants"), hereby file this brief in support of their Motion to Dismiss, ECF No. 9 ("Defs. Mot.") and its supporting memorandum, ECF No. 8 ("Mem.), and in reply to Plaintiffs' opposition memorandum, ECF No. 22 ("Opp'n").[1]

Mindful that replies are "discouraged" in this district, Local Civ. Rule 7.07 (D.S.C.), Defendants will focus on those issues that Plaintiffs raise for the first time in opposition.

[1] That memorandum, though titled a Reply in Support of Motion for Preliminary Injunction, was incorporated by reference as Plaintiffs' opposition to Defendants' Motion to Dismiss. *See* ECF No. 23.

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Case Is Limited To Challenging the 2022 Adjustment. 2

II. The Court Lacks Jurisdiction. 3

A. Plaintiffs Lack Standing, Because the Harms They Fear Are Not Traceable to the Challenged Portion of the 2022 Adjustment or Redressable By Vacating It. 3

B. The Challenged Portion of 2022 Adjustment Is Not Reviewable Under the Administrative Procedure Act. 5

C. The OSH Act Contains a "Fairly Discernible Intent to Preclude District Court Review" Under *Thunder-Basin* 7

III. Plaintiffs' Claims Should Be Dismissed for Failure To State a Claim. 8

CONCLUSION 10

INTRODUCTION

Plaintiffs are right that Defendants' prior memorandum focused on threshold issues. That was for good reason: Plaintiffs lack standing, they have not challenged reviewable action under the Administrative Procedure Act, and their claims are so implausible as to warrant dismissal under Rule 12(b)(6). Defendants did not wade through the "proverbial statutory weeds," Pls. Mot. for Prelim. Inj. ("PI Mot.") 11, of the 2015 Federal Penalties Act with Plaintiffs, because the challenged agency action does not implement that Act. Nor did Defendants dust off the 1971 edition of the Oxford English Dictionary to examine its definition of "effective," Opp'n 9, or debate with Plaintiffs the meaning of a regulatory term ("such as") that has never been challenged in 50 years. But contrary to Plaintiffs' suggestion, *id.* at 11, those arguments have not been conceded; they simply are not before the Court. *See* Mem. 22–23.

That is because Plaintiffs only bring two claims against one agency action: the Department of Labor's *Civil Penalties Inflation Adjustment Act Annual Adjustments for 2022*, 87 Fed. Reg. 2,328 (Jan. 14, 2022) (the "2022 Adjustment"). The only challenged portion of that publication—the "mandate that the States increase their civil penalties," PI Mot. 3—did not announce any new requirement; it merely restated *pre-existing* statutory and regulatory authority obligating such State plans to maintain maximum and minimum civil penalties that are at least as high as federal OSHA's penalty levels. Accordingly, Plaintiffs lack standing because any hypothetical revocation by OSHA of its final approval of Plaintiffs' State plan would not be traceable to the 2022 Adjustment or redressable by vacating it. Moreover, because the 2022 Adjustment merely sets forth pre-existing requirements, it is not "agency action" reviewable under the Administrative Procedure Act. Finally, to the extent that Plaintiffs fear OSHA's ultimate withdrawal of its approval of Plaintiffs' State plan, the Court lacks jurisdiction under the *Thunder-Basin* doctrine to review Plaintiffs' claims in district court.

Plaintiffs' response to Defendants' Rule 12(b)(6) arguments is telling. Instead of

buttressing their *actual* claims, Plaintiffs repeat their arguments about the 2015 Federal Penalties Act and OSHA's regulations, 29 C.F.R. § 1902.4(c)(2)(xi), neither of which Plaintiffs challenge. Until those arguments are properly before the Court, Defendants need not address them.

