ORAL ARGUMENT SCHEDULED FOR MAY 16, 2016
Nos. 15-1326 and 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
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Respondents.

On Petitions for Review of a Memorandum of the
Occupational Safety and Health Administration

FINAL BRIEF FOR THE UNITED STATES DEPARTMENT OF LABOR AND THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

M. PATRICIA SMITH
Solicitor of Labor

ANN S. ROSENTHAL
Associate Solicitor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

LAUREN S. GOODMAN
Attorney
U.S. Department of Labor
200 Constitution Ave., NW, Rm. S-4004
Washington, DC 20210
(202) 693-5445

March 28, 2016

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The parties in Case No. 15-1326 are:

Petitioners:
Agricultural Retailers Association
The Fertilizer Institute

Respondents:
U.S. Department of Labor
Occupational Safety & Health Administration

The parties in Case No. 15-1340 are:

Petitioners:
Allied Cooperative of Adams, WI
Basin Fertilizer & Chemical Co., LLC of Merrill, OR
Bern Seed, Inc. of Bern, KA
Brandt Consolidated, Inc. of Springfield, IL
Centennial Ag Supply Co. of Greeley, CO
Consumers Oil & Supply Company of Braymer, MO
Farmers Feed & Grain Company, LLC of Riceville, IA
Harvest Land Co-Op of Richmond, IN
O'Toole, Inc. of Letts, IA
Pinnacle Ag Holdings, LLC of Memphis, TN
Premier Ag Co-op Association of Columbus, IN
Sinclair Elevator, Inc. of Parkersburg, IA
South Dakota Wheat Growers of Aberdeen, SD
Stratton Seed Co. of Stuttgart, AK
The Andersons, Inc. of Maumee, OH
The Equity of Effingham, IL
The McGregor Company of Colfax, WA
Van Horn, Inc. of Mt. Zion, IL

Respondents:
U.S. Department of Labor
Occupational Safety & Health Administration

The United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC has moved to intervene in both cases.

(B) Rulings Under Review

At issue is an OSHA Memorandum, dated July 22, 2015, entitled "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(i))."

(C) Related Cases

These matters have not previously been before this Court or any other court. The undersigned counsel are not aware of any other related cases currently pending in this Court or any other court.

TABLE OF CONTENTS

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

GLOSSARY x

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 2

I. Statement of Facts 2

A. *Statutory background* 2

B. *OSHA's process safety management standard* 4

C. *History of the July 22, 2015 Retail Memorandum* 5

II. Procedural History 10

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

I. The Court Lacks Subject-Matter Jurisdiction Because the Challenged Memorandum is not an Occupational Safety and Health Standard. 12

A. *The Retail Memorandum is an interpretive rule, and thus, by definition, cannot be an OSHA standard.* 12

1. The Retail Memorandum is prototypically interpretive. 14

2. The Retail Memorandum does not create new rights or obligations....18

3. The Retail Memorandum does not amend a prior legislative rule....21

B. *Petitioners' reliance on the "basic function" test is unavailing.*....23

C. *Transfer to the district court is not warranted because Petitioners' pre-enforcement challenge to OSHA's interpretive rule is premature.*....27

II. The Court Should Grant the Steelworkers' Motion to Intervene....30

A. *The Steelworkers have standing to intervene..*....30

B. *The totality of the circumstances favors granting the Steelworkers' motion out of time.*....31

CONCLUSION....32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM – STATUTES AND REGULATIONS

TABLE OF AUTHORITIES

CASES: **Pages**

Air Transport Ass'n v. FAA,
291 F.3d 49 (D.C. Cir. 2002)....................16

**American Mining Cong. v. Mine Safety and Health Admin.*,
995 F.2d 1106 (D.C. Cir. 1993).................... 13, 16, 18, 19, 21

American Tort Reform Ass'n v. OSHA,
738 F.3d 387 (D.C. Cir. 2013)....................29

**Ass'n of Flight Attendants – CWA, AFL-CIO v. Huerta*,
785 F.3d 710 (D.C. Cir. 2015).................... 13, 21, 22

Catholic Health Initiatives v. Sebelius,
617 F.3d 490 (D.C. Cir. 2010).................... 15, 16

**Cent. Texas Tel. Coop., Inc. v. FCC*,
402 F.3d 205 (D.C. Cir. 2005).................... 20, 21

Chamber of Commerce v. U.S. Dep't of Labor,
174 F.3d 206 (D.C. Cir. 1999).................... 26, 27

Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n,
788 F.3d 312 (D.C. Cir. 2015).................... 30, 31

Edison Electric Institute (EEI) v. OSHA,
411 F.3d 272 (D.C. Cir. 2005).................... 28, 29

Fabi Constr. Co. v. Sec'y of Labor,
370 F.3d 29 (D.C. Cir. 2004)....................17

Fabi Constr. Co. v. Sec'y of Labor,
508 F.3d 1077 (D.C. Cir. 2007)....................19

*** Authorities upon which we chiefly rely are marked with asterisks.**

*_Fertilizer Inst. v. U.S. EPA_,
935 F.2d 1303 (D.C. Cir. 1991)..16-17, 18, 20

Gen. Motors Corp. v. Ruckelshaus,
742 F.2d 1561 (D.C. Cir. 1984)...15

Martin v. Occupational Safety and Health Review Comm'n,
499 U.S. 144 (1991) 3, 14, 19

Mendoza v. Perez,
754 F.3d 1002 (D.C. Cir. 2014)... 14, 17

Nat'l Latino Media Coalition v, FCC,
816 F.2d 785 (D.C. Cir. 1987)..25

Nat'l Roofing Contractors Ass'n v. U.S. Dep't of Labor,
639 F.3d 339 (7th Cir. 2011) 13

Orengo Caraballo v. Reich,
11 F.3d 186, 195 (D.C. Cir. 1993) 14

*_Perez v. Mortgage Bankers Ass'n_,
135 S.Ct. 1199 (2015) 14, 21, 22, 23

Petro Hunt LLC, 24 O.S.H. Cas. (BNA) 1360,
2012 WL 3550136 (OSHRC ALJ June 20, 2012) 17

Roane v. Leonhart,
741 F.3d 147 (D.C. Cir. 2014)..31

Steel Erectors Ass'n v. OSHA,
636 F.3d 107 (4th Cir 2011) 22

Sturm, Ruger & Co. v Chao,
300 F.3d 867 (D.C. Cir. 2002)..28

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 28

United Techs. Corp. v. U.S. EPA,
821 F.2d 714 (D.C. Cir. 1987).. 15, 18

Workplace Health & Safety Council v. Reich,
56 F.3d 1465 (D.C. Cir. 1995).. 12, 24, 25

