

**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’ MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION  
FOR PRELIMINARY INJUNCTION  
AND IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

Pursuant to Local Civil Rule 7.06 and the Court’s August 23, 2022, order (ECF No. 11), 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 their consolidated memorandum opposition to the Motion for Preliminary Injunction, ECF No. 8 (“Mot.”), filed by Plaintiffs Henry McMaster, in his official capacity as Governor of South Carolina and the South Carolina Department of Labor, Licensing & Regulation (“LLR”) (collectively “Plaintiffs,” “South Carolina,” or “the State”) and in support of Defendants’ Motion to Dismiss, to be filed contemporaneously with this opposition.

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## INTRODUCTION

Under Section 18 of the Occupational Safety and Health Act of 1970 (“OSH Act”), any State or territory may seek the Secretary of Labor’s approval to operate its own, independent plan for workplace safety and health. 29 U.S.C. § 667.<sup>1</sup> Twenty-one states, including South Carolina, have been approved by the Department of Labor to operate such plans (commonly known as “State plans”) with coverage over private-sector employees. One condition, however, is that a State plan must enforce workplace standards “at least as effective[ly]” as the Occupational Health and Safety Administration (“OSHA”) does. *Id.* § 667(c)(2). As relevant here, that means establishing minimum and maximum civil penalties for violations that are at least as high as OSHA’s.

For decades, OSHA’s minimum and maximum penalties were set by the OSH Act itself, *see id.* § 666. When the penalties in the OSH Act were amended by statute in 1990, all State plans with private sector coverage correspondingly revised their penalties. Thus, for 45 years, in accordance with the OSH Act and OSHA’s regulations, State plans had imposed minimum and maximum civil penalties that were at least as high as those imposed by OSHA.

In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, Title VII, 129 Stat. 584, 599, sec. 701 (Nov. 2, 2015) (“2015 Federal Penalties Act”), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990. The 2015 Federal Penalties Act required agencies, including OSHA, to publish in the Federal Register a one-time “catch-up” adjustment by July 1, 2016, to be effective August 1, 2016. Thereafter, beginning in January 2017, the Act requires each agency to publish annual, inflation-based adjustments for all civil penalties that it enforces, prescribes a specific formula for calculating this annual adjustment, and exempts such adjustments from the

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<sup>1</sup> The Secretary of Labor has delegated his responsibilities under the OSH Act to his Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (“OSHA”). Secretary of Labor’s Order 8-2020, 85 Fed. Reg. 58,393 (Sep. 18, 2020). In this memorandum, the terms “OSHA” and “Secretary” are used interchangeably.

Administrative Procedure Act requirements for agency rulemaking under 5 U.S.C. § 553.

South Carolina challenges the U.S. Department of Labor’s most recent adjustment. *See Civil Penalties Inflation Adjustment Act Annual Adjustments for 2022*, 87 Fed. Reg. 2,328 (Jan. 14, 2022) (the “2022 Adjustment”). Specifically, the State contends that OSHA has overreached by requiring State plans “to increase their penalties in alignment with OSHA’s penalty increases.” *Id.* at 2,332. South Carolina claims that this requirement violates the Administrative Procedure Act, 5 U.S.C. § 553, because it was not promulgated through notice-and-comment rulemaking. The State also argues that the 2022 Adjustment should be set aside as arbitrary and capricious under 5 U.S.C. § 706(2)(A), because it provided no reasoned explanation for requiring State plans to match federal levels, and because it failed to address federalism concerns. South Carolina asks for a preliminary injunction to prevent Defendants from requiring the State to raise its fine levels and to keep Defendants from revoking final approval of South Carolina’s State plan.

The fundamental flaw in the State’s case is that *the 2022 Adjustment* does not require State plans to match federal fine levels. That requirement traces back to the OSH Act itself, which has required since 1970 that State plans enforce workplace standards “at least as effective[ly]” as the federal government does. 29 U.S.C. § 667(c)(2). From 1970 to 2015, OSHA-approved State plans did this in part by matching the penalty levels in the OSH Act, 29 U.S.C. § 666, as amended. For example, when Congress increased the OSH Act penalty levels in 1990, South Carolina amended its laws in 1991 to match. Since 2015, when Congress relocated OSHA’s statutorily-prescribed minimum and maximum penalty amounts from the OSH Act to the agency’s annual adjustments, “at least as effective” enforcement has included matching those adjustments.

To make clear that Congress had chosen to relocate the OSHA penalty levels from the OSH Act to a regulation, OSHA amended its regulations in July 2016 to add a reference to 29 C.F.R. 1903.15(d), the new Code of Federal Regulations section designated to include OSHA’s annual

penalty increases mandated by the 2015 Federal Penalties Act. Specifically, the amended regulation made clear that the Secretary of Labor would evaluate each proposed State plan to see whether it “[p]rovides effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, *and in 29 CFR 1903.15(d)* [where OSHA fine levels are set]” (emphasis on text added in July 2016). The July 2016 publication was clear: “OSHA’s penalty increases under the Inflation Adjustment 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.” *See Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments*, 81 Fed. Reg. 43,430, 43,446 (July 1, 2016) (“2016 Catch-up Adjustment”). OSHA reiterated the requirement in a report issued to South Carolina that fiscal year, and cited below, apprising South Carolina that among the “Major New Issues” was that “State Plans are required to adopt both the catch-up increase and the annual increase.” And the requirement has been reiterated in every annual adjustment since January 18, 2017.

Despite all of this, South Carolina has never challenged Section 18(c)(2) of the OSH Act, 29 U.S.C. § 667(c)(2); never challenged the July 2016 amendment to OSHA’s regulations; and never challenged the 2017, 2018, 2019, 2020, or 2021 annual adjustments. Instead, the State now seeks to enjoin the most recent of seven adjustments as if it sets forth a novel requirement. That motion should be denied for several reasons.

*First*, South Carolina cannot demonstrate a likelihood of success on the merits. Because the 2022 Adjustment does not cause the harms that Plaintiffs allege, they cannot demonstrate two of the essential elements of Article III standing: traceability and redressability. The State’s professed harms (from being required to match federal levels) are not traceable to the 2022 Adjustment, which merely repeats language and cites regulations that have been in place for years. Likewise, enjoining the 2022 Adjustment would not alleviate the requirement that South Carolina

match federal fine levels. Moreover, because the 2022 Adjustment merely restates existing law, regulation, and agency interpretation, it is not “agency action” reviewable under the APA. For these reasons, this lawsuit should be dismissed at the outset for lack of jurisdiction.

Even if the Court had jurisdiction to hear Plaintiffs’ claims, those claims would fail on their merits. Plaintiffs’ procedural claim fails because the 2022 Adjustment’s “mandate” (Mot. 3) to increase State plan penalty levels merely repeats *verbatim* what has been in every annual adjustment since January 2017. Because this “mandate” sets forth no substantive rule, notice and comment were not required.<sup>2</sup> Plaintiffs’ substantive claim fails for similar reasons: it is not arbitrary or capricious merely to repeat a longstanding statutory and regulatory requirement. And the 2022 Adjustment reiterated the same consideration of federalism implications that was stated in every prior adjustment. Because these claims are certain to fail, they should be dismissed at the outset under Rule 12(b)(6).

*Second*, Plaintiffs cannot demonstrate the prospect of irreparable harm. Their six-year delay in bringing this challenge is reason enough to deny their plea for emergency relief. But even if they had not delayed, Plaintiffs could not show irreparable harm absent an injunction. They seek to enjoin any publication by OSHA of a notice in the Federal Register that would propose to reconsider or revoke South Carolina’s final approval as a State Plan. But that notice would only be the first step in an extensive process governed by OSHA regulations, which would include an opportunity for public comment and a hearing if substantial objections are filed. Moreover, if consummated, such revocation would only result in concurrent jurisdiction between the State and OSHA; revocation would not deprive South Carolina of any funding or authority under its State plan. South Carolina accepted the prospect of this process when it chose to administer a State plan under the OSH Act; the possibility that OSHA might commence that process does not constitute

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<sup>2</sup> As noted above, the 2015 Federal Penalties Act exempts the actual adjustments to federal civil penalties from the rulemaking requirements of the APA, 5 U.S.C. § 553.

an irreparable harm to the State's sovereignty or dignity.

