

ORAL ARGUMENT SCHEDULED FOR MAY 16, 2016

No. 15-1326 (and consolidated Case No. 15-1340)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AGRICULTURAL RETAILERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR and
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Respondents.

ON PETITIONS FOR REVIEW OF A MEMORANDUM PROMULGATED BY
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

JOINT REPLY BRIEF OF PETITIONERS

**(AGRICULTURAL RETAILERS ASSOCIATION; THE FERTILIZER
INSTITUTE; ALLIED COOPERATIVE; BASIN FERTILIZER &
CHEMICAL CO., LLC; BERN SEED, INC.; BRANDT CONSOLIDATED,
INC.; CENTENNIAL AG SUPPLY CO.; EFFINGHAM EQUITY;
FARMERS FEED & GRAIN COMPANY, LLC; HARVEST LAND CO-OP,
INC.; O'TOOLE, INC.; PINNACLE AGRICULTURE HOLDINGS, LLC;
PREMIER AG CO-OP, INC.; STRATTON SEED COMPANY; SINCLAIR
ELEVATOR, INC.; SOUTH DAKOTA WHEAT GROWERS
ASSOCIATION; THE ANDERSONS, INC.; THE CONSUMERS OIL &
SUPPLY COMPANY; THE MCGREGOR COMPANY; VAN HORN, INC.)**

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GLOSSARY

As used herein,

APA means the Administrative Procedure Act;

ARA means the Agricultural Retailers Association;

JA means the Joint Appendix;

NAICS means the North American Industry Classification System;

OSHA means the Occupational Safety and Health Administration;

OSH Act means the Occupational Safety and Health Act; and

TFI means The Fertilizer Institute.

SUMMARY OF THE ARGUMENT

The *Brief for the United States Department of Labor and the Occupational Safety and Health Administration* (“OSHA”) (Feb. 19, 2016) (“OSHA’s Brief”) goes to considerable lengths to avoid confronting Petitioners’ arguments under the Occupational Safety and Health Act (“OSH Act”). Ultimately, OSHA’s Brief is founded upon two arguments that attempt to distract this Court from the relevant inquiry under 29 U.S.C. § 655 of the OSH Act, and the “basic function” of the Memorandum entitled “Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(i))” (July 22, 2015) (the “Memorandum”). Under the OSH Act, the jurisdictional question is whether the Memorandum constitutes a new occupational safety and health “standard” under 29 U.S.C. § 655.

But, as its first argument, OSHA claims that this case should be decided under the Administrative Procedure Act (“APA”) and related cases about “interpretive rules” exempted by 5 U.S.C. § 553(d)(2) of the APA, rather than the OSH Act and this Court’s *own cases* regarding 29 U.S.C. § 655 and identifying

“standards.”¹ OSHA is wrong: The “jurisdictional structure and form of the OSH Act” requires a probing evaluation of the distinction between “standards” and “regulations” (though this Court has recognized the OSH Act does “not define” the latter term). *Chamber of Commerce*, 174 F.3d at 209-10. There is no previously-undiscovered third category of “interpretive” OSH Act regulations that allows OSHA to side-step judicial review altogether, avoid the definition of a “standard” in 29 U.S.C. § 652(8), or dismiss the “basic function” test in *Chamber of Commerce* out of hand.²

Therefore, OSHA’s attempt to rely on the APA and related cases for its defense is illogical: OSHA dodges one (relevant) statute (the OSH Act) in favor of another (irrelevant) statute (the APA), without admitting as much. For the same reason, much of OSHA’s Brief is irrelevant to the Court’s narrow jurisdictional

¹ See, e.g., OSHA’s Br. at 11-13, 24-25 (after citing a litany of APA cases, claiming that “the ‘basic function’ test is simply of no utility in addressing the central issue before the Court: whether the Retail Memorandum is an interpretive rule”); OSHA’s Reply in Support of Its Motion to Dismiss (“OSHA’s Reply”), at 5-6 (Nov. 19, 2015) (claiming that the Court should “not attempt” to evaluate 29 U.S.C. § 655(f) pursuant to *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d 206, 209-11 (D.C. Cir. 1999)) .

² In fact, this Court developed its “basic function” test to scrutinize claims by OSHA that its regulatory actions, irrespective of OSHA’s labeling, would be subject to meaningful review under 29 U.S.C. § 655(f). *Chamber of Commerce*, 174 F.3d at 209, 212 (evaluating a “directive” that OSHA claimed could not qualify as either a “standard” under the OSH Act or a “substantive rule” under the APA, ostensibly because the “Directive” was a “general statement of policy” or “procedural rule”).

inquiry under 29 U.S.C. § 655(f). That inquiry is decisive for both subject-matter jurisdiction and the merits, given OSHA's admissions regarding the Memorandum's intended function and its failure to follow OSH Act procedures.