STATUTES AND REGULATIONS:

5 U.S.C. § 553(b)...13

28 U.S.C. § 1631...29

Occupational Safety and Health Act of 1970

29 U.S.C. § 651(a)...2

29 U.S.C. § 651(b)...2

*29 U.S.C. § 652(8).. 3, 12, 24

29 U.S.C. § 654(a)(2)..3

29 U.S.C. § 655...2

*29 U.S.C. § 655(f)... 1, 3, 11, 12

29 U.S.C. § 657...24

29 U.S.C. § 658...3

29 U.S.C. § 659...3

29 U.S.C. § 659(b)...3, 28

29 U.S.C. § 659(c)...3, 28

29 U.S.C. § 660...3

29 U.S.C. § 661 ....3, 28

29 U.S.C. § 661(j) 3

29 C.F.R. § 1910.119..4

29 C.F.R. § 1910.119 (*Purpose*)..4

*29 C.F.R. § 1910.119(a)(2)(i).. 4, 14, 21

29 C.F.R. § 1910.119(e) 4

29 C.F.R. § 1910.119(f)..4

29 C.F.R. § 1910.119(g) 4

29 C.F.R. § 1910.119(n) 4

MISCELLANEOUS:

Federal Rules of Appellate Procedure:

Fed. R. App. P. 15(d) 10, 31

Fed. R. App. P. 26(b) 31

Federal Register Notices:

Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012). 2

Executive Order 13650 (*Improving Chemical Facility Safety and Security*), 78 Fed. Reg. 48029 (Aug. 1, 2013) 6

Process Safety Management and Prevention of Major Chemical Accidents, Request for Information, 78 Fed. Reg. 73756 (Dec. 9, 2013) 6, 7, 15

Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents,
57 Fed. Reg. 6356 (Feb. 24, 1992) 4, 5, 8

Other Authorities:

Fact Sheet: Executive Order on Improving Chemical Facility Safety and Security (Aug. 1, 2013) 6

Letter to Gary Myers (President, The Fertilizer Institute) (June 19, 1992) 5, 14

Letter to J.D. Varn III (Vice-President, Varnco, Inc.) (Jan. 26, 2001) 5

Letter to Robert A. Heidrich (Operations Department, Brewer Environmental Industries, Inc.) (Oct. 23, 1992) 5

Memorandum entitled "Applicability of 29 CFR 1910.119 Process Safety Management (PSM) Standard to the Manufacture of Explosives Required Under 29 CFR 1910.109(k)(2)" (Nov. 8, 1995) 5, 6

*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) 7, 8, 9, 15

OSHA's Responses to Public Comment on its New Interpretation of the Term "Retail Facilities" in the PSM Standard 8

PSM Retail Exemption Enforcement Delay Notice (Dec. 23, 2015) 9, 28

GLOSSARY

APA:	Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.
NAICS:	North American Industry Classification System
OSHA:	The Occupational Safety and Health Administration
OSH Act (or Act):	The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
PSM:	OSHA's process safety management standard, 29 C.F.R. § 1910.119
Retail Memorandum (or Memorandum)	OSHA memorandum of July 22, 2015 entitled "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(i))"
Review Commission (or Commission)	Occupational Safety and Health Review Commission
RFI:	Request for Information, 78 Fed. Reg. 73756 (Dec. 9, 2013)
Secretary:	The United States Secretary of Labor
SIC:	Standard Industrial Classification
Steelworkers:	United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC

JURISDICTIONAL STATEMENT

These cases involve a challenge to a memorandum issued by the Occupational Safety and Health Administration (OSHA) on July 22, 2015. The Court lacks subject-matter jurisdiction over these cases because the challenged memorandum is not an occupational safety and health standard subject to pre-enforcement review in this Court under the Occupational Safety and Health Act (OSH Act or Act). *See* 29 U.S.C. § 655(f).

STATEMENT OF ISSUES

1. Whether the Court lacks subject-matter jurisdiction over the petitions for review because the challenged memorandum is an interpretive rule, not an occupational safety and health standard.

2. Whether the Court should grant the motion to intervene filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC (Steelworkers).

STATUTES AND REGULATIONS

Except for the excerpts from the OSH Act contained in the Addendum to this brief, all applicable statutes and regulations are included in Addendum 1 to the Opening Joint Brief of Petitioners.

STATEMENT OF THE CASE

I. Statement of Facts

A. *Statutory background*

After extensive investigation, Congress concluded in 1970 that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). Accordingly, Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

To effectuate the Act's purpose, Congress authorized the Secretary of Labor (Secretary) to promulgate occupational safety and health standards following specified rulemaking procedures. *See* 29 U.S.C. § 655.[1] The OSH Act defines an occupational safety and health standard as a rule that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and

[1] The Secretary has delegated most of his responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms Secretary and OSHA are used interchangeably herein.

places of employment." 29 U.S.C. § 652(8). Any party adversely affected by the promulgation of an occupational safety and health standard may, "at any time prior to the sixtieth day after such standard is promulgated[,]" challenge "the validity of such standard" in "the United States court of appeals for the circuit wherein such person resides or has his principal place of business." 29 U.S.C. § 655(f).

Employers must comply with the Secretary's standards and other OSHA regulations, and OSHA can cite employers for noncompliance. *See* 29 U.S.C. §§ 654(a)(2), 658, 659. OSHA citations are subject to review before the Occupational Safety and Health Review Commission – an independent adjudicative forum established by the OSH Act. *See* 29 U.S.C. §§ 659(c), 661. *See also Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991). When an employer contests an OSHA citation, its abatement obligations are stayed until the Commission enters a final order. *See* 29 U.S.C. § 659(b). Administrative law judges hold hearings on contested citations. *See* 29 U.S.C. §§ 659(c), 661(j). Any party dissatisfied with a judge's decision may petition for discretionary review by the three-member Review Commission. *See* 29 U.S.C. § 661(j). If the Commission does not review the judge's decision, that decision becomes the Commission's final order. *See id.* Orders of the Review Commission are subject to judicial review in the federal courts of appeals. *See* 29 U.S.C. § 660.

