IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; OKLAHOMA STATE HOME BUILDERS ASSOCIATION; STATE CHAMBER OF OKLAHOMA; NATIONAL CHICKEN COUNCIL; NATIONAL TURKEY FEDERATION; and U.S. POULTRY & EGG ASSOCIATION, ***Plaintiffs,*** **vs.** **R. ALEXANDER ACOSTA, SECRETARY OF LABOR, in his official capacity;** **LOREN E. SWEATT, DEPUTY ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, in her official capacity;** **OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; and** **UNITED STATES DEPARTMENT OF LABOR,** ***Defendants.***	**NO. CIV-17-0009-PRW**

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MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs National Association of Home Builders of the United States, Chamber of Commerce of the United States of America, Oklahoma State Home Builders Association, State Chamber of Oklahoma, National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association ("Plaintiffs"), file this Memorandum in Support of Motion for Summary Judgment.

INTRODUCTION

Plaintiffs bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., challenging certain provisions of the Occupational Safety and Health Administration's ("OSHA" or the "Agency") final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), 81 Fed. Reg. 31,854 (May 20, 2016) (the "Rule"), Ex. 1, AR08967.

The Rule was finalized in the waning days of the administration of President Obama and amended OSHA's recordkeeping regulations at 29 C.F.R. Part 1904. Relevant here, the Rule added (1) a requirement that employers establish a "reasonable" procedure for employees to report injuries and illnesses (29 C.F.R. § 1904.35(b)(1)(i)), and (2) new anti-retaliation procedures and enforcement mechanisms that conflict with existing procedures specifically laid out by Congress in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("OSH Act" or "Act" or the "Statute") (29 C.F.R. § 1904.35(b)(1)(iv) and the revision to 29 C.F.R. § 1904.36). Plaintiffs ask the Court to declare these provisions invalid and vacate them.

- *First*, 29 C.F.R. § 1904.35(b)(l)(iv) and 29 C.F.R. § 1904.36's new enforcement scheme exceeds OSHA's statutory authority, as it contravenes the express scheme established by Congress in Section 11(c) of the OSH Act to provide redress for alleged discriminatory actions by employers against employees.

- *Second*, the promulgation of 29 C.F.R. §§ 1904.35(b)(l)(i) and (iv) and the revision to 29 C.F.R. § 1904.36 are arbitrary and capricious in violation of the APA because they are not supported by the rulemaking record and run counter to the evidence before the Agency.

- *Third*, OSHA failed to provide adequate and fair notice and denied interested parties an opportunity to meaningfully comment by failing to make critical information relied upon by the Agency available for comment and by failing to adequately explain what action the Agency proposed to take in the Rule.

- *Fourth*, the Rule violates the Fifth Amendment, and thus the APA, by failing to provide employers adequate notice of their compliance obligations, subjecting employers to citation and potentially significant penalties without due process of law.

At bottom, this Rule is an example of federal agency overreach. To be clear, Plaintiffs believe strongly that no employee should be discriminated against for reporting a work-related injury or illness. *Congress already created a specific mechanism to handle discrimination complaints and included that mechanism in the OSH Act*. In so doing, Congress rejected statutory language that would have given the Agency the ability to issue citations to employers for alleged discriminatory conduct. In other words, Congress

considered and rejected giving OSHA the very tool that OSHA has now given itself – by regulatory fiat – to handle alleged instances of discrimination. This is improper. A federal agency should not be able to ignore the will of Congress simply because it is dissatisfied with Congress's determination.

Furthermore, Plaintiffs believe that employees should be given a clear mechanism to report work-related injuries and illnesses. But the rulemaking record does not support the Agency's new requirement that employer's adopt "reasonable" reporting procedures and the anti-discrimination provisions. And what OSHA believes is permitted (and not permitted) in this area is entirely undefined in the regulatory text of the Rule, providing employers no notice of their ultimate compliance obligations. In effect, OSHA has given itself the ability to define what is allowable and not allowable with respect to a host of safety and health procedures at the worksite on an ongoing basis and doing so without affording any employers and employees the opportunity to comment on the guidance.