Second, OSHA argues that the focus of Petitioners' claims is the so-called "50 percent test," and that is all that OSHA changed via the Memorandum and its accompanying "enforcement policies." *See, e.g.*, OSHA's Br. at 5, 8, 14-15, 23, 26; JA ___-___, ___-___, ___-___.³ But Petitioners assuredly do not base their claims on the "50 percent test." Petitioners focus their claims on the fact that the Memorandum — for the first time — imposes Process Safety Management requirements on Petitioners and their members contrary to a specific regulatory exemption.

Similarly, the *Brief for The Intervenor, The United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union* (Feb. 26, 2016) ("Union's Brief") makes a straw-man

³ The "50 percent test" was set forth in a letter from Ms. Patricia K. Clark, OSHA Director of Enforcement Programs, to Mr. Gary Myers, President, The Fertilizer Institute (June 19, 1992) ("OSHA's 1992 Letter"), JA ___. Apart from discussing the "50 percent test" guidance for purposes of enforcement, OSHA's 1992 Letter provided "confirmation" to Petitioner The Fertilizer Institute ("TFI") about the exemption's coverage of agricultural retail facilities, as TFI had requested. *See id.* OSHA concluded that all of the specific facilities that TFI had described in its request "sell directly to end users or consumers, for example, farmers." *See id.*

argument that the “50 percent test” was “codified” in 1992, and then attacks it (Union’s Brief at 4-7, 14-17). Again, Petitioners never claimed this.

Instead, Petitioners have consistently relied on the codified regulatory exemption for *all* “retail facilities” at 29 C.F.R. § 1910.119(a)(2)(i). The “prospective guidance” of the “50 percent test” merely bolstered that exemption. *See, e.g., Opening Joint Brief of Petitioners* (“Petitioners’ Brief”) at 24, 40-41, 43-44 (Jan. 22, 2016) (discussing how OSHA may “re-interpret or revoke” its guidance, but does not have authority to change a standard absent compliance with statutory requirements).

Petitioners and their members plainly are “retail facilities” that sell end-products to end-users (namely, farmers), and Petitioners’ positions are not premised upon the “50 percent test.” Instead, Petitioners and their members are harmed by OSHA’s replacement of the categorical (and indeed, “codified”) exemption of “retail facilities” in the Process Safety Management Standard with a narrow range of North American Industry Classification System (“NAICS”) codes that (conveniently) omits agricultural retail facilities. Suddenly, agricultural retailers find themselves subject to new legal duties and obligations, ostensibly to address a specific alleged hazard at their facilities. Pet’rs’ Br. at 25-28.

The Court should disregard OSHA’s and the Union’s irrelevant APA-based arguments and focus on the “basic function” of the Memorandum — regardless of

the labels OSHA applies to it. *Chamber of Commerce*, 174 F.3d at 209-11. In function, the Memorandum eliminated the “retail facilities” exemption for the entire agricultural retail sector. OSHA’s objective is to impose new regulatory obligations and duties upon all agricultural retail facilities, on pain of criminal and civil enforcement under the OSH Act. *See, e.g.*, 29 U.S.C. § 666. In fact, the administrative record reveals OSHA’s admissions of this objective: Namely, to implement Executive Order No. 13650, 78 Fed. Reg. 48,029, 48,029, 48,032 (Aug. 1, 2013) (JA __, __) by finding a way to enforce previously-inapplicable Process Safety Management duties at facilities like West Fertilizer. OSHA, “Questions and Answers – PSM Retail Exemption Policy,” at 1-2 (July 22, 2015) (“Q&A Document”), JA __-__; “OSHA’s Responses to Public Comment on Its New Interpretation of The Term ‘Retail Facilities’ in The PSM Standard” (July 24, 2015), at 1-3, JA __-__.

Because the Memorandum imposes new substantive legal duties and obligations on agricultural retail facilities, nationwide, to address the “specific alleged hazard” raised by the West Fertilizer incident (and implement an otherwise unenforceable Executive Order), the Memorandum qualifies as a “standard” under 29 U.S.C. § 655(f). This decisively supports both subject-matter jurisdiction and the relief requested by Petitioners in this case.

ARGUMENT

As recognized in the Court's Order of December 15, 2015, because OSHA now has conceded that the Memorandum did not follow the procedures for "promulgation, modification, or revocation of standards" under the OSH Act — 29 U.S.C. § 655(b) — the legal analysis in this case has been simplified.

On the merits, OSHA's Brief boils down to three points. OSHA claims: (1) its Memorandum is merely an "interpretive rule" under the APA (OSHA's Br. at 12-23), therefore (2) it cannot be evaluated as a potential "standard" or even a "regulation" under the OSH Act (*id.* at 24-25), and (3) the Court should not consider the "basic function" test from *Chamber of Commerce* because it is "not relevant to the jurisdictional issue in the case at bar" (*id.* at 24-25). Even for the latter points, OSHA relies on APA cases. *Id.* at 23-25 (using "*cf.*" signals for OSH Act cases); *see also id.* at v-vii. In other words, OSHA cites no authorities that support its points asserting that the Court must ignore OSH Act cases.