*Third*, the equities favor denying Plaintiffs' motion. Congress balanced the relevant public interests decades ago: States may develop and enforce their own standards, but they must do so at least as effectively as the federal government. 29 U.S.C. § 667(c)(2). Equally effective enforcement necessarily includes having authority to impose maximum and minimum penalties that are at least as high as OSHA's penalty levels, and OSHA has consistently included State plans' penalty levels among the criteria it evaluates in determining whether to approve State plans, *see* 29 C.F.R. §§ 1902.4(c)(2)(xi), 1902.37(b)(12), and in fulfilling its duty to "make a continuing evaluation" of State plans under section 18(f) of the OSH Act, 29 U.S.C. § 667(f). The State's bid to upend this balance should be denied.

For these reasons, South Carolina's motion for a preliminary injunction should be denied. And for the first reason stated above, the case should be dismissed.

## **BACKGROUND**

### **I. STATE PLANS UNDER THE OSH ACT.**

The OSH Act's purpose is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To effectuate that purpose, Congress gave the Secretary of Labor, acting through OSHA, authority to promulgate and enforce safety and health standards for the workplace. *See generally* 29 U.S.C. § 655. By default, OSHA covers most private sector employers and their workers in the United States. But Section 18 of the OSH Act also gives States the option "to assume responsibility for development and enforcement therein of occupational safety and health standards" relating to occupational safety and health issues regulated by OSHA. *Id.* § 667(b). Any State wishing to do so must submit a "State plan" for Department of Labor approval. *Id.*

Section 18(c) of the OSH Act imposes several preconditions to the approval of such a State

plan. *See generally id.* § 667(c). Chief among them, for present purposes, the Assistant Secretary for Occupational Safety and Health (“Assistant Secretary”) must find that the State plan:

provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (*and the enforcement of which standards*) are or will be *at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated [by the Secretary of Labor] under [29 U.S.C. §] 655.

*Id.* § 667(c)(2) (emphasis added).

If the Assistant Secretary finds that the State plan satisfies, or will satisfy, the criteria set forth in Section 18(c) of the OSH Act and OSHA’s State plan regulations at 29 C.F.R. §§ 1902.3 and 1902.4, “initial approval” is granted, and a State may commence operations under its plan—although the Assistant Secretary retains discretionary concurrent federal authority for a period of at least three years. 29 U.S.C. § 667(e); *see also* 29 C.F.R. §§ 1902.2(a), 1902.32(a), 1954.1(c). If, after that period, the Assistant Secretary determines that the State plan has satisfied and continues to meet all criteria in section 18(c) of the OSH Act, the Assistant Secretary may make an affirmative determination under Section 18(e) of the OSH Act—referred to as “final approval” of the State plan—resulting in OSHA’s relinquishing concurrent federal authority in the State for issues covered by the plan. 29 U.S.C. § 667(e).

After a State plan receives final approval, Section 18(f) of the OSH Act requires OSHA to “make a continuing evaluation” of the State plan, to ensure that it continues to meet all of its obligations, including the requirement to have and enforce standards in a manner at least as effective as OSHA. 29 U.S.C. §§ 667(f), 667(c)(2). Should OSHA later determine that a State plan does not continue to meet its obligations, the Assistant Secretary may initiate proceedings to reconsider and revoke final approval of the State plan and reinstate concurrent authority over occupational safety and health issues covered by the State plan, *see* 29 C.F.R. §§ 1902.32, 1902.44(b), 1902.49–53. If completed, “reconsideration and revocation” results in the

reinstatement of concurrent State/federal jurisdiction within the State “for a reasonable time” until OSHA determines whether to restore final approval status or withdraw the State plan’s approval, in total or in part, under Section 18(f) of the OSH Act. 29 C.F.R. § 1902.52(b).

As noted, the criteria applied by the Assistant Secretary in evaluating whether prospective State plans meet the requirements of section 18(c) of the OSH Act are codified in Department regulations. *See generally* 29 C.F.R. Part 1902, Subpart B (Criteria for State Plans). Before July 2016, one of those criteria was that the State plan “[p]rovide[] effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act.” 29 C.F.R. § 1902.4(c)(2)(xi) (2015). But in 2016, the Department of Labor amended those regulations to add a reference to 29 C.F.R. § 1903.15(d) to the provision. *See* 2016 Catch-up Adjustment, 81 Fed. Reg. at 43,439 (“This IFR amends § 1902.4(c)(2)(xi) to clarify that State Plans must provide sanctions as effective as those set forth in the OSH Act and in § 1903.15(d), against private-sector employers who violate State standards and orders.”); *See also* 29 C.F.R. § 1902.4(c)(2)(xi). The referenced section, 29 C.F.R. § 1903.15(d), lists the sanctions, and the maximum and minimum penalties for such sanctions that OSHA has authority to impose.

OSHA amended the Code of Federal Regulations to add 29 C.F.R. § 1903.15(d) as required by the 2015 Federal Penalties Act, discussed below. That law relocated the OSHA fines that State plans must meet or exceed in order to be as effective as OSHA. Before Congress promulgated the 2015 Federal Penalties Act, OSHA’s penalties were found in the OSH Act, 29 U.S.C. § 666. Whereas Congress amended the OSH Act penalties by statute in 1990, *see* Pub. L. 101-508, 104 Stat. 1388, as a result of the 2015 Federal Penalties Act, Congress required OSHA to make yearly regulatory adjustments to penalty levels using statutorily-prescribed calculations based on inflation rates. Thus, after 2016, instead of looking to the OSH Act and its amendments for the relevant penalty levels, State plans must track OSHA’s annual adjustments in order to comply with 29

C.F.R. 1902.4(c)(2)(xi), and Section 18(c) of the OSH Act. *See id.* at 43,446 (“OSHA’s penalty increases under the Inflation Adjustment 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.”); *see also* 29 C.F.R. § 1902.4(c)(2)(xi) (the Secretary of Labor evaluates each proposed State plan to see whether it “[p]rovides effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, *and in 29 CFR 1903.15(d).*”) (emphasis added).

South Carolina has been aware of the annual penalty increases, and OSHA’s expectations that State plans must keep pace of these increases, since OSHA published the Interim Final Rule cited above, in direct response to the 2015 Federal Penalties Act. Apart from the Federal Register publication cited above, OSHA included in the next Federal Annual Monitoring and Evaluation (“FAME”) Report to the State, under “Major New Issues,” the following:

With the passage of the Bipartisan Budget Bill on November 2, 2015, OSHA raised its maximum penalties effective August of 2016 and again increased penalties according to the consumer price index (CPI) in January of 2017. As required by law, OSHA will continue to raise maximum penalties each year according to the CPI. *State Plans are required to adopt both the catch-up increase and the annual increase.*

FY2016 FAME Report 3 (emphasis added).<sup>3</sup>

Prior to the 2016 amendment to 29 C.F.R. 1902.4(c)(2)(xi), South Carolina did not contest, as a matter of law, that “at least as effective” in the OSH Act, 29 U.S.C. § 667(c)(2), meant that the State had to match federal fine levels. For example, Congress amended the OSH Act’s penalties through the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101, 104 Stat. 1388, 1388-29, and the following year, South Carolina amended its fine levels to match. *See* 1991 S.C. Acts 25 (increasing State penalty amounts to match the OSH Act, as amended). The 1990

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<sup>3</sup> Available at [https://www.osha.gov/sites/default/files/2019-07/south\\_carolina\\_2016.pdf](https://www.osha.gov/sites/default/files/2019-07/south_carolina_2016.pdf).