ARGUMENT

I. THE CASE IS LIMITED TO CHALLENGING THE 2022 ADJUSTMENT.

This much is undisputed: neither of Plaintiffs' claims asks the Court to set aside anything other than the 2022 Adjustment. Count I alleges that the 2022 Adjustment should have gone through notice-and-comment rulemaking. Compl. ¶¶ 46–54. Count II alleges that the 2022 Adjustment was arbitrary and capricious. *Id.* ¶¶ 55–68. Count III is not a claim, but rather a plea for injunctive relief based on Counts I and II. *Id.* ¶ 69–72. But even there, the only referenced agency action is the 2022 Adjustment. *Id.* ¶ 71. How, then, can Plaintiffs claim that their case is broader than the four corners of their complaint? Plaintiffs offer two novel theories in their opposition memorandum.

First, Plaintiffs argue that their claims concerning the 2022 Adjustment "encompass the legal reasoning of" all of the prior adjustments, all the way back to the 2016 interim final rule. Opp'n 3. But the Constitution limits a federal court's jurisdiction to the "case[]" or "controvers[y]" before it. U.S. Const., art. III, § 2. Neither Plaintiffs nor the Court have license to roam the Federal Register, striking down other agency actions that are "encompass[ed within] the legal reasoning of" the case at bar. *Contra* Opp'n 3; *cf. Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (Article III's limitation prevents federal courts from opining on "issues not before the court"). Indeed, as Defendants have shown, it is reversible error to enter an injunction that is broader than the claims before the Court. Mem. 32–33 (citing *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 255–56 (4th Cir. 2020); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009)). Scope of "legal reasoning" aside, there simply is no extant claim against any agency

action but the 2022 Adjustment.

Second, Plaintiffs argue that they "sought both preliminary and permanent injunctive 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." Opp'n 3. But Plaintiffs are referring to the "Relief Requested" in the complaint, not any of their allegations or claims. *See* Compl. 11–12. And there is a critical difference between remedies and claims, as Plaintiffs acknowledge two sentences later: "Plaintiffs know the Court cannot (and should not) enjoin Defendants from ever seeking to revoke the State Plan's final approval for any reason . . . ." Opp'n 3. Plaintiffs' prayer for relief does not expand their underlying claims.

Plaintiffs allude at least twice to Rule 15, *see id.* at 3 n.2, 8, suggesting that they could "remedy this issue easily." But until Plaintiffs *do* amend their complaint to add timely, plausible claims over which the Court has jurisdiction, the Court must limit this case to the claims that have actually been brought.

II. THE COURT LACKS JURISDICTION.

With the case properly understood as limited to the 2022 Adjustment, it is apparent that the Court lacks jurisdiction for two reasons.

A. Plaintiffs Lack Standing, Because the Harms They Fear Are Not Traceable to the Challenged Portion of the 2022 Adjustment or Redressable By Vacating It.

Plaintiffs suggest for the first time in opposition that, because they are right on the merits, they must be right on traceability, too. Opp'n 4–5. That is incorrect. Regardless of whether Section 18(c)(2) of the OSH Act, 29 U.S.C. § 667(c)(2), requires State plans to match OSHA minimum and maximum fine levels, the 2022 Adjustment does not. The 2022 Adjustment merely repeats *verbatim*—in a section of the adjustment addressed to federalism concerns, not anything codified in the Code of Federal Regulations—the agency's longstanding interpretation of the OSH Act and

OSHA's regulations. It is essentially a citation *to* legal authority, not the authority itself. The actual authorities, and thus the sources of any injury alleged by Plaintiffs, are the OSH Act, 29 U.S.C. § 667(c)(2), and OSHA's regulations, 29 C.F.R. 1902.4(c)(2)(xi), as amended in July 2016—*neither of which Plaintiffs challenge*.