I. OSHA Avoids A Jurisdictional Analysis Under The OSH Act By Defending Its Memorandum As An APA “Interpretation,” But This Is A Red Herring.

A. Under The OSH Act, The Memorandum Fits The Definition Of A “Standard” Perfectly, And “Fits the Definition Of A Regulation Not at All.”⁴

The “jurisdictional issue in the case at bar,” as OSHA puts it, should be evaluated under 29 U.S.C. § 655 and this Court’s cases under the OSH Act — *not* the APA. *Chamber of Commerce*, 174 F.3d at 209 (distinguishing judicial review and analysis under the APA and the OSH Act); *La. Chem. Ass’n v. Bingham*, 657 F.2d 777, 778 (5th Cir. 1981) (same). Section 655(b) provides that OSHA cannot “promulgate, modify, or revoke” an OSH Act “standard” without following specified procedures, and section 655(f) grants direct review to persons “adversely affected by a standard.” A new “standard” is identified by its “basic function” rather than the label OSHA might choose to apply to it, like “directive” or “rule.” *Chamber of Commerce*, 174 F.3d at 209-11; *Bingham*, 657 F.2d at 779.

Under the OSH Act, this Court has observed that “regulations” are “not defined,” but presumably cover a wide range of both binding and non-binding OSHA actions (*e.g.*, a “general enforcement or detection procedure,” a rule regarding “records” or “reports,” or even a “general statement of policy,” depending on the function of the action). *Chamber of Commerce*, 174 F.3d at 209-

⁴ *Chamber of Commerce*, 174 F.3d at 210.

10, 212. Nevertheless, OSHA decries the “false notion” advanced by Petitioners that “every OSHA rule must be either a ‘standard’” or a “regulation” of some sort.

OSHA’s Br. at 25. But that “notion” comes from this Court:

[W]e are forced by the *jurisdictional structure and form of the OSH Act* to characterize the [challenged] Directive either as a “standard” or as a “regulation.”

Id. at 210. And, that applies “[a]lthough neither moniker is entirely apt.” *Id.*

The Court concluded in *Chamber of Commerce* that an OSHA “Directive” was a “standard” within the meaning of section 652(8) because:

[1] it effectively obligates employers, under penalty of certain inspection, to adopt a CSHP, and [2] thereby imposes upon employers new safety standards more demanding than those required by the Act or by any pre-existing regulation implementing the Act. And because the Directive is a standard, *we have jurisdiction under § 655(f) to consider the Chamber’s petition to review it.*

Id. at 210-11 (emphasis added). While OSHA’s Brief attempts to side-step this analysis of “standards” versus “regulations,” Petitioners’ briefing from the outset has focused on this relevant inquiry. Pet’rs’ Br. at 21-35.

Moreover, Petitioners have cited examples showing that this Court’s “basic function” test applies to wide varieties of binding and non-binding OSHA actions, including mere “reiterations,” “enforcement policies,” or “interpretations.” *See, e.g.,* Pet’rs’ Br. at 23, 35 (citing *Edison Elec. Inst. v. OSHA*, 411 F.3d 272, 277 (D.C. Cir. 2005); *Steel Erectors Ass’n of Am., Inc. v. OSHA*, 636 F.3d 107, 114-15,

118-19 (4th Cir. 2011); *Sec’y of Labor v. Petro Hunt LLC*, 24 O.S.H. Cas. (BNA) 1360, 2012 WL 3550136, at *8-10 (O.S.H.R.C. June 20, 2012) (ruling that an OSHA “memorandum” was a “standard,” even though OSHA claimed it just set forth an “interpretation”). In contrast, OSHA does not cite a single case showing that this Court’s “basic function” test is “not relevant” to evaluate anything OSHA seeks to label as an “interpretation.” OSHA’s Br. at 24-25.

OSHA’s attempt to avoid the relevant test under 29 U.S.C. § 655(f) is fatal to its defense. OSHA’s Brief also refuses to examine the Memorandum as a potential “regulation,” even for the sake of argument. OSHA’s Br. at 26-27. For the reasons already set forth in the very first section of the argument in Petitioners’ Brief, the Memorandum qualifies as a “standard” promulgated in violation of required OSH Act procedures, is invalid, and should be vacated. *Chamber of Commerce*, 174 F.3d at 213.

B. The Memorandum Also Is A “Legislative Rule,” Despite OSHA’s Hollow Claim That Nobody’s Legal Duties Have Changed, And That OSHA Could Have Enforced Those Duties Before.

As one aspect of its misplaced APA defense, OSHA argues that the Memorandum is not “legislative” in nature. OSHA’s Br. at 18-21, 25-26. Significantly, under the OSH Act, there is no exemption for “interpretative rules and statements of policy,” as there is in the APA at 5 U.S.C. § 553(d)(2), so the

foundation of OSHA's entire defense is irrelevant here. Instead, under the OSH Act, which applies here, the relevant term is a "standard." 29 U.S.C. § 652(8).