Reconciliation Act had not itself dictated any such change.

## II. INFLATIONARY ADJUSTMENTS TO FEDERAL CIVIL PENALTIES.

Congress recognized in 1990 that many civil penalties imposed by the federal government were long overdue for inflation-based adjustments. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, codified at 28 U.S.C. § 2461 note. Congress found that inflation had diminished the impact of civil monetary penalties, and by extension weakened their deterrent effect. *Id.* § 2(a), 104 Stat. at 890. Congress ordered Executive agencies to begin studying the issue and reporting on which civil penalties should be increased. *Id.* §§ 4, 5, 104 Stat. at 891–92. In 1996, Congress amended the 1990 Act to convert the reporting requirement into a quadrennial process for adjusting civil penalties through agency regulation. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, title III, § 31001(s)(1), 110 Stat. 1321, 1321-373. However, the OSH Act was excepted from these regulatory adjustments. *Id.*

Most recently, Congress passed the 2015 Federal Penalties Act. That law requires agencies, including OSHA, to make annual adjustments for federal civil penalties, beginning with a one-time “catch-up” adjustment to be promulgated “through an interim final rulemaking” no later than July 1, 2016, with an effective date no later than August 1, 2016, *id.* §§ 701(b)(1)(A), 701(b)(1)(D), 129 Stat. at 599. The law prescribes a non-discretionary formula for making annual adjustments thereafter, to be published no later than January 15 of each year, and which are exempt from the APA’s notice-and-comment requirements. *Id.*

The Department of Labor published its “catch-up” adjustment on July 1, 2016. *See* 2016 Catch-up Adjustment, 81 Fed. Reg. 43,430. Pursuant to the 2015 Federal Penalties Act, the Department has continued publishing inflation-based adjustments each January since then. *See* 2022 Adjustment, 87 Fed. Reg. 2,328; *Department of Labor Federal Civil Penalties Inflation*

*Adjustment Act Annual Adjustments for 2021*, 86 Fed. Reg. 2,964 (Jan. 14, 2021) (“2021 Adjustment”); *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020*, 85 Fed. Reg. 2,292 (Jan. 15, 2020) (“2020 Adjustment”); *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019*, 84 Fed. Reg. 213 (Jan. 23, 2019) (“2019 Adjustment”); *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7 (Jan. 2, 2018) (“2018 Adjustment”); *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017*, 82 Fed. Reg. 5,373 (Jan. 18, 2017) (“2017 Adjustment”).

For the Court’s reference, this chart lists the payment adjustments year over year:

Date	Source	Type of Violation						
		Willful		Repeated	Serious	Non-Serious	Failure to Correct	Posting
		Min	Max					
1990.11.05	OSH Act of 1970, as amended by Pub. L. No. 101-508, § 3101, 104 Stat. 1388 (Nov. 5, 1990), codified at 29 U.S.C. § 666.	\$5,000	\$70,000	\$70,000	\$7,000	\$7,000	\$7,000	\$7,000
2016.07.01	81 FR 43430	\$8,908	\$124,709	\$124,709	\$12,471	\$12,471	\$12,471	\$12,471
2017.01.18	82 FR 5373	\$9,054	\$126,749	\$126,749	\$12,675	\$12,675	\$12,675	\$12,675
2018.01.02	83 FR 7	\$9,239	\$129,336	\$129,336	\$12,934	\$12,934	\$12,934	\$12,934
2019.01.23	84 FR 213	\$9,472	\$132,598	\$132,598	\$13,260	\$13,260	\$13,260	\$13,260
2020.01.15	85 FR 2292	\$9,639	\$134,937	\$134,937	\$13,494	\$13,494	\$13,494	\$13,494
2021.01.14	86 FR 2964	\$9,753	\$136,532	\$136,532	\$13,653	\$13,653	\$13,653	\$13,653
2022.01.14	87 FR 2328	\$10,360	\$145,027	\$145,027	\$14,502	\$14,502	\$14,502	\$14,502

### III. PLAINTIFFS’ CLAIMS AND ARGUMENTS.

Plaintiffs bring two claims under the Administrative Procedure Act (“APA”). First, Plaintiffs argue that the 2022 Adjustment should have gone through notice-and-comment rulemaking and, therefore, was “without observance of procedure required by law.” Compl. ¶¶ 46–54, ECF No. 1 (Count I) (quoting 5 U.S.C. § 706(2)(D)). Second, Plaintiffs claim that the 2022

Adjustment was arbitrary and capricious because it did not provide an adequate explanation or sufficiently address federalism implications. *Id.* ¶¶ 55–68 (Count II) (citing 5 U.S.C. § 706(2)(A)). Plaintiffs seek preliminary and permanent injunctive relief. *Id.* ¶¶ 69–72. In their preliminary injunction motion, Plaintiffs seek to enjoin Defendants (1) from “[r]equiring the State Plan to impose or enforce civil penalties identical to the federal penalties” as set forth in the 2022 Adjustment; (2) from “[r]equiring the State Plan to impose or enforce civil penalties identical to the federal penalties provided in any prior or future annual inflation adjustments”; and (3) from “[p]ublishing in the Federal Register any proposal to reconsider or revoke OSHA’s final approval of South Carolina’s State Plan or otherwise taking any adverse action against the State Plan during the pendency of this action.” Mot. 1–2.

It is just as important to appreciate what Plaintiffs do *not* challenge in this case. Plaintiffs do not challenge the provision of the OSH Act that requires State plans to enforce standards at least as effectively as OSHA does, 29 U.S.C. § 667(c)(2). Nor do Plaintiffs challenge OSHA’s regulation regarding State plans’ obligation to adopt penalties that are at least as effective as those OSHA is authorized to impose, 29 C.F.R. § 1902.4(c)(2)(xi), or the July 2016 amendment to that regulation, 81 Fed. Reg. 43,430, which reflected Congress’s relocation of the relevant minimum and maximum fines from the OSH Act to OSHA’s annual adjustments. Nor do Plaintiffs challenge the 2017, 2018, 2019, 2020, or 2021 annual adjustments by OSHA.

### LEGAL STANDARDS

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Both preliminary injunctions and temporary restraining orders “involv[e] the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.” *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (citation omitted). Plaintiffs must “*by a clear showing*” establish that (1) they have a

substantial likelihood of success on the merits; (2) they will suffer irreparable harm without an injunction; (3) the balance of equities tips in their favor; and (4) preliminary relief serves the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). Plaintiffs must establish each of the four factors in order to qualify for injunctive relief. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (acknowledging that the Fourth Circuit recalibrated its preliminary injunction balancing test in light of the Supreme Court’s decision in *Winter*).

This memorandum also supports Defendants’ contemporary motion to dismiss under Rules 12(b)(1) (for lack of jurisdiction) and 12(b)(6) (for failure to state a claim on which relief can be granted). In a “facial” challenge to jurisdiction such as this, Defendants “must show that [the] complaint fails to allege facts upon which subject-matter jurisdiction can be predicated.” *Hutton v. Nat’l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 621 n.7 (4th Cir. 2018) (citing *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017)). Defendants may do so by showing that the Plaintiffs’ Complaint, on its face, fails to make allegations sufficient to satisfy the Plaintiffs’ burden of establishing jurisdiction. *Id.* at 621 (citing *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). To survive Defendants’ motion under Rule 12(b)(6), the Complaint “must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” *Strickland v. United States*, 32 F.4th 311, 347 (4th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). That is, the complaint “must contain enough facts ‘to raise a right to relief above the speculative level.’” *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 361 (4th Cir. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[A]lthough a court must accept as true all factual allegations contained in a complaint, such deference is not accorded legal conclusions stated therein,” and “[t]he mere recital of elements of a cause of action, supported only by conclusory statements is not sufficient.” *Id.* (quoting *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012)).