BACKGROUND

The OSH Act vests OSHA with significant authority to protect workers. Section 6 of the Act authorizes OSHA authority to promulgate safety and health standards (29 U.S.C. § 655). Section 9 gives OSHA the authority to enforce those same standards (20 U.S.C. § 658).

Congress also recognized that it needed to place limits on OSHA, which would have broad jurisdiction over all of private industry in the United States. Although OSHA generally enjoys authority to issue citations and penalties when enforcing workplace safety

and health standards, Congress determined that OSHA should *not* have that authority when investigating and enforcing alleged discrimination (or retaliation) against employees for exercising rights under the Act. Instead, OSHA should conduct an investigation into alleged violations and pursue an action in a United States district court when the Agency believes there was discriminatory conduct.

It is with this backdrop that OSHA promulgated the Rule. The Rule was an amendment to OSHA's recordkeeping regulations, which generally require employers to maintain records about certain workplace injuries and illnesses. *See* 29 C.F.R. Part 1904. OSHA initially published recordkeeping rules in 1971, shortly after the Act was promulgated. It then significantly revised these rules in 2001. *See* 66 Fed. Reg. 5,916 (Jan. 19, 2001).

The 2001 revisions created three separate recordkeeping forms that covered employers must maintain: (1) Form 300; (2) Form 301; and (3) Form 300A. *Id.* at 6,130. These forms remain today. Form 300, typically referred to as the "OSHA 300 Log," is a list of work-related injuries and illnesses that employers must keep at the worksite. Form 301 includes more detailed information about the nature of an injury and its cause. Form 300A is an annual summary form completed at the beginning of the calendar year which calculates an overall injury and illness rate based upon injuries that occurred the year before and the number of total hours worked. (Copies of these forms are attached to Plaintiffs' First Amended Complaint, *see* Exhibits 2-4, Dkt. No. 86.).

On November 8, 2013, OSHA issued a proposal in the *Federal Register* to amend its recordkeeping rules. 78 Fed. Reg. 67,254 (Nov. 8, 2013), Ex. 2, AR00001. OSHA proposed to require certain employers to submit electronically information from their OSHA 300 Logs, Form 301, and Form 300A to OSHA on a regular basis, and the Agency stated that it would make this information publicly available on an online database. *Id*. at AR00002 and AR00007. The purported safety and health benefits justifying the proposal flowed from the Agency's commitment to make the data publicly available. *Id.* at AR00006.

During the rulemaking, a handful of commenters raised concerns that by requiring employers to submit these records electronically to the Agency and then the Agency making the information public, employers might engage in practices to discourage employees from reporting. In response to these reported concerns, OSHA issued a "Supplemental Notice of Proposed Rulemaking" ("Supplemental Notice"). 79 Fed. Reg. 47,605 (Aug. 14, 2014), Ex. 3, AR00035. The Supplemental Notice sought comment on whether to "(1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit an employer from taking adverse action against employees for reporting injuries and illnesses." *Id*. at AR00036.

Although OSHA identified the three areas above as potential means to address the concerns alleged by some stakeholders, OSHA provided no regulatory text for the public's

consideration. *See id*. at AR00035-AR00040. The Agency also never specifically defined what a "reasonable" or "unreasonable" reporting requirement might be. *Id.* In addition, OSHA sought comment on a variety of supposed "adverse actions" that certain participants mentioned in the public meeting on the proposed rule that could impact reporting. *Id*. at AR00038.