OSHA specifically asserts that the Memorandum (1) merely "clarifies" the applicable "scope of the existing exception for retail facilities," but does not change it; (2) does not affect the "adequate basis for enforcement" OSHA already possessed against the new facilities it is attempting to regulate; and (3) does not "amend" or "repudiate" the term "retail facilities." OSHA's Br. at 18-19, 21. These assertions lack any logical or factual support.

First, the "scope" of the exemptions in the Process Safety Management Standard identifies who that standard *does* and *does not* "apply to." 29 C.F.R. § 1910.119(a). Thus, changes to the "scope" of Process Safety Management fully impose (or fully *relieve*) entire classes of persons of the rigorous legal duties and obligations of Process Safety Management. For instance, "gas well drilling or servicing operations" are categorically exempt (and therefore have no substantive duties or obligations for Process Safety Management), just like "retail facilities." *Id.* § 1910.119(a)(2)(ii). If OSHA were to substitute a narrow range of NAICS codes to impose Process Safety Management duties and obligations upon some "gas well drilling" operators — but not others — it would hardly be surprising if the newly-regulated operators complained about their new legal obligations, and demanded due process.

In OSHA's words, the Memorandum merely illuminates "the universe of employers OSHA *deems subject* to the requirements of the standard." OSHA's Br. at 11 (emphasis added). Picking and choosing *who* the law applies to effectively amends the law, and is thus a quintessentially *legislative* action. *See, e.g., Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95-96 (D.C. Cir. 1997) ("FDA has concluded, by way of its challenged rule, that PET manufacturers '*should* be regulated.' Their activities—which clearly fell within the scope of the regular course of the practice of the profession of pharmacy in 1984—are thought no longer to fall within that scope. This is not a change in interpretation or in enforcement policy, but rather, is fundamentally new regulation. . . . [The FDA's rule] is as far removed from the typical policy statement as it is from an interpretative rule; it drew a boundary to the agency's regulatory reach."); *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 469-70 (D.C. Cir. 1980) ("There was no 'existing duty' to serve as the subject of an Administration reminder. . . . [H]ighhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action.").

"[T]he universe of employers" that the Process Safety Management Standard governs was established long ago through an OSH Act rulemaking. *See* 29 C.F.R. § 1910.119(a). As one of OSHA's cited APA cases holds, a "rule that effectively

amends a prior legislative rule” is “a legislative, not an interpretive rule.”⁵

OSHA’s next argument — that it already had an “adequate basis for enforcement” against agricultural “retail facilities” — is even more off the mark. *See* OSHA’s Br. at 29. *But for* the Memorandum, there would be no legal basis to enforce previously-inapplicable Process Safety Management requirements at any agricultural retail facilities because their business inherently is to “sell directly to end users or consumers, for example, farmers.”⁶ In the past, OSHA consistently confirmed this.⁷ OSHA’s expert “interpretation” of the Process Safety Management Standard had nothing to do with it: From the inception, it was the

⁵ *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (“Our cases have formulated this ‘effective amendment’ test in a number of ways. We have, for example, held that ‘new rules *that work substantive changes*’” or “‘*major substantive legal addition[s]*,’” to “prior regulations are subject to the APA’s procedures.”) (citations omitted); *Shalala v. Guernsey Mem’l Hospital*, 514 U.S. 87, 100 (1995) (holding that if “an agency adopt[s] a new position inconsistent with” an existing regulation, or effects “a substantive change in the regulation,” notice and comment are required).

⁶ OSHA’s 1992 Letter, JA ___. Notably, if such facilities were in the business of re-selling their products for further distribution, it would make them “wholesale” facilities under the plain meaning of that word, as discussed further below.

⁷ Letter from Mr. Richard E. Fairfax, OSHA Director of Compliance Programs, to Mr. J.D. Varn III, Vice-President Varnco, Inc. (Jan. 26, 2001), JA __-__; Letter from Mr. John B. Miles, Jr., OSHA Director of Compliance Programs, to Mr. Pete Mutschler, Cenex Supply & Marketing, Inc. (Nov. 7, 1994), JA __-__; Letter from Mr. Roger A. Clark, OSHA Director of Compliance Programs, to Mr. Robert A. Heidrich, Brewer Environmental Industries, Inc. (Oct. 23, 1992), JA __-__ (collectively, the “Letters to Agricultural Businesses”).

Standard *itself* that exempted “retail facilities.” 57 Fed. Reg. 6,369, 6,403 (Feb. 24, 1992), JA __.⁸

Just imagine: Had OSHA *attempted* to enforce Process Safety Management requirements against a typical agricultural retailer before the Memorandum, that facility would have had three unquestionable defenses: (1) It plainly qualifies as a categorically-exempt “retail facility” under the ordinary meaning of that word in 29 C.F.R. § 1910.119(a)(2)(i); (2) It is the same type of business that OSHA’s consistent chain of letters expressly confirmed were unregulated (*see* Letters to Agricultural Businesses, JA __-__); and, (3) Even under OSHA’s so-called “50 percent test” guidance (OSHA’s 1992 Letter, JA __), the facility sells its products to end-users, namely, farmers (so, it is difficult to see how it would “flunk” that test). Any such “enforcement” case would be laughed out of the courtroom.