B. *OSHA's process safety management standard*

OSHA promulgated its process safety management (PSM) standard (29 C.F.R. § 1910.119) in 1992 in order to "provide safe and healthful employment and places of employment for employees in industries which have processes involving highly hazardous chemicals." Joint Appendix (J.A.) 70 (Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6359 (Feb. 24, 1992)). The standard "contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals" that "may result in toxic, fire or explosion hazards." 29 C.F.R. § 1910.119 (*Purpose*). It includes provisions addressing process hazard analyses (29 C.F.R. § 1910.119(e)), written operating procedures (29 C.F.R. § 1910.119(f)), worker training (29 C.F.R. § 1910.119(g)), and emergency planning and response (29 C.F.R. § 1910.119(n)).

The PSM standard states that its requirements do not apply to "retail facilities." 29 C.F.R. § 1910.119(a)(2)(i). Although the standard does not define the term "retail," the preamble published with the rule explained that OSHA intended the retail exemption to apply to facilities, such as gas stations, that sell highly hazardous chemicals in "small volume packages, containers and allotments." J.A. 74 (57 Fed. Reg. at 6369). OSHA believed that catastrophic releases of hazardous chemicals were unlikely in these facilities and that these

facilities did not present the same hazards as the types of facilities OSHA designed the PSM standard to cover. *See id.*

C. *History of the July 22, 2015 Retail Memorandum*

In 1992, OSHA issued an interpretation letter stating that a "retail facility" for purposes of the PSM standard was an establishment "which would otherwise be subject to the PSM standard, at which more than half of the income is obtained from direct sales to end users." J.A. 81 (Letter to Gary Myers (President, The Fertilizer Institute) (June 19, 1992)). OSHA reiterated this fifty-percent test in subsequent letters of interpretation. *See, e.g.*, J.A. 94 (Letter to J.D. Varn III (Vice-President, Varnco, Inc.) (Jan. 26, 2001)); J.A. 91 (Letter to Robert A. Heidrich (Operations Department, Brewer Environmental Industries, Inc.) (Oct. 23, 1992)). Also, in a memorandum issued in 1995, OSHA advised its field personnel that even applying the fifty-percent test, the retail exemption was intended to apply to establishments "in the retail trade as delineated in the Standard Industrial Classification (SIC) Manual," and that "retail trade establishments [generally] sell merchandise to the general public for personal or household consumption." J.A. 93 (Memorandum entitled "Applicability of 29 CFR 1910.119 Process Safety Management (PSM) Standard to the Manufacture of Explosives Required Under 29 CFR 1910.109(k)(2)" (Nov. 8, 1995)). In the 1995 memorandum, OSHA

distinguished retail establishments from "wholesale trade establishments" that "sell similar merchandise for exclusive use by industry." *Id*.

In August of 2013, after a catastrophic explosion at a fertilizer plant in West, Texas, President Obama issued Executive Order 13650 (*Improving Chemical Facility Safety and Security*) to improve safety and security at facilities that handle and store hazardous chemicals. *See* J.A. 95-99 (78 Fed. Reg. 48029 (Aug. 1, 2013)); J.A. 100-03 (Fact Sheet: Executive Order on Improving Chemical Facility Safety and Security (Aug. 1, 2013)). As part of the Executive Order, the President directed the Secretary to "identify any changes that need to be made in the retail . . . exemption[] in the PSM Standard[,]" and to "issue a Request for Information designed to identify issues related to modernization of the PSM Standard . . . necessary to meet the goal of preventing major chemical accidents." J.A. 98 (78 Fed. Reg. at 48032).

In accordance with the Executive Order, OSHA issued a Request for Information (RFI) on December 9, 2013, requesting comments on a number of issues related to the PSM standard. *See* J.A. 1-7 (Process Safety Management and Prevention of Major Chemical Accidents, 78 Fed. Reg. 73756 (Dec. 9, 2013)). In the RFI, OSHA stated that the fifty-percent test it had been using to give meaning to the term "retail" in the PSM standard was, upon further reflection, "inconsistent with the normal meaning of 'retail' and the preamble's explanation of the purpose

of the [retail] exemption." J.A. 4 (78 Fed. Reg. at 73763). OSHA preliminarily determined that only facilities listed in Sectors 44 and 45 ("Retail Trade") of the U.S. Department of Commerce North American Industry Classification System (NAICS) Manual that "sell highly hazardous chemicals in small containers, packages, or allotments to the general public qualify for the retail-facilities exemption" in the PSM standard. *Id.*[2] OSHA requested comments on what facilities the retail exemption should cover, whether OSHA's fifty-percent test was adequate, and what the safety and economic impacts would be if OSHA adopted an interpretation based on the NAICS Manual. *See* J.A. 5, 7 (78 Fed. Reg. at 73764, 73768). OSHA received thirteen comments in response to these questions.

On July 22, 2015, OSHA issued a memorandum entitled "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 CFR 1910.119(a)(2)(i))" (Retail Memorandum or Memorandum). *See* J.A. 45-47. The Memorandum adopted the approach OSHA described in the RFI and interprets "retail" in accordance with the NAICS Manual – an

---

[2] The United States Census Bureau explains that the NAICS Manual "is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." *See* U.S. CENSUS BUREAU, http://www.census.gov/eos/www/naics/ (last visited Feb. 18, 2016). "NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system." *Id.*

interpretation OSHA finds consistent with the original intent of the PSM standard and the commonly understood meaning of "retail." *See id. See also* J.A. 53-58 (OSHA's Responses to Public Comment on its New Interpretation of the Term "Retail Facilities" in the PSM Standard (Ex. 0106 in OSHA Docket No. OSHA-2013-0020)).

In the Retail Memorandum, OSHA explains that "the 50 percent test allow[ed] employers who sell or distribute large, bulk quantities of highly hazardous chemicals directly to end users to claim the exemption, even if the end users [were] themselves commercial establishments." J.A. 45. OSHA found this outcome inconsistent with its original intent, as stated in the preamble to the PSM standard, for the retail exemption to apply only to facilities handling "small container, package, or allotment sizes" of hazardous chemicals, as such facilities "do not present the same safety hazards as establishments that handle large, bulk quantities of materials." *Id. See also* J.A. 74 (57 Fed. Reg. at 6369). OSHA determined that the types of facilities described as "retail" in the preamble to the PSM standard "generally fall into NAICS Sectors 44-45 – Retail Trade," whereas "facilities that handle large, bulk quantities of materials typically fall into NAICS Sector 42 – Wholesale Trade – and include facilities that sell or arrange the purchase or sale of raw and intermediate materials and supplies used in the production of other end products." J.A. 45-46. Because the plain language of the

exemption covers only retail facilities, OSHA concluded that the exemption "should never have been interpreted to cover facilities engaged in distinctly wholesale activities." J.A. 46.