## ARGUMENT

### I. THIS COURT LACKS JURISDICTION, AND PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

#### A. Plaintiffs Lack Standing.

The well-known, “irreducible constitutional minimum” for a plaintiff to establish standing includes: “(1) an injury in fact; (2) a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the defendant's actions; and (3) a likelihood that the injury will be redressed by a favorable decision.” *Ali v. Hogan*, 26 F.4th 587, 596 (4th Cir. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). “The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.” *Spokeo, Inc.*, 578 U.S. at 338 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

Plaintiffs allege that they will be harmed in two ways.<sup>4</sup> First, they claim an infringement on South Carolina’s sovereignty. *See* Compl. ¶ 71; Mot. 27. Plaintiffs cite the Chief Justice’s stay opinion in *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) for the proposition that the 2022 Adjustment poses a “harm to the State’s sovereignty and dignity.” Mot. 27. But Plaintiffs candidly admit that this is *not* a case seeking a judicial injunction to change State law. *Id.* The *Maryland v. King* stay opinion is therefore inapposite. In any case, the 2022 Adjustment is not a “a federal directive to change the State’s law.” Mot. 27. The 2022 Adjustment merely repeats language that has been in every inflation-based adjustment since July 2016, when OSHA’s

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<sup>4</sup> Plaintiffs also make a passing reference to the harms purportedly facing private employers in South Carolina: “[B]usinesses will, if violations are found, be subject to increased penalties that the State would not have adopted but for the 2022 Adjustment.” Compl. ¶ 71. But those businesses are not before the Court, and the State is not claiming to assert standing on their behalf. It also bears noting that the fines at issue are applied to private, not State, employers. 2022 Adjustment, 87 Fed. Reg. at 2,332 (“State Plans are not required to impose monetary penalties on state and local government employers.”) (citing 29 C.F.R. § 1956.11(c)(2)(x)). Thus, the State stands to suffer no economic harm by virtue of the 2022 Adjustment. But even if South Carolina could claim standing from the adjusted fine levels, the State does not challenge the adjustment itself. *See generally* Compl.

regulations were amended to clarify that, consistent with the 2015 Federal Penalties Act and the OSH Act, State plans must match OSHA’s minimum and maximum fines as adjusted annually. The language has been identical in every annual adjustment.<sup>5</sup>

Thus, any compulsion to “change state law,” Compl. ¶ 71, is merely the result of South Carolina’s opting to administer a State plan under the OSH Act, 29 U.S.C. § 667. The underlying statute—not OSHA—requires South Carolina to develop and enforce safety and health standards “at least as effective[ly]” as OSHA does. *Id.* § 667(c)(2). For 45 years, that meant matching the levels in the OSH Act itself, 29 U.S.C. § 666. But since Congress decided in 2015 to stop amending the OSH Act directly, and instead to charge OSHA with adjusting for inflation, that has meant meeting or exceeding the minimum and maximum penalty levels established in OSHA’s regulations. *See* 2016 Catch-up Adjustment, 81 Fed. Reg. at 43,439, 43,446 (amending 29 C.F.R. § 1902.4(c)(2)(xi)).<sup>6</sup> Even assuming that the requirement to match federal levels is a cognizable Article III injury, it is not traceable to the 2022 Adjustment.

Plaintiffs’ second theory of harm rests on “potential implications for the State Plan.” Mot. 26. But that implication—the potential revocation of OSHA’s final approval of the State plan, for failure to adhere to 29 U.S.C. § 667(c)(2)—likewise flows from the operation of the OSH Act, not the 2022 Adjustment. This asserted harm is not traceable to the challenged agency action, either.

For similar reasons, Plaintiffs cannot demonstrate the essential element of redressability. Setting aside the 2022 Adjustment as either “without observance of procedure required by law” (Count I) or “arbitrary and capricious” (Count II) would have little effect here. Compl. ¶¶ 47, 56 (citations omitted). Plaintiffs would still have to match OSHA’s minimum and maximum fine

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<sup>5</sup> *Compare* 2022 Adjustment, 87 Fed. Reg. at 2331–32 *with* 2021 Adjustment, 86 Fed. Reg. at 2,966–67; 2020 Adjustment, 85 Fed. Reg. at 2,295; 2019 Adjustment, 84 Fed. Reg. at 215; 2018 Adjustment, 83 Fed. Reg. at 9, *and* 2017 Adjustment, 82 Fed. Reg. at 5,378–79.

<sup>6</sup> Again, Plaintiffs do not challenge these regulations.

levels. *See* 29 U.S.C. § 667(c)(2); 29 C.F.R. § 1902.4(c)(2)(xi). The most that Plaintiffs could achieve, if the 2022 Adjustment were invalidated, would be a reversion to the fine levels in the 2021 Adjustment. But because the State’s current minimum and maximum fines are well below those levels, *compare* Compl. ¶ 35, *with* 2021 Adjustment, 86 Fed. Reg. 2,964, striking down the 2022 Adjustment would not redress the State’s asserted harms in this case.

Because South Carolina does not assert harms that are traceable to the 2022 Adjustment, or redressable by setting aside the 2022 Adjustment, the State lacks standing and the Court lacks jurisdiction. For that reason alone, the motion should be denied. And for the same reason, this lawsuit should be dismissed for lack of jurisdiction.

**B. Plaintiffs Lack a Cause of Action Under the APA.**

Plaintiffs challenge the 2022 Adjustment, but not the adjustment to federal civil penalties itself. What Plaintiffs challenge is the “mandate” (Mot. 3) to increase State fines. *See* 2022 Adjustment, 87 Fed. Reg. at 2,332. But in that respect, the 2022 Adjustment is not “agency action” subject to APA review. *See* 5 U.S.C. § 704; *id.* § 551(13) (defining “agency action”).

The mere restatement of an agency’s regulation or interpretation is not reviewable agency action. *See Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004). In *IEDA*, the EPA had responded by letter to an industry group’s request for the agency’s interpretation of a regulation. *Id.* at 421. When the group sued over the letter, claiming that EPA had injected a new “intent” element into the applicable regulation, the D.C. Circuit held that the letter was not reviewable agency action. *Id.* at 425, 426–28. That was because the letter’s interpretation was “hardly new”; the agency “had publicly announced its interpretation” of the applicable regulations years before. *Id.* at 425. Thus, the letter “d[id] not reflect any change in [the relevant] regulations or [the agency’s] interpretation of those regulations.” *Id.* at 426. Instead, it “merely restated in an abstract setting—for the umpteenth time—EPA’s longstanding interpretation of the [relevant]

regulations.” *Id.* at 427.

The parallels here are apparent. The “mandate” in the 2022 Adjustment is “hardly new.” Instead, it merely restates—and “for the umpteenth time,” no less—OSHA’s interpretation of Section 18(c)(2) of the OSH Act, 29 U.S.C. § 667(c)(2), and the agency’s implementing regulations, 29 C.F.R. § 1902.4(c)(2)(xi). *See supra* n.5 (compiling citations to identical language in the 2021, 2020, 2019, 2018, and 2017 adjustments). It is not, therefore, reviewable agency action. *IEDA*, 372 F.3d at 428. While *IEDA* was brought under the judicial-review provisions of the Clean Air Act, the term “final action” in that Act “is synonymous with the term ‘final agency action’ as used in Section 704 of the APA.” *Id.* Thus, the court made clear that EPA’s letter would not have been reviewable under the APA, either: “By *restating* EPA’s established interpretation of the [relevant] 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.” *Id.* The 2022 Adjustment similarly restates OSHA’s established interpretation; it leaves the world just as it found it.

The *IEDA* opinion is no outlier; it built upon prior cases in which the court lacked jurisdiction to review alleged agency “action.” *See, e.g., AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (no reviewable action where “an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party”); *Indus. Safety Equip. Ass’n v. EPA*, 837 F.2d 1115, 1120-21 (D.C. Cir. 1988) (agency statements that did not “change any law or official policy presently in effect” were not reviewable under the APA).