In fact, since the inception of the Process Safety Management Standard in 1992, Petitioners are not aware of a single case in which OSHA claimed an

⁸ While OSHA’s APA-based cases are not pertinent to the OSH Act, they are also quite distinguishable — or support Petitioners’ positions. In *Ass’n of Flight Attendants–CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 715-17 (D.C. Cir. 2015), for example, this Court held that a non-binding Federal Aviation Administration “notice” regarding the safe use of electronic devices on airlines did not “compel the airlines to do anything,” hence it was not “legislative.” *Id.* Nor does *Fertilizer Inst. v. EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (deciding that EPA’s explanation of the statutory term “release” was contrary to its plain text, but that there was leeway for other interpretations) help OSHA. The same is true of *Cent. Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005). Unlike here, that case did not address the imposition of criminal or civil liabilities for previously-exempt conduct.

“adequate basis for enforcement” of Process Safety Management against any agricultural retailer — even at a large agricultural retail facility with several large tanks, like a large gas station along an interstate highway (to invoke OSHA’s 1992 example). *See* 57 Fed. Reg. at 6,369, JA __.⁹ As explained in Petitioners’ Brief (at 42-43), OSHA’s decades of “conspicuous inaction” belie its own arguments. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012).

For the same reasons, OSHA’s claim that the Memorandum must be an “interpretation” because it does not “amend” or “repudiate” the categorical exemption of “retail facilities” (OSHA’s Br. at 18-19, 21) is baseless. That is exactly what the Memorandum *does*, and what OSHA *set out to do*. *See, e.g.*, OSHA, “PSM Retail Exemption Interim Enforcement Policy” (July 22, 2015) (formerly-exempted facilities “now must comply with the requirements of 29 CFR 1910.119” due to the Memorandum), JA __; Q&A Document, at 1-2 (discussing: “Why will OSHA modify its retail exemption?”), JA __-__; Pet’rs’ Br. at 39-42.

⁹ Although the Union’s Brief should be ignored (as explained below), its extensive exposition of legal advocacy from the U.S. Chemical Safety Board about the Memorandum confirms that OSHA had no prior “adequate basis for enforcement” of the Process Safety Management Standard at agricultural “retail facilities,” even at West Fertilizer. *See* Union’s Br. at 4-7 (citing U.S. Chemical Safety and Hazard Investigation Board, “Investigation Report – West Fertilizer Company Fire and Explosive,” at 178-81 (2013) (“[West Fertilizer] qualified under the PSM standard’s retail facilities exemption and was not required to comply with the standard. . . . CSB asked OSHA to consider whether the retail facilities exemption should be revised in order to cover facilities such as [West Fertilizer.]”).

To wit, the Memorandum announces a new standard to govern all future cases by *substituting* a long phrase that refers to a narrow range of (extrinsic) statistical codes for the categorical term “retail facilities.” Namely: “Only facilities, or the portions of facilities, engaged in retail trade as defined by the current and any future updates to sectors 44 and 45 of the NAICS Manual.” Memorandum, JA ___. What is more, the NAICS Manual did not even exist when Process Safety Management was adopted in 1992. Pet’rs’ Br. at 12. So, through this substitution, OSHA conveniently *invented* an “adequate basis for enforcement” against agricultural “retail facilities,” while bypassing required OSH Act procedures.

For the same reasons, it strains credulity for OSHA to claim that a narrow range of extrinsic statistical codes that periodically are *changed* by the U.S. Census Bureau “flows fairly from the substance” of just two words (*i.e.*, “retail facilities”), and, therefore, “does not go beyond the actual language” in the Process Safety Management Standard. OSHA’s Br. at 16, 18.

Thus, even if the Court indulges OSHA’s effort to frame this entire litigation under the auspices of the APA, the Memorandum still qualifies as a “legislative rule” because it created new legal duties and obligations for an entire sector of the American economy. *See* Pet’rs’ Br. at 36-41. As this Court noted last year, the crucial factor “in differentiating between binding and nonbinding actions,” was the

“actual legal effect (or lack thereof) of the agency action in question.” *Ass’n of Flight Attendants*, 785 F.3d at 715-17. And agency action that “creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule.” *Id.* at 717.

II. OSHA Should Not Be Allowed To Undermine Judicial Review Under 29 U.S.C. § 655(f) By Claiming That Binding Documents Like The Memorandum Or Its Accompanying “Enforcement Policies” Cannot Be Reviewed As Either “Standards” Or “Regulations” Of Any Type.

Without any supporting citations (*e.g.*, based on its own enabling statute), OSHA’s Brief claims that OSHA can side-step judicial review of whether the Memorandum meets the definition of a “standard” under 29 U.S.C. § 652(8) by dismissing the “basic function” test in *Chamber of Commerce*. OSHA’s Br. at 23-25. Agencies have no authority to dictate how this Court should begin and end its evaluation of subject-matter jurisdiction based on an assertion of expert “interpretive” authority. *See* Pet’rs’ Br. at 33-34 (*citing, e.g., Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014)).