The Retail Memorandum makes clear that OSHA "now interprets the retail facilities exemption in accord with its original intent," and that facilities qualify for the retail exemption only if they are "engaged in retail trade as defined by the current and any future updates to sectors 44 and 45 of the NAICS Manual." *Id.* NAICS Sector 44-45 is comprised of "establishments engaged in retailing merchandise, generally without transformation, and rendering services incidental to the sale of merchandise"; retailers in this NAICS category "are . . . organized to sell merchandise in small quantities to the general public." U.S. CENSUS BUREAU, http://www.census.gov/retail/mrts/www/benchmark/2015/html/naicsdef.html (last visited Feb. 18, 2016).

In December of 2015, OSHA issued a "PSM Retail Exemption Enforcement Delay Notice" stating that "[t]hrough September 30, 2016, OSHA will not cite employers for violations of the PSM standard at facilities that it would not have cited applying the interpretation of the term 'retail' that was in place prior to July 22, 2015." J.A. 60. This enforcement delay provides affected facilities over a year from the time OSHA issued the Retail Memorandum to come into compliance with the relevant PSM requirements.

II. Procedural History

The Agricultural Retailers Association and the Fertilizer Institute filed a petition for pre-enforcement review of the Retail Memorandum on September 16, 2015 (Case No. 15-1326). On September 21, 2015, members of those organizations filed a second petition for review (Case No. 15-1340). The Court consolidated the two cases.

On November 2, 2015, OSHA filed a motion to dismiss these cases on the grounds that the Court lacks subject-matter jurisdiction. OSHA maintains that the Retail Memorandum is not an "occupational safety and health standard" subject to pre-enforcement review in this Court under the OSH Act. On November 5, 2015 (approximately two weeks after expiration of the period allowed for intervention under Fed. R. App. P. 15(d)), the Steelworkers filed a motion requesting leave to intervene (out of time) on behalf of OSHA in these consolidated cases. The Agricultural Retailers Association and the other petitioners opposed the Steelworkers' request to intervene. Also, on November 16, 2015, the petitioners filed a motion asking the Court to stay enforcement of the Retail Memorandum pending judicial review. The parties completed briefing on the motion to dismiss and the motion to intervene. By order dated December 15, 2015, the Court referred those two motions to the merits panel and deferred further proceedings on the petitioners' stay motion.

SUMMARY OF THE ARGUMENT

The Court lacks subject-matter jurisdiction over these consolidated petitions for review because the Retail Memorandum is not an occupational safety and health standard that is directly reviewable by the Court under section 6(f) of the OSH Act (29 U.S.C. § 655(f)). An occupational safety and health standard is a substantive rule that imposes new obligations on parties. The Memorandum, however, is an interpretive rule that imposes no new obligations; it simply informs the regulated community of the manner in which OSHA interprets the retail exemption in the scope provisions of the PSM standard, thus clarifying the universe of employers OSHA deems subject to the requirements of the standard. Moreover, the interpretive rule embodied in the Retail Memorandum does not become a legislative rule (or an OSHA standard) simply because it reflects a change from a prior interpretation or will have an impact on affected facilities.

Furthermore, the Court should permit the Steelworkers to intervene in this litigation. The union has a significant interest in the outcome of this case by virtue of representing workers at facilities affected by the Retail Memorandum, and the Court should exercise its discretion to accept the Steelworkers' late filing because the Court will benefit from the union's input and allowing the union to intervene will not disrupt or delay the litigation or prejudice any party.

ARGUMENT

I. The Court Lacks Subject-Matter Jurisdiction Because the Challenged Memorandum is not an Occupational Safety and Health Standard.

A. *The Retail Memorandum is an interpretive rule, and thus, by definition, cannot be an OSHA standard.*

Petitioners contend that the Retail Memorandum is an occupational safety and health standard that is directly reviewable by the Court under section 6(f) of the OSH Act (29 U.S.C. § 655(f)). They are wrong. The Memorandum is an interpretive rule, not a standard, so section 6(f) of the OSH Act does not apply and the Court lacks subject-matter jurisdiction.

Section 6(f) of the OSH Act provides that the Court's jurisdiction is limited to review of occupational safety and health standards. *See* 29 U.S.C. § 655(f). *See also Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467 (D.C. Cir. 1995). As noted previously, an occupational safety and health standard, as defined in the OSH Act, is a rule that "*requires* conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (emphasis added). Standards are thus substantive rules affecting individual rights and obligations. By contrast, interpretive rules advise the regulated community of the manner in which an agency construes the regulations it administers and have no legal effect independent of the underlying

regulations. *See American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-12 (D.C. Cir. 1993). Thus, by definition, an interpretive rule (which does not carry the force of law) cannot be an OSHA standard (which requires the adoption of practices to address workplace safety and health hazards).[3]

The Retail Memorandum satisfies all of the criteria necessary to classify it as an interpretive rule: (1) it advises the public of OSHA's construction of the term "retail facilities" in the PSM standard; (2) it does not create new legal rights or obligations independent of the PSM standard; and (3) it does not amend a prior legislative rule. *See Ass'n of Flight Attendants – CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015); *American Mining Cong.*, 995 F.2d at 1112.[4]

---

[3] Interpretive rules, like policy statements and rules of agency organization, procedure, or practice, are exempt from the notice and comment requirements of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553(b). Petitioners suggest that it is not pertinent to the jurisdictional question in this case whether the Retail Memorandum is an interpretive rule for purposes of the APA. *See* Petitioners' Br. at 32-35. This inquiry is quite pertinent, however, because a rule that meets the test for an interpretive rule cannot also meet the definition of an OSHA standard. *Cf. Nat'l Roofing Contractors Ass'n v. U.S. Dep't of Labor*, 639 F.3d 339 (7th Cir. 2011) (court dismissed challenge to OSHA directive because the directive was an enforcement policy, not an OSHA standard).

[4] This Court will also look to see "whether the agency has published the rule in the Code of Federal Regulations" and "whether the agency has explicitly invoked its general legislative authority." *American Mining Cong*., 995 F.2d at 1112. With respect to the Retail Memorandum, the answers to both questions are "no" – providing additional support for classifying the Memorandum as an interpretive rule.

1. The Retail Memorandum is prototypically interpretive.

The "critical feature" of an interpretive rule is that it "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1204 (2015) (internal quotations omitted). *See also Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (interpretive rule describes agency's view of what an existing regulation means). Because the PSM standard does not define "retail facilities," OSHA is presumed to have the power to resolve that ambiguity. *See Martin*, 499 U.S. at 151 (agency's authority to interpret its own regulations is a component of its delegated lawmaking powers). This is precisely what the Retail Memorandum does. It states what OSHA thinks the term "retail facilities" means for purposes of the PSM standard (29 C.F.R. § 1910.119(a)(2)(i)); it does nothing more. As this Court has recognized before, this type of statement, which "seek[s] to interpret a statutory or regulatory term[,] is . . . the quintessential example of an interpretive rule." *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).