Citing *IEDA*, the Fourth Circuit held that a Bureau of Alcohol, Tobacco, and Firearms (“ATF”) reference guide was not “agency action” reviewable under the APA. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010). The question-and-answer section of the reference guide, which plaintiffs had challenged, “d[id] not impose new legal

requirements, having been reiterated over 13 times during the course of over 40 years.” *Id.* Rather, ATF’s answers “attempt[ed] to restate or report what already exist[ed] in the relevant body of statutes, regulations, and rulings.” *Id.* Finding the reasoning of *IEDA* “persuasive,” the Court of Appeals held that ATF’s restatement was not reviewable agency action.

Because the “mandate” in the 2022 Adjustment merely restates the agency’s longstanding interpretation of the OSH Act and its implementing regulation, that portion of the 2022 Adjustment is not “agency action” reviewable under the APA. Accordingly, the Court lacks jurisdiction to hear APA claims challenging that “mandate.” *See IEDA*, 372 F.3d at 428; *Golden & Zimmerman*, 599 F.3d at 433.

**C. To the Extent that Plaintiffs Seek an Injunction Barring Revocation of OSHA’s Final Approval of Their State Plan, that Claim Is Barred at the Threshold for Separate Reasons.**

The third element of Plaintiffs’ proposed injunction, Mot. 1–2, would enjoin Defendants from “[p]ublishing in the Federal Register any proposal to reconsider or revoke OSHA’s final approval of South Carolina’s State Plan,” *id.* at 2. That request differs in kind from the first two, insofar as it seeks to *preempt* agency action not yet taken. As such, the request fails for independent, threshold reasons.

**1. The Court lacks jurisdiction, and Plaintiffs lack a cause of action, under the APA.**

Plaintiffs may only challenge “final agency action” under the APA. *See* 5 U.S.C. § 704. To be “final,” an agency action must both “mark the consummation of the agency’s decisionmaking process” and “be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Nat’l Veterans Legal Servs. Program v. U.S. Dep’t of Def.*, 990 F.3d 834, 840 (4th Cir. 2021) (quoting *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016)). Plaintiffs admit that the process for revoking South Carolina’s plan has not even begun, let alone resulted in OSHA revoking its final approval of South Carolina’s State plan (which does

not deprive the state of any funding or authority). Because there is no final agency action, the Court lacks jurisdiction. *See NVLSP*, 990 F.3d at 839 (whether a plaintiff challenges “final agency action” is a “jurisdictional question”).

Moreover, the APA only affords judicial review of “final agency action *for which there is no other adequate remedy in a court.*” 5 U.S.C. § 704 (emphasis added). The APA thus “provides a limited cause of action,” *Genesis Healthcare, Inc. v. Becerra*, 39 F.4th 253, 262 (4th Cir. 2022) (quoting *Lee v. USCIS*, 592 F.3d 612, 619 (4th Cir. 2010) (cleaned up)), which “is available only when Congress has not otherwise provided ‘special and adequate review procedure[s]’ for an agency action.” *Nielsen v. Hagel*, 666 F. App’x 225, 231 (4th Cir. 2016) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Two examples of such procedures, cited by the Supreme Court in *Bowen*, were orders from the Federal Trade Commission and National Labor Relations Board, which are directly reviewable in regional courts of appeals. *Bowen*, 487 U.S. at 903.

Here, South Carolina has asked the Court to stop OSHA from revoking its final approval of South Carolina’s State plan. But *revocation* by itself would not deprive the state of any funding or authority; it would simply establish concurrent federal authority. And even if OSHA ultimately sought to *withdraw* approval of South Carolina’s State plan, the withdrawal of approval by OSHA of any State plan—like the FTC and NLRB orders discussed in *Bowen*—is directly reviewable in the regional courts of appeals and, ultimately, in the Supreme Court. *See* 29 U.S.C. § 667(g). Because these qualify as “special and adequate review procedures” under *Bowen*, Plaintiffs would have no cause of action under the APA to challenge any revocation or withdrawal here—even *if* they were proposed. Accordingly, they cannot enjoin such revocation through this action.

**2. Under *Thunder-Basin*, Plaintiffs could not bring a pre-enforcement challenge to revocation of final approval.**

The Supreme Court has similarly held that a statutory scheme providing for post-

enforcement review by agencies and in the regional courts of appeal can preempt *pre*-enforcement challenges in district court. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Under the Federal Mine Safety and Health Amendments Act of 1977, any civil penalties or other sanctions were reviewable by the Mine Safety and Health Review Commission and ultimately by the appropriate U.S. Court of Appeals. *Id.* at 204. Rather than await those sanctions and pursue that process, the plaintiffs in *Thunder-Basin* had filed a pre-enforcement challenge in district court, seeking injunctive relief. *Id.* at 205. The Mine Act’s “comprehensive enforcement structure,” however, precluded jurisdiction in the district court. *Id.* at 216.

Citing *Thunder-Basin*, the Fourth Circuit has found that other statutes similarly reflected Congress’s intent to preclude district-court jurisdiction. *See Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018) (Natural Gas Act); *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016) (Securities Exchange Act of 1934). In both cases, the relevant statute provided for initial administrative review, followed by judicial review in the courts of appeals.

This case is analogous in all relevant respects. Just as under the Mine Act, Natural Gas Act, and Securities Exchange Act, initial review of any State plan’s proposed revocation is heard administratively. *See generally* 29 C.F.R. §§ 1902.49–.53. Should that process culminate in revocation, and then, ultimately, in the Assistant Secretary’s determination to withdraw approval of the State plan or a portion thereof, such withdrawal is reviewable in the Courts of Appeals. *See* 29 U.S.C. § 667(g). This “establishes a ‘fairly discernible’ intent to preclude district court review in the present case.” *Thunder Basin*, 510 U.S. at 216.

**3. Plaintiffs lack standing because their feared revocation is too speculative to support injunctive relief.**

Even if Plaintiffs could bring a claim to preempt revocation of their State plan, their feared harms are too speculative to support injunctive relief. A plaintiff seeking such relief must demonstrate a “sufficiently imminent and substantial” risk of harm. *TransUnion LLC v. Ramirez*,

141 S. Ct. 2190, 2210 (2021) (citing *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Any such harm must be “*certainly impending*,” and not merely “*possible*.” *Clapper*, 568 U.S. at 409 (citations omitted) (collecting cases).

South Carolina fears that final approval of its State plan will be revoked for failure to match federal fine levels. But as the State admits, that requirement has been in every annual adjustment since 2017, Compl. ¶ 39, and South Carolina never increased its fines to match federal levels, *id.* ¶ 35. Yet despite this persistent failure to comply, OSHA has never proposed to revoke South Carolina’s State plan, and the State had never before sought an injunction to prevent such revocation.

What seems to have prompted this litigation is Defendants’ proposed revocation, issued on April 21, 2022, of Arizona’s State plan. *See* Mot. Ex. 1, Declaration of Emily Farr ¶ 16, ECF No. 8-1 (“Farr Decl.”); OSHA, *Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation*, 87 Fed. Reg. 23,783 (Apr. 21, 2022) (the “Ariz. Proposal”). But that does not take South Carolina’s fears from speculation to certainty. First, the Arizona notice is a proposal, not a final determination. Indeed, OSHA has since postponed the hearing date and reopened the comment period. *See* OSHA, *Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation; Reopening of Comment Period; Postponement of Public Hearing*, 87 Fed. Reg. 50,025 (Aug. 15, 2022) (the “Ariz. Reopening”). Second, the action regarding Arizona was based on a “history of shortcomings,” dating to 2012, only one of which is that “Arizona has not yet fulfilled its State Plan obligation to adopt penalty levels that are at least as effective as Federal OSHA’s.” Ariz. Proposal, 87 Fed. Reg. at 23,786. So the Arizona proposal cannot reasonably be read as threatening any State’s plan merely because it has not increased its minimum and maximum fines—which is what South Carolina ostensibly fears.