Conceptually, OSHA’s effort to avoid the legal test that governs this case was already anticipated and disposed of in Petitioners’ Brief. *Id.* Previously, when it moved for dismissal, OSHA even went so far as to argue that the Court should “not attempt” to consider that test. OSHA’s Reply at 5-6. Fortunately, OSHA now is reluctantly signaling that *Chamber of Commerce* might assist the Court’s

analysis. *See* OSHA’s Br. at 23, 25 (begrudgingly admitting that “some courts” apply “a basic function” test — but refusing to acknowledge that this is the test that *this Court* applies).

Petitioners respectfully submit that an analysis of their claims under 29 U.S.C. § 655(f) should begin by evaluating whether the Memorandum qualifies as a “standard” under the OSH Act and this Court’s cases on that subject. 29 U.S.C. § 652(8); *Chamber of Commerce*, 174 F.3d at 209-11. If it does qualify as a “standard,” the Court has recognized that this will be a simple case. *See* Order, at 2 (Dec. 15, 2015) (“[I]f this court has jurisdiction over this case, the petitions for review must be granted.”).

III. Even Setting Aside the Controlling “Basic Function” Test And The OSH Act, OSHA’s Purported “Interpretation” That Agricultural Retailers Are No Longer “Retail Facilities” Is Contrary To The Plain Meaning of the Term.

Aside from asking this Court to abandon its “basic function” test for purposes of evaluating its jurisdiction under 29 U.S.C. § 655(f), OSHA’s Brief defends the Memorandum by claiming that its Memorandum simply reiterates the “plain language of the exemption” for “retail facilities.” OSHA’s Br. at 8-9, 16. Specifically, OSHA attempts to build up a distinction between “retail” and “wholesale” facilities, based in part on a 1995 Memorandum that OSHA wrote to

itself about “wholesale trade establishments” that sell “merchandise for exclusive use by industry.” *Id.* at 5-6.

As already set forth above and in Petitioners’ Brief, OSHA’s defense side-steps relevant law (under which its Memorandum is invalid). Nevertheless, even if one were to assume *arguendo* that (1) OSHA’s arguments against this Court’s jurisdiction under § 655(f) could be evaluated under the auspices of the APA alone, and (2) the Memorandum is a mere “interpretation” that should be evaluated using only APA cases (both of which are false premises), OSHA’s “plain language” argument abuses the English language.

Previously, OSHA confirmed for all agricultural retailers who asked that they clearly qualified as “retail facilities.” *See* Letters to Agricultural Businesses, JA ___-___. It requires no expert feat to “interpret” that agricultural retailers that “sell directly to end users or consumers, for example, farmers” are “retail facilities.” *See* OSHA’s 1992 Letter, JA ___. When Petitioner TFI first asked OSHA to “confirm” this, it explained how “retail fertilizer distribution” involves holding “products for sale to end users,” and selling products (*e.g.*, fertilizer) “directly to a farming operation.” *See* Letter from Mr. Gary Myers, President, TFI, to Ms. Dorothy Strunk, Acting Administrator, OSHA (March 27, 1992) (“TFI’s 1992 Letter”), JA ___-___. Describing such “retail facilities” did not require any semantic gymnastics.

OSHA cannot now credibly assert that the “plain language of the exemption” for “retail facilities” *would normally exclude* agricultural retailers because agricultural retailers are really “wholesale” operations, regardless of who their customers are. OSHA’s Br. at 9; *see* Memorandum, JA ___-___ (even if “a farm supply company” sells all of its products solely “to farmers for application to farmland,” it is a “wholesaler” and is “not eligible for the retail exemption”). Even resorting to a sophisticated dictionary, the “plain language” of the term “retail” means: “The sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing.”¹⁰ In contrast, “wholesale” ordinarily means: “The sale of goods or commodities usu. to a retailer for resale, and not to the ultimate consumer.”¹¹ Without question, farmers are the ultimate consumers of the products sold by agricultural retailers. OSHA formerly confirmed that agricultural retailers who “sell directly to end users or consumers, for example, farmers” were “retail facilities.” *See* OSHA’s 1992 Letter, JA ___. This belies OSHA’s current suggestion that there are no longer such things as “retail facilities” across the *entire* agricultural sector because they are not listed in two narrow NAICS codes. By their nature, agricultural “retail facilities” are not in

¹⁰ Black’s Law Dictionary, “Retail,” at 1509 (8th ed. 2004).

¹¹ *Id.* at 1628.

the business of selling products to middle-men for further distribution or processing.