OSHA has always regarded the issue of what "retail" means as interpretive. That is how OSHA described it in the 1992 letter initially adopting the fifty-percent test. *See* J.A. 81 (Letter to Gary Myers) ("With respect to enforcement of the PSM Standard, a retail facility *means* an establishment . . . at which more than half of the income is obtained from direct sales to end users.") (emphasis added).

That is how OSHA described it in the RFI it issued in 2013: "OSHA believes that only retail-trade facilities listed in NAICS sectors 44 and 45 that sell highly hazardous chemicals in small containers, packages, or allotments to the general public qualify for the retail-facilities exemption." J.A. 4 (78 Fed. Reg. at 73763). And that is what OSHA said in the Retail Memorandum itself: "This memorandum revises [OSHA's] *interpretation* of the exemption of retail facilities from coverage of the [PSM] standard." J.A. 45 (emphasis added). The fact that OSHA has characterized the Retail Memorandum as interpretive indicates its interpretive nature. *See United Techs. Corp. v. U.S. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987) (agency's characterization of rule is relevant factor); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (rule's stated purpose indicated its interpretive nature).

Moreover, the Memorandum construes specific language in the PSM standard, not general or vague regulatory terms. In *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010), this Court distinguished between agency actions, like the Retail Memorandum, that "derive a proposition from an existing document whose meaning compels or logically justifies the proposition" and agency actions "announcing propositions that specify applications" of "vague or vacuous terms – such as 'fair and equitable,' 'just and reasonable,' 'in the public

interest' and the like." *Catholic Health Initiatives*, 617 F.3d at 494-95 (internal quotations omitted). The former are interpretive; the latter are not. *See id.*

OSHA's interpretation that the term "retail facilities" in the PSM standard means facilities classified as retail per the NAICS Manual is one that "flow[s] fairly from the substance" of the rule. *Id.* at 494 (internal quotations omitted). NAICS is a widely-used system that classifies firms in accordance with the processes they use to produce or provide goods and services. The criteria NAICS applies in distinguishing between retailers and wholesalers have found general acceptance in industry, and are directly related to the purpose of the retail facilities exemption as set forth in the preamble.

In *American Mining*, this Court upheld an interpretive rule that was based on a classification system analogous to NAICS. In that case, the Court held that a Mine Safety and Health Administration rule that defined the term "diagnosis" in an MSHA regulation to mean a chest x-ray rating of 1/0 or above on the International Labor Office classification system was an interpretive rule. *See American Mining Cong.*, 995 F.2d at 1112-13. The Court noted that a score of 1/0 or higher is generally accepted as the basis for a finding of disease. *Id.* *See also Air Transport Ass'n v. FAA*, 291 F.3d 49, 55-56 (D.C. Cir. 2002) (FAA letter explaining the meaning of the phrase "scheduled completion of any flight segment" in flight time limitation regulations was interpretive); *Fertilizer Inst. v. U.S. EPA*, 935 F.2d

1303, 1307-09 (D.C. Cir. 1991) (EPA preamble statement clarifying the meaning of the term "release" for purposes of statutory reporting requirement was interpretive).

Petitioners suggest this case is akin to *Mendoza v. Perez*, in which this Court ruled that Department of Labor letters were legislative, not interpretive, rules. *See* Petitioners' Br. at 38-39. That case is readily distinguishable, however. Unlike the Retail Memorandum, which gives meaning to a specific phrase in OSHA's existing PSM standard, the Court found that the letters in *Mendoza* did not interpret any specific statutory or regulatory language, but instead served the legislative function of implementing broad grants of authority in the underlying statute and regulations. *See Mendoza*, 754 F.3d at 1021-23.[5]

[5] The Retail Memorandum is similarly distinguishable from the memo deemed legislative in *Petro Hunt, LLC*, 24 O.S.H. Cas. (BNA) 1360, 2012 WL 3550136 (OSHRC ALJ June 20, 2012), a case cited frequently in Petitioners' brief. In *Petro Hunt*, the OSHA memo in question required the use of specific types of protective clothing in oil and gas operations. An administrative law judge for the Review Commission found that the memo was not an interpretation of OSHA's personal protective equipment standard because it converted the standard's broad performance-oriented language into a specific requirement. *Petro Hunt*, 2012 WL 3550136, at *8-*10. In contrast to the Retail Memorandum, the memo in *Petro Hunt* did not, according to the judge, give meaning to specific terminology in an existing regulatory provision. In any event, as an unreviewed decision of a Review Commission administrative law judge, *Petro Hunt* has no precedential value. *See Fabi Constr. Co. v. Sec'y of Labor*, 370 F.3d 29, 35 n.7 (D.C. Cir. 2004).

2. The Retail Memorandum does not create new rights or obligations.

The Retail Memorandum is not legislative (and hence is not an OSHA standard) because it does not purport to establish any new rights or obligations. *See, e.g., United Techs. Corp.*, 821 F.2d at 718 (rule is legislative "if by its action the agency intends to create new law, rights or duties") (internal quotations omitted). Rather, as explained previously, the Retail Memorandum interprets the scope of the existing exception for retail facilities in the PSM standard. The interpretation does not go beyond the actual language of the PSM standard and therefore does not create a new legislative rule. *See Fertilizer Inst.*, 935 F.2d at 1308 (rule is legislative when it goes beyond the text of existing requirements). All of the duties and obligations Petitioners are concerned about arise, not from the Memorandum, but from the text of the PSM standard itself. Employers are not subject to citation for failing to comply with the terms of the Memorandum; indeed, the Memorandum has no terms with which to comply.