Regarding redressability, Plaintiffs argue that avoiding the 2022 Adjustment is at least a "partial remedy" and thus "satisfies the redressability requirement." Opp'n 6 (quoting *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (cleaned up). To see why that is wrong, the Court should look to the distinct elements of the 2022 Adjustment and the scope of Plaintiffs' claims. Like its predecessors, the 2022 Adjustment raises the minimum and maximum fines that the Department of Labor imposes. But Plaintiffs do not challenge that increase. They only challenge the 2022 Adjustment's "mandate that the States increase their civil penalties." PI Mot. 3; *see* 87 Fed. Reg. at 2,331–32. But striking down that "mandate" would have no effect, because the pre-existing regulation, 29 C.F.R. § 1902.4(c)(2)(xi), would remain—as would the OSH Act provision from which it emanates, 29 U.S.C. § 667(c)(2). Thus, every State plan would *still* have to match federal fine levels order to enforce its standards "at least as effective[ly]" as OSHA does, 29 U.S.C. § 667(c)(2), even if the 2022 Adjustment's "mandate" were set aside. And because the 2022 adjustment to *Department of Labor* fines would not be disturbed—because Plaintiffs do not challenge that increase—that would mean matching the minimum and maximum fine levels in the 2022 Adjustment. In short, striking down the "mandate" in the 2022 Adjustment would do nothing.

Plaintiffs suggest that it would be an inequitable result if "no one can challenge the 2022 Adjustment in federal court." Opp'n 8. But "the 'assumption that if [Plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1621 (2020) (quoting *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)). And Plaintiffs conveniently

overlook the many opportunities that they have had to bring this challenge. If the State felt that Congress could not require State plans to enforce their standards at least as effectively as OSHA does, Plaintiffs could have challenged Section 18(c)(2) of the OSH Act when it was passed in 1970. Or if the State felt that "at least as effective[]" did not include imposing minimum and maximum fines equivalent to the federal government's, Plaintiffs could have challenged the term "such as" in OSHA's regulations when they were promulgated in 1971. If South Carolina felt that OSHA was wrong to read the OSH Act, in conjunction with the 2015 Federal Penalties Act, as requiring States to match federal fine levels as reflect in OSHA's annual adjustments, then Plaintiffs could have challenged the July 2016 amendment to 29 C.F.R. § 1902.4(c)(2)(xi). And if that amendment left any confusion—which it could not have, *see* 81 Fed. Reg. at 43,446 ("OSHA's penalty increases under the 2015 Federal Penalties Act will necessitate an increase to the maximum and minimum penalty amounts required by states that administer their own occupational safety and health programs as well.")—Plaintiffs could have brought that challenge after OSHA reiterated its position in the very first FAME report issued to South Carolina after that amendment. *See* Mem. 8 (quoting FY2016 FAME Report 3 ("State Plans are required to adopt both the catch-up increase and the annual increase.")). South Carolina has known for more than six years exactly how OSHA reads the OSH Act in conjunction with the 2015 Civil Penalties Act, and yet has never brought suit.

B. The Challenged Portion of 2022 Adjustment Is Not Reviewable Under the Administrative Procedure Act.

For many of the same reasons that Plaintiffs lack standing to challenge the "mandate" to increase State fines in the 2022 Adjustment, that action is not reviewable under the APA. Opp'n 15–17 (citing, inter alia, *Ind. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004) and *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 428 (4th Cir. 2010)). Plaintiffs distinguish *IEDA* on the grounds on that it involved a "letter," and *Golden & Zimmerman* on the

grounds that it involved a "guidance document." Opp'n 7. Binding Fourth Circuit precedent deserves more careful analysis. To distinguish the 2022 Adjustment because it was a "final rule in the Federal Register," Opp'n 7, misses the point: despite being published in the Federal Register, the challenged "mandate" from the 2022 Adjustment is not an "agency action" reviewable under the APA, because it merely "attempt[ed] to restate or report what already exist[ed] in the relevant body of statutes, regulations, and rulings." *Golden & Zimmerman*, 599 F.3d at 432; *accord IEDA*, 372 F.3d at 428 ("By *restating* EPA's established interpretation of the certificate of conformity regulation, the EPA Letter tread no new ground. It left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy.").