To support its argument that all “retailers” are now “wholesalers” in the agricultural sector, OSHA misguidedly attempts to highlight differences between gasoline stations and agricultural retailers. OSHA’s Br. at 4. OSHA asserts, for instance, that gasoline stations sell fuel in small quantities and to households, while agricultural retailers are “wholesalers” because they sell to “commercial” entities. OSHA’s argument ignores how gasoline stations operate: They store thousands of gallons of highly flammable and potentially-explosive fuel in large, on-site tanks. They sell that fuel to any end-users who want to fill up their tanks, trucks, cars, or containers (irrespective of quantity): *e.g.*, semi-trailer drivers, lawn care companies, and other “commercial” entities that must consume gasoline to go about their business. But there is no dispute that these “commercial” entities, like farmers who purchase fertilizer, are the end-users of fuel from gasoline stations.

As such, even if one only applied APA case law regarding agencies’ supposed “interpretations” of their own regulations, OSHA’s “plain language” argument would fall flat. To wit, as applied to the agricultural sector, the categorical exemption of “retail facilities” would not be “ambiguous” (*see, e.g.*, OSHA’s 1992 Letter, JA __); the Memorandum’s “interpretation” would be directly contrary to the “plain language” of the exemption; *and* that

“interpretation” would be plainly erroneous due to OSHA’s baseless “wholesale” distinction. *See, e.g., Christiansen v. Harris County*, 529 U.S. 576, 588 (2000) (“To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Therefore, even if the Memorandum had been lawfully promulgated and was clearly a mere “interpretation” (neither of which is true), a full analysis under the APA would simply reveal that OSHA’s Memorandum abuses “plain language,” rather than confirming it. As relevant to the jurisdictional issue at bar, the Memorandum abuses a standard stating that agricultural “retail facilities” have no Process Safety Management duties or obligations — and in so doing, abruptly reverses more than twenty years of consistent regulatory law.

IV. The Motion To Intervene By The Union Should Be Denied And Its Brief Stricken.

The Union’s Brief, like the *Motion to Intervene Out of Time Filed on Behalf of [the Union]* (Nov. 5, 2015) (the “Union’s Motion”), fails to establish standing. The Union’s Brief concedes that none of its members are employed by agricultural retailers (Union’s Br. at 10) and does not demonstrate that a decision in Petitioners’ favor in these consolidated cases will cause it or its members to suffer

an injury-in-fact. Accordingly, the Court should deny the Union's Motion and strike the Union's Brief.

The Union's Brief also should be stricken because its arguments misconstrue the narrow jurisdictional issue before this Court. The Union argues that the Petitions for Review are improper requests "seeking pre-enforcement review" (Union's Br. at 12), and that OSHA was not required to engage in notice and comment prior to issuing the Memorandum pursuant to *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). *Mortgage Bankers*, an APA case, is neither relevant to nor instructive of whether OSHA was required to adhere to the notice and comment provisions of 29 U.S.C. § 655(b) prior to issuing the Memorandum. Further, *Mortgage Bankers* did not even examine the APA issue the Union seeks to raise (and OSHA's Brief also fails to address this). *See* Pet'rs' Br. at 43. The Union's Brief therefore interjects arguments irrelevant to the narrow question before this Court that only serve to prejudice Petitioners and waste judicial resources. Thus, the Union's untimely Motion and its recent, alternative request for *amicus curiae* status should be denied, and its Brief stricken.

A. The Union's Brief Fails To Establish Standing.

There is no dispute that an applicant for intervention must establish standing. *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538 (D.C. Cir. 1999). Specifically, entities seeking leave to intervene must show (1) an injury-in-fact,

(2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The absence of any one factor is fatal to an application for intervention as of right. Petitioners are not aware of a rule that grants interest groups, such as labor unions, special dispensation.

The Union's arguments in support of its standing to intervene are misleading and fail to demonstrate its standing. First, recognizing its failure to demonstrate sufficient standing in its untimely motion to intervene, the Union blames its failure on Petitioners' challenge of its standing.¹² An intervenor's obligation is to establish standing in the first instance in its motion to intervene. *See Lujan*, 504 U.S. at 561. The Union missed its opportunity.

Second, the Union's post-hoc attempt to establish standing is misleading. In its Brief and in an attached Declaration by Michael Wright (the "Wright Declaration"), the Union claims it:

. . . represents workers in 58 separate bargaining units directly impacted by OSHA's interpretation of the scope of the "retail facilities" exception to the PSM standard. Its members will suffer an injury-in-fact if OSHA's Retail Memorandum is invalidated.

¹² According to the Union, it did not elect to attempt to demonstrate its standing in its Motion because "in the more than 40 years that the union has actively participated in litigation concerning the validity of OSHA standards, no industry petitioner has previously challenged its assertion of a legitimate interest in doing so." Union's Br. at 9, n.4.

Union Brief at 7, Wright Decl. ¶ 4. Yet the Union fails to describe with any specificity how its members will suffer an injury-in-fact if the Memorandum is vacated.

The Union also states that its members work in NAICS Code 424910, a code applicable to agricultural retailers.¹³ Wright Decl. ¶ 5. However, the Union concedes that its members do not actually work at agricultural retail facilities. Union's Br. at 10 (admitting "no USW members work at *agricultural* retail facilities").