Another way to approach this issue is to ask whether there would be an adequate basis for enforcement in the absence of the Retail Memorandum. *See American Mining Cong.*, 995 F.2d at 1112. The answer is "yes." The legislative basis for enforcement is the text of the PSM standard, not the Memorandum. In fact, OSHA could withdraw the Memorandum and prior interpretations of the retail exemption and establish its new interpretation of the standard through case by case

enforcement. *See Martin*, 499 U.S. at 157 (OSHA's litigating position before the Review Commission is an exercise of delegated lawmaking powers); *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (OSHA's interpretation may be entitled to deference even if announced for the first time in litigation); *American Mining Cong.*, 995 F.2d at 1111-12 (where a legislative rule creates the legal basis for enforcement, an agency can choose to let its interpretation evolve in the process of enforcement). With or without the Retail Memorandum, the validity of OSHA's interpretation will be tested in individual enforcement proceedings. *See, e.g., Fabi Constr. Co.*, 508 F.3d at 1085-88 (rejecting OSHA's interpretation of a construction safety standard).[6]

Petitioners argue that the Retail Memorandum *does* create legal obligations because it has the *effect* of requiring certain facilities to comply with the PSM standard, at some expense, for the first time. *See* Petitioners' Br. at 27-28, 39-40. This argument has no merit. Agency interpretations do not lose their interpretive status simply because they have practical implications for the regulated

---

[6] While the Retail Memorandum is not a necessary predicate to enforcement, it serves an important public interest by providing advance notice to the regulated community of the manner in which OSHA intends to enforce the retail exemption. In *American Mining Congress*, this Court noted: "The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretive rule' so narrowly as to drive agencies into pure ad hocery – an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties." *American Mining Cong.*, 995 F.2d at 1112.

community. In *Fertilizer Institute*, this Court explained that "regardless of the consequences" of an agency action, "a rule will be considered interpretive if it represents an agency's explanation" of a pre-existing legal requirement. *Fertilizer Inst.*, 935 F.2d at 1308. In other words, that an agency action "may affect how parties act does not make [it] legislative." *Id*. *See also Cent. Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) ("[T]o the extent petitioners are contending that interpretive rules cannot be conduct-altering, the law is to the contrary."). Put simply, an interpretive rule "may have the effect of creating new duties" and is not legislative as a result. *Cent. Texas Tel. Coop.*, 402 F.3d at 214 (internal quotations omitted).

Furthermore, the fact that affected entities may incur costs in complying with the PSM standard does not mean that the Retail Memorandum serves a legislative function or creates new legal obligations. This Court has rejected a "substantial impact" test for distinguishing between interpretive and legislative rules. *See id.* (rejecting contention that agency action was legislative because it had an "adverse financial impact" on some parties). Because both legislative and interpretive rules may "vitally affect private interests," this Court has found that the "substantial impact test has no utility in distinguishing between the two." *Id*. (internal quotations omitted). Therefore, "the mere fact that an interpretive rule

may have a substantial impact does not transform it into a legislative rule." *Id.* (internal quotations omitted).

3. The Retail Memorandum does not amend a prior legislative rule.

A rule that amends a prior legislative rule must itself be legislative. *See American Mining Cong.*, 995 F.2d at 1109. However, the Retail Memorandum does not amend a prior legislative rule. The only prior legislative rule at issue here is the PSM standard's exception for retail facilities (29 C.F.R. § 1910.119(a)(2)(i)), and that exception remains exactly the same as it was when OSHA first promulgated the PSM standard in 1992. As explained previously, the interpretation announced in the Retail Memorandum (that excepted retail facilities are those facilities classified as retail under the NIACS Manual) is entirely consistent with the phrase "retail facilities" in the PSM standard; the Memorandum neither "repudiates [nor] is irreconcilable with" the existing legislative rule. *American Mining Cong.*, 995 F.2d at 1109 (internal quotations omitted). And the Supreme Court's decision in *Mortgage Bankers* makes clear that an agency does not amend an underlying source of law simply by interpreting its terms. *Mortgage Bankers Ass'n*, 135 S.Ct. at 1208. *See also Ass'n of Flight Attendants*, 785 F.3d at 713 ("agency interpretations . . . do not 'amend' the regulations to which they refer").

Petitioners contend that they "are not challenging a mere revision in an agency 'interpretation'" (Petitioners' Br. at 44) and that the Retail Memorandum effectively changes the underlying standard. In doing so, Petitioners appear to overlook the fact that it was OSHA's prior interpretation of the retail facilities exemption (the fifty-percent test), *not* definitive language in the PSM standard itself, that spared the affected facilities from compliance obligations at the outset. The Retail Memorandum reflects a change in OSHA's *interpretation* of the PSM standard, not a change in the standard, and amending an interpretation (even significantly) does not create new rights or obligations any more so than does issuing the initial interpretation in the first place. *See Mortgage Bankers Ass'n*, 135 S.Ct. at 1207-08 (rejecting argument that changing an interpretation effectively amends the underlying legal requirement); *Ass'n of Flight Attendants*, 785 F.3d at 716 ("[U]nder *Perez*, it is clear that an agency does not 'amend' an established regulation merely by issuing a new interpretation of the regulation."). *See also Steel Erectors Ass'n v. OSHA*, 636 F.3d 107, 116 (4th Cir 2011) (OSHA directive was not an OSHA standard because, even though it changed the manner in which OSHA was enforcing the underlying standard, it did not impose any new requirements not already contained in the standard).[7]

[7] Petitioners contend that *Mortgage Bankers* allows for APA claims when an agency action affects reliance interests among regulated entities. *See* Petitioners' Br. at 44-45. That decision does not suggest, however, that reliance issues have a

Notably, Petitioners concede that OSHA's prior interpretation of "retail facilities" was "guidance" that did not have the effect of amending the PSM standard. *See* Petitioners' Br. at 8, 9, 16, 21, 30, 40, 42, 44, and 45. They fail to explain why, if the letters adopting the fifty-percent test constituted interpretive guidance, the Retail Memorandum setting forth the new interpretation is not also guidance. The fifty-percent test and the Retail Memorandum serve precisely the same purpose – they give definite meaning to the term "retail facilities" in the PSM standard. *See Mortgage Bankers Ass'n*, 135 S.Ct. at 1208. If the fifty-percent test constituted interpretive "guidance" – as Petitioners concede – so does the new Memorandum; the two are equally interpretive. The 2015 Memorandum no more effects a change in the PSM standard than did OSHA's prior interpretation of "retail facilities."