Plaintiffs lean too heavily on the 2022 Adjustment's denomination as a "final rule." The annual adjustments were directed by Congress to be published "notwithstanding [the rulemaking strictures of] section 553 of title 5." Calling the adjustments "final rules" is therefore a slight misnomer; they do not consummate any proposed rulemaking and, as noted by Defendants, involve no exercise of agency discretion. *See* Mem. 9. But regardless of the 2022 Adjustment's *title*, the question is whether the challenged "mandate" had "an immediate and practical effect." *Golden & Zimmerman*, 599 F.3d at 433. It did not, and to assume otherwise merely begs the question.

Plaintiffs argue that the section on Federalism from which the "mandate" comes, *see* 87 Fed. Reg. 2,331–32, wouldn't have been included if that "mandate" weren't a regulation. Opp'n 8. That argument is misguided: Executive Order 13,132 applies to "regulations, legislative comments or proposed legislation, and other policy statements or actions." Exec. Order No. 13,132, § 1(a), 64 Fed. Reg. 43,255 (Aug. 10, 1999). Several of those categories obviously have no "force and effect of law." Opp'n 8 (quoting *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 619–20 (4th Cir. 2018)). Plaintiffs also fail to distinguish between (1) the adjustment of penalties itself, which likely *is* an agency action, but which Plaintiffs do not

challenge here; and (2) the "mandate" that State plans raise their fines to match, which merely restates (for the seventh time) pre-existing legal authority. It is the *former* that triggered Executive Order 13,132 and required a response to federalism concerns. Plaintiffs' contrary argument is circular: they suggest that the response to federalism is the reason why a response to federalism was required in the first place. With that argument untangled and the various portions of the 2022 Adjustment properly understood, it becomes clear that the "mandate" is not agency action.

Plaintiffs mock Defendants' argument as "we didn't have to do what Plaintiffs said we did because we are just doing what we've done in years past," Opp'n 13. But *Golden & Zimmerman* and *IEDA* both hold that "just doing what [an agency has] done in years past," Mem. 13, is *not* reviewable agency action under the APA. Plaintiffs' claims should be dismissed for want of jurisdiction.

C. The OSH Act Contains a "Fairly Discernible Intent to Preclude District Court Review" Under *Thunder-Basin*.

Plaintiffs suggest that the *Thunder-Basin* doctrine does not apply because the statutes that Defendants cited (the Mine Act, Natural Gas Act, and Securities and Exchange Act of 1934) are more comprehensive by comparison to the OSH Act. Opp'n 3–4. They claim that the OSH Act provides no mechanism for "judicial review of OSHA regulations," Opp'n 4, which is a red herring since none of the relevant provisions in the three Acts above provided for review of regulations, either.[2] Indeed, the whole point of *Thunder-Basin* and its progeny is that post-enforcement review

[2] *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) ("The Act establishes a detailed structure for reviewing *violations* of 'any mandatory health or safety standard, rule, order, or regulation promulgated' under the Act. § 814(a).") (emphasis added); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) ("Under the Natural Gas Act, an aggrieved party who seeks review from *the issuance of a Certificate* [of public convenience and necessity] must first file for rehearing before FERC.") (emphasis added); *Bennett v. SEC*, 844 F.3d 174, 177 (4th Cir. 2016) ("In the Exchange Act, Congress has provided that judicial review of *administrative enforcement proceedings* shall be available directly in the appropriate court of appeals.") (emphasis added).

in the Courts of Appeals *precludes* pre-enforcement review (*i.e.*, challenges to regulations) in district court. At bottom, all four Acts provide for judicial review, in the relevant circuit court, of final agency action—which, in this situation, would be the withdrawal by OSHA of its approval of South Carolina's State plan. *See* Opp'n 4, 8 (acknowledging that removal of "all approval" is Plaintiffs' ultimate concern); *compare* 29 U.S.C. § 667(g) (providing for judicial review in circuit court of such withdrawals). The rationale of *Thunder-Basin* applies fully here.