On May 12, 2016, OSHA issued the Rule, adopting almost all of the electronic recording and reporting obligations as originally proposed. 81 Fed. Reg. 31,854, Ex. 1, AR08967. OSHA stated in the preamble to the Rule that it would take the work-related injury and illness information submitted electronically by covered employers and post such information online to make it available to the public. *Id*. at AR08968-AR06989. OSHA also added a requirement that employers adopt "reasonable" employee reporting procedures and to be "reasonable" a procedure could not deter or discourage an employee from reporting an injury or illness. *Id*. at AR09035. OSHA included a provision prohibiting the discharge or discrimination of any employee for reporting an injury or illness, granting itself the authority to pursue retaliation complaints with Citations and Notifications of Penalty outside of the congressionally-mandated Section 11(c) process.[1]

[1]In the Rule, OSHA created the anti-discrimination requirement by adding language in a new 29 C.F.R. § 1904.35(b)(1)(iv) and then cross-referencing that new language in a revised 29 C.F.R. § 1904.36, which had previously existed and simply re-affirmed that Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., covered instances of discrimination. In this cause of action, Plaintiffs specifically request that 29 C.F.R. § 1904.35(b)(1)(iv) be declared invalid, along with the cross-reference in 29 C.F.R. § 1904.36. References to 29 C.F.R. § 1904.35(b)(1)(iv) or the "anti-discrimination

Id. at AR09036. In the preamble to the Rule, OSHA interpreted the new anti-discrimination provisions as prohibiting certain common workplace safety and health programs such as safety incentive programs and post-incident drug testing programs. *Id*. at AR09015-AR09018.

On July 30, 2018, OSHA issued yet another Notice of Proposed Rulemaking to remove the requirement for the submission of information from the OSHA Forms 300 and 301 electronically. 83 Fed. Reg. 36,494 (July 30, 3018). OSHA proposed to continue the requirement that certain employers submit information from their 300A Forms to the Agency electronically, although the Agency under President Trump had previously stated that it would not immediately post this information on its website. *See* 84 Fed. Reg. 380, 383 (Jan. 25, 2019). On January 25, 2019, OSHA finalized this second proposal, removing the requirement that employers submit information electronically from the Forms 300 and 301. 84 Fed. Reg. at 380. This rulemaking did not change the requirements from the Rule at issue in this case. *Id*. at 383.

STATEMENT OF MATERIAL FACTS

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The parties agree that summary judgment is the appropriate mechanism for deciding this cause of action, a legal challenge to a regulation under the

provisions" incorporate both the new language in 29 C.F.R. § 1904.35(b)(1)(iv) and the cross-reference in 29 C.F.R. § 1904.36.

APA. *See* Joint Motion and Memorandum in Support to Lift Stay, Dkt. No. 84. *See also Am. Bioscience, Inc. v. Thompson*, 269 F. 3d 1077, 1083 (D.C. Cir 2001) (when seeking review of agency action under the APA, entire case presents legal questions). The following material facts are not in dispute.

1. On May 12, 2016, OSHA issued the Rule. 81 Fed. Reg. 29,654 (May 12, 2016), Ex. 1, AR08967.

2. The Rule included a requirement at 29 C.F.R. § 1904.35(b)(1)(iv) that employers may not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness, giving OSHA the authority to issue a Citation and Notification of Penalty to employers for violating the requirement with remedies similar to those authorized by Section 11(c) of the OSH Act, such as back pay and reinstatement, but without Section 11(c)'s procedural protections. *Id*. at AR09035-AR09037. The Rule also revised 29 C.F.R. § 1904.36 to reflect the addition of the enforcement mechanism added to 29 C.F.R. § 1904.35(b)(1)(iv). *Id*.

3. The Rule also included a requirement at 29 C.F.R. § 1904.35(b)(1)(i) that employers establish a "reasonable" procedure for employees to report injuries and illnesses and to be "reasonable" the procedure must not deter or discourage employees from reporting workplace injuries and illnesses. *Id*.

ARGUMENT

I. OSHA Lacks Statutory Authority To Promulgate 29 C.F.R. § 1904.35(b)(1)(iv) And The Revision To 29 C.F.R. § 1904.36 And, Therefore, The Rule Violates The APA (First Cause Of Action).