Plaintiffs also cite the most recent Federal Annual Monitoring and Evaluation (“FAME”)

report, issued by OSHA. Mot. 9, 26–27; Farr Decl. ¶ 16. The State suggests that OSHA announced in the FY2021 FAME Report, for the first time, “that failure to increase [South Carolina’s] maximum penalties makes the State Plan less effective than the federal standards,” and that the FY2021 FAME Report thus “opens the door for OSHA to revoke the State Plan.” Mot. 26. That is incorrect. OSHA stated in the *FY2016* FAME Report that South Carolina had to increase its fine levels to match OSHA’s. *See* FY2016 FAME Report 3. OSHA has also stated consistently, for more than six years, that States must increase their penalty amounts to match OSHA’s. *See supra* n.5 (compiling citations to each year’s annual adjustment). Plaintiffs cannot, therefore, ground any plea for injunctive relief in the FY2021 FAME Report. That report is but the latest in a long, consistent line of pronouncements by OSHA; any fear that OSHA will *now* revoke the State’s plan is mere speculation.

Plaintiffs emphasize that the FY2021 FAME Report listed, for the first time, a *finding* that the “State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.” Mot. 9. But while FAME Report findings do indicate “issues that warrant corrective action by the State Plan,” *id.*, those findings are neither the source of OSHA’s authority to revoke final approval of a State plan nor prerequisites to doing so. Whether termed a “finding” or not, OSHA has told South Carolina every year since 2016 that the State must raise its fine levels to satisfy Section 18(c)(2) of the OSH Act.

**D. Plaintiffs’ Two Claims Would Fail on Their Merits.**

Even if Plaintiffs’ claims were not barred at the threshold, they would fail on their merits. The 2022 Adjustment was neither procedurally defective (Count I) nor arbitrary and capricious (Count II).

**1. The 2022 Adjustment was not “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D) (Count I).**

The APA, 5 U.S.C. § 553, requires notice and comment for any “substantive rule.” That is,

a rule is subject to § 553’s requirements if it “effects a substantive change in existing law or policy,” *Children’s Hosp. of the King’s Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018) (citation omitted), or where it affects “individual rights and obligations.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). These substantive rules, also called “legislative” rules, are those “issued by agencies pursuant to statutory authority and which implement the statute.” *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995).

**a) The 2022 Adjustment was not required to go through notice-and-comment rulemaking.**

The 2022 Adjustment is not a “substantive rule.”<sup>7</sup> It effects no change in existing law or policy, and does not alter anyone’s rights or obligations. It merely announces an inflation-based adjustment and reiterates, with respect to State plans under the OSH Act, the same interpretation that had been announced in July 2016 and reiterated five times since then. Nor does the latest adjustment affect any individual right or obligation; again, the sources of that obligation are the OSH Act itself, 29 U.S.C. § 667(c)(2), and OSHA’s regulations, 29 C.F.R. § 1902.4(c)(2)(xi)—neither of which Plaintiffs challenge in this case.

Plaintiffs’ primary argument, Mot. 11–14, is that the 2015 Federal Penalties Act does not authorize the Department of Labor to increase State civil penalties. For the reasons above, that argument is a red herring. Whether the 2015 Federal Penalties Act endowed such power is beside the point, because the 2022 Adjustment did not exercise that power. The 2022 Adjustment merely repeats what was first announced in the July 2016 Catch-up Adjustment (which amended 29 C.F.R. § 1902.4(c)(2)(xi) to add a citation to OSHA’s regulations) and repeated in every annual adjustment since. Plaintiffs do not challenge the July 2016 Catch-up Adjustment or OSHA’s

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<sup>7</sup> The adjustment itself, which Plaintiffs do not challenge, is exempt from notice-and-comment rulemaking. *See* 2015 Federal Penalties Act, § 701, 129 Stat. at 599 (“the head of an agency shall adjust civil monetary penalties and shall make the adjustment *notwithstanding section 553 of title 5, United States Code.*”) (emphasis added).

regulations, 29 C.F.R. § 1902.4(c)(2)(xi). Nor do Plaintiffs challenge the statute from which these promulgations ultimately flow: 29 U.S.C. § 667(c)(2). Plaintiffs’ treading into the “proverbial statutory weeds” (Mot. 11) of the 2015 Federal Penalties Act does not aid their claims or support their motion for preliminary injunction.

**b) Plaintiffs do not challenge 29 C.F.R. § 1902.4(c)(2)(xi), but even if they did, that challenge would fail.**

Plaintiffs advance a secondary argument: that 29 C.F.R. § 1902.4(c)(2)(xi) does not, in fact, require the State to increase its fine levels. *See* Mot. 15–18. First, Plaintiffs argue that the plain text “does not support OSHA’s mandate.” *Id.* at 15–16. Alternatively, Plaintiffs argue that the July 2016 amendment to Section 1902.4(c)(2)(xi) was “invalid” because OSHA “did not have the authority under the 2015 Federal Penalties Act to amend § 1902.4(c)(2)(xi) to add the cross-reference to § 1903.15(d).” *Id.* at 16. Neither argument can succeed because, as explained above, Plaintiffs do not challenge either 29 C.F.R. § 1902.4(c)(2)(xi) or its July 2016 amendment in this case. That is enough to reject these arguments.

Even if Plaintiffs could (and did) challenge the regulation, that challenge would fail. For ease of reference, Defendants set forth the text of the relevant regulation:

<b>29 C.F.R. 1902.4(c)(2)(xi)</b>	
(eff. Oct. 29, 1971 – July 31, 2016)	(eff. Aug. 1, 2016 – present)
Indices of effectiveness of a proposed State plan includes whether the plan— ... “Provides effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act.”	Indices of effectiveness of a proposed State plan includes whether the plan— ... “Provides effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, and in 29 CFR 1903.15(d).”

The plain text validates OSHA’s reading of the regulation. For 45 years, “such as” was understood to mean that State plans had to match federal penalty levels in order to have “effective sanctions.” For example, South Carolina amended its fines statute in 1991 to match Congress’s

1990 amendments to the OSH Act. *See* 1991 S.C. Acts 25 (increasing State penalty amounts to match the OSH Act, as amended by Pub. L. No. 101-508, § 3101, 104 Stat. 1388 (Nov. 5, 1990), codified at 29 U.S.C. § 666). And indeed, *all* State plans covering the private sector amended their fines to match Congress’s 1990 amendments to the OSH Act. *See Approval of State Plan Supplements*, 59 Fed. Reg. 14,554 (Mar. 29, 1994). Notably, the 1990 legislation did not expressly require any State to increase its minimum or maximum fines. Instead, like other State plans, South Carolina followed suit based on the requirement of the OSH Act, 29 U.S.C. § 667(c)(2), to require State plans to remain at least as effective as OSHA in their enforcement of occupational safety and health standards, including by implementing equivalent maximum and minimum penalties. As another example, Arizona recently amended its fine levels to match OSHA’s current levels. *See Ariz. Reopening*, 87 Fed. Reg. at 50,026. The State Plans’ historical unanimity in keeping pace with federal penalty increases demonstrates their universally shared understanding that they were required to do so.

In 2015, Congress merely relocated the source of the fines that each State must match, from the OSH Act itself to OSHA’s annual adjustments. *See* 2015 Federal Penalties Act, § 701, 129 Stat. at 599. Accordingly, OSHA added an additional cite, “and in 29 CFR 1903.15(d)” to the relevant regulation, 29 C.F.R. § 1902.4(c)(2)(xi). But that did not change plain meaning of the regulation, which has been consistent since 1971.