Plaintiffs argue that "[n]o 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." Opp'n 7. But that is exactly what *Thunder-Basin* holds, provided that there is no "practical effect of coercive penalties for noncompliance" that would "foreclose all access to the courts," and that compliance is not "sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." 510 U.S. at 782. For reasons previously explained, South Carolina faces no irreparable injury here. Mem. 27–30. At most, the State would have to challenge OSHA's authority through judicial review in the Fourth Circuit. "The burden of defending oneself in an unlawful administrative proceeding, however, does not amount to irreparable injury." *Bennett*, 844 F.3d at 184–85 (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)).

III. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Not only are Plaintiffs' claims so unlikely to succeed that they do not support a preliminary injunction, but they are so implausible as to warrant dismissal under Rule 12(b)(6).

The structure of Plaintiffs' response to that argument is itself telling. Recall that Plaintiffs bring two challenges to the 2022 Adjustment: (1) that it should have gone through notice-and-comment rulemaking (Count I); and (2) that it was arbitrary and capricious (Count II). Plaintiffs

devote one meager paragraph to supporting those claims. Opp'n 12–13. To get there, the Court must first read four pages about the OSH Act and 29 C.F.R. § 1902.4(c)(2)(xi), neither of which Plaintiffs challenge. *See* Opp'n 8–12.[3]

Were those arguments properly presented, Defendants would gladly refute them. On the question of plain meaning, for example, Defendants would note that for more than 40 years, every State has acted as if they understood "at least as effective," 29 U.S.C. § 667(c)(2), and "such as," 29 C.F.R. § 1902.4(c)(2)(xi), to require State plans to match federal fine levels.[4] Defendants could also spare the Court from addressing Plaintiffs' laundry list of arguments why the 2015 Federal Civil Penalties Act does not increase State penalties, *see* PI Mot. 11–13, Opp'n 11, by clarifying that *no one things otherwise*. Rather, the 2015 Act mandates annual increases to *federal* penalties, while the *OSH Act* mandates concomitant increases to *State* penalties. Defendants might further observe that OSHA has no authority to impose fines other than what the OSH Act prescribes, and thus that Plaintiffs' semantic arguments over the term "such as" rest on a false dichotomy between

[3] At the end of those four pages, the Court will find an odd argument about the recently proposed Build Back Better Act. *See* Opp'n 12 ("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."). Plaintiffs seem to think that, because Congress considered amending Section 17 of the OSH Act, 29 U.S.C. § 666, but not the penalties in OSHA's regulations, 29 C.F.R. 1903.15(d), that Congress views the two as independently "effective" penalty regimes. That argument fails for at least two reasons. First, Congress does not typically amend agency regulations, so it is no wonder that the Build Back Better Act would only have addressed the OSH Act. Second, by amending Section 17 of the OSH Act, the Build Back Better Act necessarily *would* have amended OSHA's regulatory penalties. Under the 1990 Federal Penalties Act, as amended in 1996 and 2015, the OSHA penalties in 29 C.F.R. 1903.15(d) are merely the product of the statutory penalties multiplied by a formulaic, inflation-based adjustment. *See generally* Mem. 9–10. Thus, amending the OSH Act would have, effectively, amended OSHA's regulations, too. And the fact that Congress has fused the two together only *undermines* Plaintiffs' argument that each is a "distinct alternative." Opp'n 12.

[4] This undisputed fact, more than anything else, torpedoes Plaintiffs' belated argument that that the plain text of the OSH Act forecloses OSHA's interpretation. Opp'n 9 (citing *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, [a court's] job is at an end."); *compare* PI Mot. 3 ("Whether OSHA can require the States with state plans to set specific amounts for their civil penalties is an open question.").

those fines "set forth in the [OSH] Act" and those "in 29 C.F.R. 1903.15(d)." Finally, Defendants would point out that OSHA's longstanding, un-challenged interpretation is entitled to deference.

But no such arguments are necessary at this stage. The case should be dismissed for failure to state a claim on which relief can be granted.

CONCLUSION

For the foregoing reasons, and those in Defendants' prior memorandum, the Court should grant Defendants' motion to dismiss.

Dated: October 12, 2022

Respectfully submitted,

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