Finally, the Union's claim that its members are directly affected by the Memorandum is false. As noted above, no Union members are employed by agricultural retailers. The sole evidentiary support for the Union's contention is the Wright Declaration. The Wright Declaration, however, is replete with qualifications regarding the purported benefits to the Union's members in two

¹³ The Union notes "NAICS Code 494910" in the Wright Declaration; however, there is no such NAICS Code. Wright Decl. ¶ 5. Thus, Petitioners assume the Union meant NAICS Code 424910. The Union cites several cases in support of the proposition that this Court routinely grants intervention by unions in cases in which OSHA standards are challenged. Union's Br. at 11, n.5. The Union's citations are inapposite: In each citation provided, either the motion to intervene was unopposed or the intervening union members worked in industries directly affected by the challenged standard. *See, e.g., Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387 (D.C. Cir. 2013) (a union intervened in support of OSHA to defend the Hazard Communication Standard, a standard that indisputably applied to all "employees," including union members).

NAICS codes applicable to (1) petroleum wholesalers and bulk stations, as well as (2) a “handful of members in agricultural *wholesale* establishments,” which implicitly sell products for further distribution. Wright Decl. ¶ 3 (emphasis added). Moreover, the Wright Declaration only contends that its members “*may* not have been protected by the Process Safety Management Standard, but *may* gain health and safety protections from that standard under OSHA’s revised interpretation.” *Id.* ¶ 4 (emphasis added).

So, the Union tacitly admits that it does not have any members who work at agricultural retail facilities. Next, it asserts this is irrelevant “because the ‘retail facilities’ exception to the Process Safety Management Standard is not limited to *agricultural* retail facilities.” Union’s Br. at 10 (emphasis in original). While the “retail facilities” exemption to the Process Safety Management Standard is not limited to the agricultural retail sector, the Memorandum’s objective was to target precisely that sector. Pet’rs’ Br. at 26-27. Because the Union apparently cannot state that it represents anyone in the agricultural retail sector, its members will not sustain any injuries-in-fact if the Memorandum is vacated. Therefore, the Union does not have standing to intervene.

Neither the Wright Declaration nor the Union’s Brief establishes that any of its members were employed by *retailers* who were exempt from compliance with the Process Safety Management Standard prior to issuance of the Memorandum or

who will sustain any injury-in-fact if it is vacated. The Union's speculative contentions fall far short of the quantum of evidence needed to establish standing to intervene.

B. The Union's Brief Includes Irrelevant, False, and Prejudicial Factual Assertions.

Much of the Union's Brief constructs a false narrative that the West Fertilizer incident would have been prevented had the facility's anhydrous ammonia tanks been subjected to a Process Safety Management hazard analysis prior to that tragedy. However, federal investigators established that the anhydrous ammonia tanks at the West Fertilizer facility maintained their integrity, and in no way contributed to or exacerbated the incident. Ammonium nitrate — a chemical not regulated under the Process Safety Management Standard — was responsible for the scale of the tragedy.¹⁴ The Union's Brief acknowledges, as it must, that ammonium nitrate, not anhydrous ammonia, had this central role in the West Fertilizer incident and that ammonium nitrate is not regulated under the Process Safety Management Standard. Union's Br. at 5.

The Union also incorrectly argues that agricultural retailers asked OSHA to "interpret" the term "retail facilities" shortly after the Process Safety Management

¹⁴ The U.S. Chemical Safety and Hazard Investigation Board Report acknowledges that "the [anhydrous ammonia] vessels did not catastrophically fail on the night of the incident." See "Investigation Report – West Fertilizer Company Fire and Explosion," at 39 (cited in Union's Br. at 4).

Standard was implemented. Union's Br. at 3. To the contrary, Petitioner TFI asked OSHA for "written confirmation" that its retail members were within the plain meaning of that term. *See* TFI's 1992 Letter, JA ___-___ (in fact, it was OSHA that "suggested that [TFI] write to [OSHA] to request written confirmation" after saying, in person, that fertilizer retail facilities were simply "not subject to the Rule").

The Union's arguments are irrelevant to the inquiry before this Court – *i.e.*, whether the "basic function" of the Memorandum is to create a new standard, violating the plain meaning of the Process Safety Management Standard. While Petitioners feel compelled to address the inaccuracies in the Union's Brief, this also serves to highlight why the Union should not be permitted to intervene or participate as *amicus curiae*. By raising irrelevant assertions, the Union only confuses the narrow inquiry before the Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Petitions for Review and grant Petitioners the relief they respectfully request. *See* Pet'rs' Br. at 52.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and this Court's Order of December 15, 2015, because this brief contains 6,391 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

DATED: March 14, 2016

/s/ Stewart D. Fried

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 25(c), I certify that on March 14, 2016, I electronically filed the foregoing *Joint Reply Brief of Petitioners* with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that, for all participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system.

/s/ Stewart D. Fried

I certify that on March 14, 2016, I transmitted the foregoing *Joint Reply Brief of Petitioners* by electronic mail to the following counsel of record:

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