The Rule's requirement in 29 C.F.R. § 1904.35(b)(1)(iv) and the revision to 29 C.F.R. § 1904.36 that allow the Agency to issue Citations and Notifications of Penalty to employers, without adhering to the procedures laid out in Section 11(c) of the Act, for allegedly retaliating against employees for reporting injuries and illnesses exceed, and is contrary to, the statutory authority Congress gave to OSHA in the OSH Act.

In the preamble to the Rule, OSHA broadly relies on its general authority to require accurate recordkeeping in Sections 8 and 24 of the OSH Act to provide a basis for these provisions. 81 Fed. Reg. at 29,625-29,626, Ex. 1, AR08969-AR08970. OSHA claims that the regulation will ensure accurate recordkeeping and that Section 11(c) of the Act is an imperfect tool to help ensure employers are accurately recording injuries and illnesses.[2] *Id*. at AR08971.

"Because this case involves an agency's construction of a statute it administers, the court's analysis is governed by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*." *Food*

[2]This regulation appears to have grown out of organized labor's frustrations with the Section 11(c) process. For example, during the comment period, one union local stated, "We have attempted to curtail discriminatory Company practices through the 11(c) process and have learned of the difficulties of this route." Docket ID No. OSHA-2013-0023-1188, Ex. 4, AR03444. The AFL-CIO similarly stated, the enforcement tools under 11(c) "are weak, cumbersome and resource intensive." Docket ID No. OSHA-2013-0023-1350, Ex. 5, AR04436.

and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000). *Chevron* involves a familiar two-step analysis. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Keller Tank Servs. II, Inc. v. Comm'r*, 848 F.3d 1251, 1269 (10th Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If, "employing the traditional tools of statutory construction," the court determines that Congress has addressed the precise issue, then that is the end of the inquiry, because the "law must be given effect" and the court must set aside the regulation. *Id.* at 843 n.9; 842-43. If the statute's meaning remains ambiguous after applying the traditional tools of construction, then and only then does the inquiry shift to determine if the Agency's interpretation is a permissible construction of the statute. *Id*. at 843.

The precise question at issue is whether the OSH Act authorizes OSHA to promulgate a regulation allowing the Agency to issue an employer a Citation and Notification of Penalty for discriminatory conduct subject to judicial review not by a United States district court but by an administrative agency created by Congress principally to enforce workplace safety and health standards. It does not.

A. Congress has Spoken Clearly and Unambiguously that Discrimination Complaints Must Proceed Under Section 11(c) of the OSH Act, Explicitly Rejecting Civil Penalties and Administrative Review for Discrimination Claims.

When determining whether Congress has spoken directly on an issue, courts begin with the statutory text. *Id*. at 837. If the statute's language is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron*

Pair Enters., Inc., 489 U.S. 235, 241 (1989) (internal citations omitted). To determine whether the language is plain and unambiguous, the court considers a number of factors, including the language of the statute itself, the overall context and structure of the language and the statute, and the statute's legislative history. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Chevron*, 467 U.S. at 845-54 (discussing at length the legislative history of the relevant statute); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council on Carpenters*, 459 U.S. 519 (1983) (interpretation cannot "ignore the larger context" of the debate); *Hackwell v. United States*, 491 F.3d 1229, 1233 (10th Cir. 2007).

In this case, Congress has spoken plainly and its intent is clear. The language of the Statute, its overall structure and context, and the Statute's legislative history make Section 11(c) the exclusive remedy for retaliation against employees.

1. The plain language of the Act clearly prohibits discrimination against employees who exercise rights afforded by the Act through Section 11(c) and does not authorize the anti-discrimination provisions.

Section 11(c)(1) of the OSH Act provides:

> 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.