The plain meaning is reinforced by numerous public pronouncements, all of which South Carolina has known about for years. The July 2016 Catch-up Adjustment could not have been clearer. *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.”). In the very next FAME report, OSHA told South Carolina that among the “Major New Issues” facing the State was

that “State Plans are required to adopt both the catch-up increase and the annual increase.” FY2016 FAME Report 3. And in every annual adjustment since January 2017, OSHA has reiterated that the OSH Act and its implementing regulations require State plans to match federal penalty levels. *See supra* n.5 (collecting citations).

Plaintiffs’ declarant, Ms. Farr, avers that “LLR has repeatedly informed OSHA that any change to the State’s statutory civil penalty structure could only be made through the legislative process.” Farr Decl. ¶ 6. But while Ms. Farr recalls raising unspecified “concerns about the manner in which the requirement was being imposed upon the state plans,” *id.* ¶ 12, she cannot identify any instance in which South Carolina previously expressed the interpretation of 29 C.F.R. § 1902.4(c)(2)(xi) that it espouses in this litigation.

Finally, the regulation is not “invalid.” Mot. 16–17. As Plaintiffs acknowledge, the amendment merely “add[ed] the cross-reference to [29 C.F.R.] § 1903.15(d).” *Id.* at 16. Such an amendment need not find authority in the 2015 Federal Penalties Act, because an agency has inherent authority to update citations in its own regulations. For similar reasons, the July 2016 amendment need not have gone through notice-and-comment rulemaking. *Contra* Mot. 17. Again, that process is only required when the rule would change law or policy, or where it would affect rights or obligations. *Children’s Hosp.*, 896 F.3d at 620; *Chrysler Corp.*, 441 U.S. at 302. The APA exempts, among other things, “interpretative rules,” “general statements of policy,” and “rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(3)(A).

The July 2016 amendment to 29 C.F.R. § 1902.4(c)(2)(xi) did not impose or alter any legal requirement. The relevant requirement—that State plans adopt the same minimum and maximum penalties as OSHA—comes from the OSH Act, 29 U.S.C. § 667(c)(2), and had existed for 40 years prior. The only difference in 2015 was that OSHA’s penalty levels would be set by annual agency adjustment instead of legislative amendment. But that was Congress’ choice, not OSHA’s. And in

any event, it did not alter the preexisting legal obligation under the OSH Act. The 2016 regulatory amendment merely echoed that legislative change.

**2. The 2022 Adjustment was not “arbitrary and capricious.” 5 U.S.C. § 706(2)(A) (Count II).**

“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). “Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency.” *Id.* “A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Id.* (collecting cases).

In this case, the question is whether it was reasonable for OSHA to say in its 2022 Adjustment that “State Plans are required to increase their penalties in alignment with OSHA’s penalty increases to maintain at least as effective penalty levels.” 2022 Adjustment, 87 Fed. Reg. at 2,332. As Defendants have made clear by now, that language was not new; OSHA was merely repeating what it had said in every annual adjustment. *See supra* n.5. Those cited passages include the Department’s consideration of federalism, which has likewise been *identical* year over year.

The requirement that States enforce their standards as effectively as OSHA had been a statutory requirement since the OSH Act was passed, and since OSHA’s inception, more than 50 years ago. OSHA’s regulations had expressly referred to maximum and minimum federal penalty levels since 1971, and to OSHA’s regulation since 2016 (when added to reflect the 2015 Federal Penalties Act). And, since the 2015 Federal Penalties Act, OSHA had repeatedly told States, including South Carolina, that they must raise their minimum and maximum fine levels to be equivalent or greater. *See, e.g.*, FY2016 FAME Report 3. To Defendants’ knowledge, no State or territory has *ever* brought a legal challenge to this requirement or OSHA’s interpretation of the OSH Act. Given that authority and history, it was more than reasonable for the 2022 Adjustment

to adhere to OSHA’s longstanding (and heretofore unchallenged) interpretation of the OSH Act.

Plaintiffs’ other arguments are unavailing. The comparative numbers of workplace injuries and illnesses, Mot. 21–22, does not change South Carolina’s *legal* obligation under the OSH Act to adopt maximum and minimum federal civil penalties that are at least as high as OSHA’s penalties. And OSHA need not “attempt to explain the change that [the 2022 Adjustment] makes,” *id.* at 22–23, because the 2022 Adjustment makes no such change. It merely repeats a policy that has been consistent since the first annual adjustment in January 2017, the catch-up adjustment in July 2016, the original State plan regulation at 29 C.F.R. § 1902.4(c)(2), published in 1971, and the OSH Act passed in 1970.<sup>8</sup>

\* \* \*

Because Plaintiffs’ claims cannot succeed, their motion should be denied. And for the same reasons, the Court should grant Defendant’s motion to dismiss this lawsuit for lack of jurisdiction. Even if the Court disagrees, however, the motion should still be denied because Plaintiffs have not demonstrated the other requisites for preliminary injunctive relief.

## **II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.**

Plaintiffs offer two theories of irreparable harm. First, they fear “potential implications for the State Plan.” Mot. 26. Second, Plaintiffs predict “harm to the State’s sovereignty and dignity.” *Id.* at 27. As Defendants argue above, neither feared harm is traceable to the 2022 Adjustment, nor would either be redressed by setting aside the 2022 Adjustment. Accordingly, Plaintiffs lack standing. But even if the Court had jurisdiction over these claims, it would have no basis to grant

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<sup>8</sup> Plaintiffs acknowledge in a footnote that OSHA has “historically taken this position,” but argue that “[t]he change here is in what has the force of law.” Mot. 22 n.5. Though unclear, Plaintiffs seem to argue that the 2022 Adjustment *has* the force of law, but every adjustment before it *lacked* the force of law. That argument makes little sense, and hardly finds support in the sole cited authority. *See id.* (citing *Sessions v. Dimaya*, 138 S. Ct. 1204, 1230–31 (2018) (Gorsuch, J., concurring in part and in the judgment)).

a preliminary injunction.

**A. Plaintiffs' Delay is Reason Enough to Deny the Motion.**

“Since an application for preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.” *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (citation omitted). Thus, a movant's delay in seeking a preliminary injunction may “indicate an absence of the kind of irreparable harm required to support a preliminary injunction.” *Id.* (citation omitted). Consistent with *Quince Orchard*, courts in this district have denied preliminary injunctions to plaintiffs that delayed in seeking them. *See, e.g., NAACP v. City of Myrtle Beach*, 383 F. Supp. 3d 603, 616 (D.S.C. 2019) (denying preliminary injunction where the plaintiffs waited three years before challenging the defendant city's actions); *Cap. Associated Indus., Inc. v. Cooper*, 129 F. Supp. 3d 281, 297 (M.D.N.C. 2015) (denying preliminary injunction where the movant was “not before the Court in exigent circumstances,” and noting that “[c]ourts must be vigilant to ensure that this extraordinary remedy is not used to manufacture a sense of urgency where none exists so as to allow the case to leapfrog earlier filed actions that may be of equal or greater urgency”) (collecting cases); *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 420–21 (E.D.N.C. 2006) (denying preliminary injunction where the plaintiff waited “six to nine week[s]” before filing suit); *Montrose Parkway Alternatives Coal. v. U.S. Army Corps of Eng'rs*, 405 F. Supp. 2d 587, 600 n.4 (D. Md. 2005) (denying preliminary injunction where the plaintiff delayed “nearly one month”).

Here, South Carolina has waited more than *six years* to bring suit. Even if the Court credited the State's arguments above, about the plain meaning or validity of OSHA's regulations, South Carolina has been aware of those arguments since July 1, 2016, when OSHA published the Catch-up Adjustment and amended 29 C.F.R. § 1902.4(c)(2)(xi). The State's six-year delay betrays the

truth: there is no emergency here, and South Carolina would suffer no imminent, irreparable harm if the case were litigated in the ordinary course.