B. *Petitioners' reliance on the "basic function" test is unavailing.*

Petitioners correctly state that some courts have applied a "basic function" test to distinguish between OSHA standards and other OSHA regulations. An OSHA standard is a specific type of OSHA regulation that, as explained previously, "requires conditions, or the adoption or use of one or more practices,

---

role to play in distinguishing legislative from interpretive rules. The Court noted simply that reliance interests may factor into the burden an agency must meet when justifying its actions on their merits. *Mortgage Bankers Ass'n*, 135 S.Ct. at 1209. The Court is not faced with addressing the merits of the interpretation announced in the Retail Memorandum, so this piece of the *Mortgage Bankers* decision is inapposite.

means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" 29 U.S.C. § 652(8). OSHA can also promulgate regulations that are not occupational safety and health standards, such as those addressing employers' reporting and recordkeeping duties. *See* 29 U.S.C. § 657. OSHA standards are reviewable directly in the court of appeals while other OSHA regulations are subject to review in district court. *See Workplace Health & Safety Council*, 56 F.3d at 1467. In assessing whether an OSHA rule is a standard or another type of OSHA regulation for jurisdictional purposes, courts have asked "whether the rule, in its basic function, reasonably purports to correct a particular significant risk, and is thus a standard, or rather is merely a general enforcement or detection procedure and thus a regulation." *Id*. at 1468 (internal quotations omitted).

Petitioners urge the Court to apply this "basic function" test to the jurisdictional question presented by this litigation and argue that an analysis of the basic function of the Retail Memorandum demonstrates that it is a standard. *See* Petitioners' Br. at 21-31. This argument is unavailing for two reasons. First, the "basic function" test was designed to distinguish between two types of substantive rules (standards and other OSHA regulations), not between substantive and interpretive rules, and is therefore not relevant to the jurisdictional issue in the case at bar. Second, the Retail Memorandum's basic function is interpretive, not

substantive, so OSHA should prevail even if the Court applies the petitioners' favored test.

An OSHA standard is a substantive rule because it establishes a rule of law that is not subject to challenge in individual enforcement cases. *See Nat'l Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) ("A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute."). Other OSHA regulations are also substantive rules because they impose legal duties, albeit of a different nature than those imposed by standards. *Cf. Workplace Health & Safety Council*, 56 F.3d at 1468 (OSHA regulations that are not standards address enforcement and detection procedures designed to further the goals of the Act generally). Petitioners' reliance on the "basic function" test – designed to distinguish between these two types of substantive OSHA rules – is premised on the false notion that every OSHA rule must be either a standard or another type of OSHA regulation. Interpretive rules are not substantive rules at all (*i.e.*, they are neither standards *nor* regulations), as they create no new rights or obligations and have no binding legal effect. Thus, with its focus on whether a rule is a standard aimed toward correction of a specific hazard or a regulation involving enquiry into possible hazards, 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, in which case it is neither a

standard nor a regulation, or a substantive rule, in which case it must be a standard.[8] *Cf. Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 210-11 (D.C. Cir. 1999) (court forced to determine whether OSHA directive was standard or regulation but found neither moniker entirely apt).

Even if the Court applies the "basic function" test, however, the conclusion must be the same. The Retail Memorandum is not a standard. The Memorandum's basic function is to interpret the meaning of a term in the "scope" section of the PSM standard. It is the terms of the PSM standard, not the interpretation in the Memorandum, that purport to address the significant risk associated with processes involving highly hazardous chemicals. That OSHA views the interpretation in the Memorandum as better effectuating the intent of the PSM standard than the prior fifty-percent test does not mean that the interpretation functions as a standard. As already explained, the Memorandum is not a necessary predicate to enforcement of the PSM standard at any facilities and speaks not at all to the specific measures employers must take to protect workers from the relevant hazards.

The Retail Memorandum is entirely different from the directive at issue in *Chamber of Commerce*, a case heavily relied upon by Petitioners. *Chamber of*

---

[8] Neither OSHA nor Petitioners contend that the Retail Memorandum is an OSHA regulation addressing general enforcement or detection procedures. *See* Petitioners' Br. at 29-31.

Commerce dealt with an OSHA directive that established a primary inspection list of facilities and provided that a facility could remove itself from the list only if it voluntarily agreed to take certain remedial measures over and above the requirements of any OSHA standard. This Court found the directive to be a standard because its basic function was to require employers, under the threat of certain inspection, to adopt new safety standards "more demanding than those required by the [OSH] Act or by any pre-existing regulation implementing the Act." *Chamber of Commerce*, 174 F.3d at 211. The Retail Memorandum, in contrast, does not impose any new obligations; instead, it simply provides notice to the regulated community of OSHA's interpretation of the "retail facilities" exemption that already exists in the PSM standard.

C. *Transfer to the district court is not warranted because Petitioners' pre-enforcement challenge to OSHA's interpretive rule is premature.*

In the event that the Court finds that it lacks subject-matter jurisdiction over this case, Petitioners ask the Court to transfer their petitions for review to the district court. *See* Petitioners Br. at 35. OSHA opposes this request. The requested transfer is not warranted because Petitioners are not entitled to pre-enforcement review of OSHA's interpretation of "retail facilities" in *any* court. OSHA has not yet enforced or applied the interpretation adopted in the Retail Memorandum, and in fact has stayed enforcement of that interpretation through

September 30, 2016. *See* J.A. 60. This pre-enforcement challenge is precluded by the OSH Act and is not ripe for review.

The OSH Act contains a comprehensive administrative enforcement structure consisting of initial review of citations by the Occupational Safety and Health Review Commission (during which employer abatement obligations are stayed), followed by review in the federal courts of appeals. *See* 29 U.S.C. §§ 659(b), 659(c), 661. Allowing pre-enforcement challenges to OSHA's regulatory interpretations in the district courts would conflict with this scheme. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (administrative review scheme in the Mine Safety and Health Act precludes district court jurisdiction over pre-enforcement challenge of agency action); *Sturm, Ruger & Co. v Chao*, 300 F.3d 867, 872-75 (D.C. Cir. 2002) (challenge to OSHA data collection initiative must be pursued through the OSH Act's administrative review process). Any claims that require interpretation of the parties rights and duties under the OSH Act and OSHA regulations, such as those Petitioners might bring challenging the validity of OSHA's interpretation of "retail" in district court, "fall[] squarely within the Commission's expertise" and must be pursued in that forum first. *Sturm, Ruger & Co.*, 300 F.3d at 874 (internal quotations omitted). In *Edison Electric Institute (EEI) v. OSHA*, 411 F.3d 272 (D.C. Cir. 2005), this Court declined to transfer to the district court a case challenging an OSHA directive –

which the Court held was not an OSHA standard – "because the question of the district court's jurisdiction raise[d] a host of issues" about the exclusivity of the Review Commission's administrative review process. *EEI*, 411 F.3d at 282 n.4. The same "host of issues" apply in this case, and transfer is equally unwarranted.