29 U.S.C. § 660(c)(1). Section 11(c) protects an employee from retaliation on the basis of filing a complaint, testifying with respect to a Section 11(c) proceeding, or exercising any right afforded by the Act on behalf of himself or others. *Id.* The scope of rights protected implicitly and explicitly under the Act is broad. These rights include an employee's right

to report a work-related injury or illness. *See, e.g., Perez v. Postal Service*, 76 F. Supp. 3d 1168, 1184 (W.D. Wash. 2015) (recognizing 29 C.F.R. § 1904.36 as including the right to report an injury or illness). Even OSHA has stated that Section 11(c) includes the right to report a work-related injury or illness. 66 Fed. Reg. at 6,050.

Sections 11(c)(2) and 11(c)(3) outline the procedural process Congress explicitly created for employees who believe they have been discriminated against. *See* 29 U.S.C. §§ 660(c)(2) and 660(c)(3). Congress stated that an employee must file a complaint with the Secretary within 30 days of the violation occurring. 29 U.S.C. § 660(c)(2). The Secretary must investigate the complaint and, if the Secretary determines that a violation has occurred, pursue an action in a United States district court to seek appropriate relief, including rehiring or reinstatement of the employee to his/her former position with back pay. *Id*. Congress specifically gave the Secretary 90 days to complete the investigation and notify the complainant of his/her determination regarding the allegations in the complaint. 29 U.S.C. § 660(c)(3).

In Section 11(c), Congress addressed *all* alleged discrimination by employers for exercising rights under the Statute. As such, Congress was not silent regarding how to handle retaliation in the workplace, which is the very issue addressed by the Rule. "Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). There is no need to go

beyond the plain language of Section 11(c) here, because Congress spoke directly to the Agency's authority to handle claims of retaliation.

OSHA attempts to draw legal authority for the regulations from a handful of provisions in the Act that direct the Secretary to require employers to maintain injury and illness records and ensure that these records are accurate. 81 Fed. Reg. at 29,625-627, Ex.1, AR08969-AR08971. These requirements are principally located in Section 8 of the Statute. *Id*. For example, Section 8(c)(2) requires OSHA to "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." 29 U.S.C. § 657(c)(2). Section 8(g)(2) also directs the Secretary to "prescribe such rules and regulations as [he] may deem necessary to carry out responsibilities." 81 Fed. Reg. at 29,626, Ex. 1, AR08970 (internal citation omitted).

Sections 8 and 24 of the OSH Act contain no language regarding discrimination or tying redress for discrimination to recordkeeping. *See* 29 U.S.C. § 657 and 29 U.S.C. § 673. Section 8 concerns "Inspections, Investigations, and Recordkeeping" but nowhere mentions discrimination or cross-references Section 11(c). *See* 29 U.S.C. § 657. Section 24 concerns "Statistics" and, again, makes no mention of discrimination or Section 11(c). *See* 29 U.S.C. § 673. OSHA's position thus appears to be that it has broad authority to ensure employers maintain accurate injury and illness records and the extra-statutory regulation is "necessary" to carry out its responsibility. Unfortunately for the Agency, OSHA "confuse[s] a necessary rule with one that is simply useful." *Chamber of Commerce*

of the United States v. NLRB, 856 F. Supp. 2d 778, 789 (D.S.C. 2012) (*aff'd*, 721 F.3d 152 (4th Cir. 2013)).

OSHA has not shown that the regulation is necessary to carry out Congress's mandate to require accurate recordkeeping for work-related injuries. To be sure, requiring employers to complete and maintain Forms 300, 301, and 300A, which track work-related deaths, injuries, and illnesses, *is* necessary to carry out Congress's recordkeeping mandate, along with the enforcement scheme set forth by Congress in the Act. But OSHA already promulgated those *necessary* regulations when it originally promulgated recordkeeping rules in 1971 and amended them in 2001. Nothing about the Rule at hand is *necessary* to carry out any other mandate by Congress.