**B. Plaintiffs Cannot Otherwise Demonstrate Irreparable Harm.**

The thrust of Plaintiffs’ argument is that they would suffer irreparable harm if OSHA revoked final approval of South Carolina’s State plan. As demonstrated above, any fears about revocation are speculative at best. But even if Defendants took such action, it would not cause irreparable harm.

When a State plan is not operating at least as effectively as its federal counterpart, as required by 29 U.S.C. § 667(c)(2), OSHA can reconsider and revoke its “final approval” of the State plan. *See generally* 29 C.F.R. §§ 1902.47–.53. OSHA recently *proposed* reconsidering and revoking Arizona’s State plan, *see* Ariz. Proposal, 87 Fed. Reg. 23,783, which seems to be the source of South Carolina’s concerns. *See* Mot. 26–27; Farr Decl. ¶ 16. Were OSHA to likewise take this step with respect to South Carolina, it would follow the procedure contemplated by OSHA’s regulations, which would include first publishing in the Federal Register a notice proposing reconsideration and revocation of South Carolina’s plan. *See* 29 C.F.R. § 1902.49(a). That notice would have to set forth the reasons for the proposed revocation. *Id.* § 1902.49(b). OSHA would then afford the public at least 35 days to submit data, views, and arguments on the proposal. *Id.* § 1902.49(c). And, if a substantial objection to OSHA’s reconsideration were filed, OSHA would be required to hold a public, informal hearing. *Id.* §§ 1902.49(d), 1902.50. Any decision by OSHA would have to be published in the federal register. *Id.* § 1902.52. Further, even if OSHA were to revoke final approval of South Carolina’s State plan, the effect of that determination would not be to terminate the State plan; rather, such revocation would result in a return to “concurrent Federal enforcement and standards authority” for “a reasonable time,” until OSHA either (1) withdraws approval of the State plan (under 29 U.S.C. § 667(f), *see* 29 C.F.R.

Part 1955) or determines that the State is again within compliance with 29 U.S.C. § 667(c). And if OSHA ultimately withdraws approval, South Carolina can seek review in the Fourth Circuit. *See id.* § 667(g).

With this procedure in mind, it is clear that the action South Carolina seeks to enjoin (“[p]ublishing in the Federal Register any proposal to reconsider or revoke OSHA’s final approval of South Carolina’s State Plan,” Mot. 2) would not inflict irreparable harm. Instead, South Carolina is seeking to short-circuit a process—one that it accepted in becoming a State Plan—that would provide the State with numerous procedural protections, and which would result in *at most* concurrent federal jurisdiction for some limited period of time. Plaintiffs cite no case for the proposition that such an administrative process—even if non-speculative—would constitute irreparable harm.

### **III. THE EQUITIES FAVOR DENYING PLAINTIFFS’ MOTION.**

The final two factors to be considered by the Court, the balance of equities and the public interest, “merge when the Government is the opposing party.” *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

The relevant public interest was articulated by Congress more than 50 years ago. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 2, 84 Stat. 1590, 1590 (“Congressional Findings and Purpose”). States and territories may operate their own plans for workplace safety and health, but they must “develop plans in accordance with the provisions of th[e OSH] Act,” including the requirement that they enforce standards as effectively as OSHA does. *See id.* §§ 2(11), 18(c)(2). This legislative judgment reflects a balancing of the interests of employers, employees, the States, and the federal government. South Carolina would upset that balance by arrogating to itself the unilateral ability to develop and enforce workplace standards, irrespective of OSHA’s requirements. South Carolina would become the first State with that power

since 1970, when Congress determined that such a scheme was not in the public interest.

Plaintiffs emphasize that South Carolina's fines are set by legislation, and that South Carolina's legislature is not presently in session. Mot. 8–9. While that may complicate South Carolina's efforts to comply with the OSH Act, it is no reason to grant Plaintiffs' motion. First, the State only faces that complication because of its years-long failure to adhere to Section 18(c) of the OSH Act, 29 U.S.C. § 667(c)(2) by passing the necessary legislation; it is, therefore, a problem of the State's making. And that problem could easily be overcome: Arizona, for example, recently amended its laws to peg permanently its civil penalties to federal levels. Ariz. Reopening, 87 Fed. Reg. at 50,026 & n.2. Second, South Carolina has recently shown itself able to convene a special legislative session and, indeed, is expected to reconvene less than a week after this opposition is filed.<sup>9</sup> If the State seriously intends to comply with the OSH Act, it will have ample opportunity to do so at the upcoming session. But if the State has no intention of doing so, then the fact that it sets its fines by legislation is irrelevant to deciding this motion.

Finally, insofar as relative burdens are concerned, the Court should be mindful that most of the amounts at issue are *maximum* penalties. *See generally* 2022 Adjustment, 87 Fed. Reg. at 2,338. Raising the maximum penalty from \$13,653 to \$14,502 for serious violations, for example, does not require South Carolina to fine every offender an extra \$849 for every serious violation. *See id.* The only exception is for willful violations, which carry a minimum penalty. But requiring South Carolina to increase its minimum fine by \$607, *see id.*, hardly tips the balance of equities in the State's favor—especially since State employers are exempt from these requirements. *See id.* at 2,332 (“State Plans are not required to impose monetary penalties on state and local government employers.”) (citing 29 C.F.R. § 1956.11(c)(2)(x)).

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<sup>9</sup> *See, e.g.*, James Pollard, S. Carolina House to Meet after Divergent Senate Abortion Ban, AP News (Sep. 12, 2022), *available at* <https://apnews.com/article/abortion-health-legislature-south-carolina-be4f9bc3ced519e44c4a0ece391b4673>.

The equities favor respect for the balance that Congress struck in 1970, and that every State has recognized since: State plans must develop and enforce occupational safety and health standards at least as effectively as OSHA, including by adopting minimum and maximum penalties as high as OSHA's.

**IV. ANY PRELIMINARY INJUNCTION WOULD HAVE TO BE NARROWLY TAILORED.**

“An injunction ‘should be tailored to restrain no more than what is reasonably required to accomplish its ends.’” *Hayes v. N. State L. Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) (quoting *Consolidation Coal Co. v. Disabled Miners of S. W. Va.*, 442 F.2d 1261, 1267 (4th Cir. 1971). “Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.” *Id.*

The preliminary injunction sought by Plaintiffs is patently overbroad. While their complaint only challenges the 2022 Adjustment, Plaintiffs ask for a preliminary injunction that goes much further. They ask the Court to enjoin enforcement of *every prior adjustment*, even though they don't challenge any of those adjustments, and to enjoin enforcement of a duly promulgated amendment to a regulation, even though they don't challenge that amendment. *See* Mot. 1-2.

More troubling still, Plaintiffs ask for an injunction against OSHA's revoking final approval of the South Carolina State plan “or otherwise taking *any adverse action* against the State Plan during the pendency of this action, whether based on the 2022 Adjustment, any other annual adjustments that OSHA has issued since 2016, *or otherwise*.” Mot. 2 (emphasis added). This plea to prevent *any* adverse action for *any* reason is totally untethered from Plaintiffs' underlying claims. It would, Defendants respectfully submit, be an abuse of discretion to grant such relief. *See CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 255–56 (4th Cir. 2020) (“[A]n overbroad injunction is an abuse of discretion”) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th

Cir. 2009)), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020).

Plaintiffs only challenge the 2022 Adjustment, and only on two limited grounds: (1) that the “mandate” to raise State minimum and maximum fines should have gone through notice-and-comment rulemaking (Count I); and (2) that the “mandate” is arbitrary and capricious (Count II). While these arguments are meritless, for the many reasons explained above, they should result *at most* in the setting aside of that portion of the 2022 Adjustment, 87 Fed. Reg. at 2,331–32, during the pendency of this case.

### CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs’ motion and grant Defendants contemporary motion to dismiss.

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Respectfully submitted,

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