Furthermore, this Court's precedent makes clear that Petitioners' challenge is not ripe for review in any court. In *American Tort Reform Association v. OSHA*, 738 F.3d 387 (D.C. Cir. 2013), this Court ruled that a challenge to an OSHA interpretation was not ripe for review because OSHA had not yet "purported to rely on or apply" the challenged interpretation "in support of an agency action in a concrete case." *Am. Tort Reform Ass'n*, 738 F.3d at 396. The same is true here. Thus, per *American Tort Reform*, Petitioners' challenge is not ripe for review in any court because OSHA has not yet enforced the challenged interpretation (and in fact does not intend to do so until October of 2016).

If and when OSHA embodies its interpretation in a citation, the cited employer may obtain review of the interpretation for reasonableness before the Review Commission and, if necessary, a court of appeals; review is not available before then. Thus, a transfer of Petitioners' challenge to the district court would not be in the interest of justice. *See* 28 U.S.C. § 1631.

II. The Court Should Grant the Steelworkers' Motion to Intervene.

A. *The Steelworkers have standing to intervene.*

This Court requires parties seeking to intervene as defendants to show an injury in fact, causation, and redressability. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) (citation omitted). The Steelworkers' interest in the outcome of this litigation is sufficient to make the required showing.

The Steelworkers assert that they represent employees who work in facilities that are affected by the Retail Memorandum (in other words, facilities that may have been exempt from PSM compliance under the fifty-percent test, but now must comply with the PSM standard by virtue of the interpretation adopted in the Retail Memorandum). *See* Steelworkers' Motion to Intervene Out of Time at 2; Steelworkers' Reply to Petitioners' Joint Opposition to Motion to Intervene at 4-5.[9] As a result of the interpretation stated in the Memorandum, workers at affected facilities (including those affiliated with the Steelworkers) will benefit from their employers following PSM requirements to address the serious workplace safety hazards that are associated with processes involving highly hazardous chemicals. This Court's "cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an

[9] It is OSHA's understanding that the Steelworkers will be filing an affidavit attesting to the union's relationship with affected facilities when it files its brief.

unfavorable decision would remove the party's benefit." *Crossroads*, 788 F.3d at 317. Because Petitioners' challenge could eliminate the benefit the Retail Memorandum affords Steelworkers' members at affected facilities, the Steelworkers have established an injury in fact. In addition, the Steelworkers meet the other criteria for intervention (causation and redressability) because, in addition to the fact that the injury faced by the Steelworkers in the event of a decision in Petitioners' favor is sufficient and substantial, that injury is directly traceable to Petitioners' challenge to the Memorandum and can be prevented by a decision denying the petitions for review. *See id.* at 316.

B. *The totality of the circumstances favors granting the Steelworkers' motion out of time.*

Though the Steelworkers' motion to intervene was filed after the 30-day deadline for doing so (*see* FED. R. APP. P. 15(d)), the Court has discretion to accept the late filing. *See* FED. R. APP. P. 26(b). Timeliness is "not require[d] . . . for its own sake." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Instead, it is important for motions to intervene to be filed in a timely fashion in order to prevent "potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id*. The Steelworkers' motion to intervene, filed just two weeks late, has not unduly disrupted the litigation in this case and has not adversely affected any party's interests. Indeed, OSHA consented to the motion at the time it was filed. The Steelworkers' motion was filed before the Court ordered

briefing, so granting it would not deny any party the opportunity to respond to the Steelworkers' position. Granting the motion will not prolong the litigation; the Steelworkers have not, for example, sought to revisit issues already decided (since none have been), nor have they asked the Court for any delay at all. It would also be unproductive for the Court to deny the motion after already allowing the Steelworkers to file a brief presenting their arguments on the merits of this case.

OSHA welcomes the Steelworkers' voice in this litigation, the outcome of which could have a significant effect on the manner in which OSHA enforces a very important safety standard. Unlike OSHA, the Steelworkers have employees on the ground in affected facilities, and OSHA believes the Court will benefit from the additional input the Steelworkers can provide on the issues at hand. Given the value of the Steelworkers' perspective, and the absence of any delay or prejudice caused by their participation in this case, the Court should permit the union to intervene.

CONCLUSION

For the reasons set forth above, the Court should grant the Steelworkers' Motion to Intervene Out of Time and dismiss the petitions for review due to lack of subject matter jurisdiction.

Respectfully submitted.

M. PATRICIA SMITH
Solicitor of Labor

ANN S. ROSENTHAL
Associate Solicitor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

/s/ Lauren Goodman
LAUREN S. GOODMAN
Attorney
U.S. Department of Labor
200 Constitution Ave., NW, Rm. S-4004
Washington, DC 20210
(202) 693-5445

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPFEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 7,615 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times new Roman 14-point font.

/s/ Lauren Goodman
Lauren Goodman

Dated: March 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2016, I caused the foregoing Final Brief for the United States Department of Labor and the Occupational Safety and Health Administration to be electronically filed, and served on the following counsel of record, via the Court's CM/ECF system:

Gary H. Baise
Stewart D. Fried
Olsson Frank Weeda Terman Matz PC
600 New Hampshire Ave., NW
Washington, DC 20037

Chris S. Leason
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Suite 1100
Phoenix, AZ 85016

Randy S. Rabinowitz
Occupational Safety & Health Law Project
P.O. Box 3769
Washington, DC 20027

/s/ Lauren Goodman
Lauren Goodman

ADDENDUM

STATUTES AND REGULATIONS

Occupational Safety and Health Act of 1970

Section 5 (29 U.S.C. § 654)……………………………………………………A1

Section 8 (29 U.S.C. § 657)…………………………………………………... A1

Section 9 (29 U.S.C. § 658)……………………………………………………A4

Section 10 (29 U.S. C. § 659)………………………………………………….A5

Section 11 (29 U.S. C. § 660)………………………………………………… A6

Section 12 (29 U.S.C. § 661)…………………………………………………..A8

Section 5. Duties (29 U.S.C. § 654)

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Section 8. Inspections, Investigations, and Recordkeeping (29 U.S.C. § 657)

(a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized –

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(b) In making his inspections and investigations under this Act the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce

evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c)(1)Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

(2) The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health and Human Services, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 6, and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f)(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a

representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g)(1) The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.

(2) The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment.

(h) The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this Act or to impose quotas or goals with regard to the results of such activities.

Section 9. Citations (29 U.S.C. § 658)

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Section 10. Procedure for Enforcement (29 U.S.C. § 659)

(a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection

(a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

Section 11. Judicial Review (29 U.S.C. § 660)

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and

shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

Section 12. The Occupational Safety and Health Review Commission
(29 U.S.C. § 661)

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that

(1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and

(2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(c) (Text omitted.)

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5, United States Code.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

(j) An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code