Furthermore, if Congress wished to provide separate discrimination penalties for employers solely for recordkeeping issues, it knew how to do so and could have added such plain language in Sections 8 or 24 when it mandated accurate recordkeeping regulations. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

2. The overall structure and context of the Statute also demonstrates that there is no authority for these provisions.

When reading the Statute as a whole, construing each section in harmony with every other part, Section 11(c) plainly and unequivocally addresses all discrimination by employers against employees who exercise rights under the Act. Section 11(c) prohibits

discriminatory practices and specifies how to investigate and address them. Sections 8 and 24 address recordkeeping requirements, amongst other things. To accept OSHA's argument that these provisions somehow give OSHA authority to "gin up" a second enforcement scheme for alleged discriminatory practices, would put the provisions at odds. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. at 133 (court must "interpret the statute as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole") (internal citations omitted)). If, as OSHA suggests, Congress gave it the authority to issue a citation to an employer for alleged discriminatory conduct and request back pay and reinstatement, then the intricate procedures and limits of Section 11(c) would be rendered superfluous. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 179 (2011) (courts must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

And as a practical matter, OSHA's approach would render Section 11(c) a dead letter, as the Agency would always choose its own administrative approach over going to court. Under the Rule, an employee would not have to file a complaint pursuant to Section 11(c) to obtain reinstatement or back pay. This would circumvent the due process for judicial review that Section 11(c) affords employers. And, in essence, it would extend the 30-day period required for filing a complaint under Section 11(c) to six-months, the statute of limitations for issuance of citations. *Compare* 29 U.S.C. § 660(c)(2) with 29 U.S.C. § 658(c) ("No citation may be issued under this section after the expiration of six months following the occurrence of any violation.").

For example, if an employee who alleges he was fired for reporting a work-related injury filed a complaint with the Secretary 45 days after the adverse action, there would be no claim under Section 11(c) because the complaint would be untimely. But, knowing there was no valid claim under Section 11(c), the Secretary could simply open up an inspection based on the employee's allegation and issue a citation under 29 C.F.R. § 1904.35(b)(1)(iv) within the six-month statute of limitations. Under the Secretary's regulation and interpretation of its congressional authorization, the same remedies that would be precluded under Section 11(c) because of an untimely complaint would be available. Congress never gave OSHA the authority to re-write the statute of limitations.

And this is just one example of the incongruities that arise with the creation by OSHA of a second enforcement scheme covering identical alleged violations. OSHA's interpretation of its authority could lead to simultaneous investigations and proceedings in different legal forums, inconsistent Agency and judicial determinations, contrary factual findings, and so on. Congress never intended this as the way to handle alleged discrimination in the workplace.

3. There is no silence in the Act that allows OSHA to "gap fill."

"As one court has aptly put it, '[n]ot every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual

evidence of congressional intent." *Burns v. United States*, 501 U.S. 129, 136 (1991) (internal citation omitted).

OSHA seems to believe that since Section 11(c) does not speak directly to retaliation for recordkeeping and since Sections 8 and 24 fail to expressly prohibit the Agency's actions, it has limitless authority. In short, if Congress did not expressly say "no," OSHA believes it has broad discretion to say "yes" regarding virtually any rule associated with recordkeeping. However, "Courts have repeatedly rejected such a presumption of authority." *Chamber of Commerce of the United States*, 856 F. Supp. 2d at 791 (citing *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact there is not an express withholding of such power.").

Furthermore, the question presented by the interpretation of the OSH Act and this provision is significant. The judicial review provided for discrimination and the remedies available to employees who are discriminated against is a significant matter, one thoughtfully considered and debated by Congress during the promulgation of the Act. "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Indeed, with respect to the handling of workplace retaliation and discrimination, Congress knows full well how to address employee complaints directly in statutory language. Since the creation of OSHA, Congress has specifically given the Agency authority to investigate alleged workplace retaliation *in*

over 20 different statutes. *See* https://www.whistleblowers.gov/. Here, had Congress been concerned retaliation would result in inaccurate records for work-related injuries and illnesses Congress could have and would have expressly provided such language in Sections 8 and 24. Congress did not cryptically bury a sweeping new enforcement authority for retaliation in a separate statutory provision mandating accurate recordkeeping.

In short, the Secretary attempts to find silence in the Act on the issue of retaliation for recordkeeping where there is none. The silence here is not "pregnant." The plain language of Section 11(c), the Statute constructed as a whole, and the legislative history, as discussed below, are clear evidence of congressional intent and the regulations promulgated are contrary to that intent. As noted above, to read Sections 8 and 24 as silent on retaliation relating to recordkeeping creates an absurd result. The silence in Sections 8 and 24 represent an intentional and purposeful exclusion of a separate recordkeeping retaliation claim subject to a civil penalty and administrative review. *See Wichita Ctr. for Graduate Med. Educ., Inc. v. United States*, 917 F.3d 1221, 1226 (10th Cir. 2019) ("where Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

4. The OSH Act legislative history establishes clear congressional intent.

"Where the terms of a statute are unambiguous, further judicial inquiry into the intent of the drafters is *generally unnecessary*. … [However], [r]eference to statutory design and pertinent *legislative history* may often shed new light on congressional intent,

notwithstanding statutory language that appears '*superficially clear.*'" *New Mexico v. DOI*, 854 F.3d 1207, 1227 (10th Cir. 2017) (emphases in the original) (citations omitted). Here, even the Statute's legislative history leaves no ambiguity as to Congress's intent. Congress never intended for OSHA to have the authority the Agency has now abrogated unto itself in 29 C.F.R. § 1904.35(b)(1)(iv) and revised 29 C.F.R. § 1904.36, nor did it expressly or implicitly grant such authority to promulgate such a regulation.

Indeed, Congress *contemplated and rejected* making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of a citation. Congress considered a bill that would have given OSHA the authority it now attempts to give itself. The bill stated:

> (g) Any person who discharges or in any other manner discriminates 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, shall be assessed a *civil penalty* by the *Commission* of up to $10,000. Such a person may also be subject to a fine of not more than $10,000 or imprisonment of a period of not to exceed ten years or both.

H.R. Bill No. 19200 (September 15, 1970), 91st Cong., 2nd Session (1970), *reprinted* in H.R. SUBCOMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG. LEGIS. HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, (Comm. Print 1971) at 763 (emphasis added). Similar language is found in other proposed bills, such as H.R. 16785. *See* H.R. Bill No. 16785 (July 9, 1970), 91st Cong., 2nd Session (1970), *reprinted* in H.R. SUBCOMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG. LEGIS. HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, (Comm. Print 1971) at 961.

The final bill rejected allowing the Secretary to issue citations and civil penalties for discriminatory actions in lieu of a full process whereby employees could file complaints and employers could have an opportunity for judicial review in the district courts. 29 U.S.C. § 660(c). The final Conference Report explained precisely this difference.

> The Senate bill provided for administrative action to obtain relief for an employee discriminated against for asserting rights under this Act, including reinstatement with back pay. The House bill contained no provision for obtaining such administrative relief; rather it provided civil and criminal penalties for employers who discriminate against employees in such cases. With respect to the first matter, the House receded with an amendment making specific jurisdiction of the district courts for proceedings brought by the Secretary to restrain violations and other appropriate relief. With respect to the second matter dealing with civil and criminal penalties for employers, the House receded.

Conf. Rep. No. 91-1765 (December 16, 1970), 91st Cong., 2nd Session (1970), *reprinted* in H.R. SUBCOMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG. LEGIS. HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, (Comm. Print 1971) at 1192. Congress's decision to reject putting the proposed language in the "Penalties" section of the Statute and instead placing it in the "Judicial Review" section of the Act is consequential.

Through 29 C.F.R. § 1904.35(b)(1)(iv) and revised 29 C.F.R. § 1904.36, OSHA gave itself the very authority Congress rejected. OSHA states in the Supplemental Notice, "Under this provision, OSHA could issue citations and … the employer could challenge the citations before the [*Commission*]. The citations would carry *civil penalties* in accordance with Section 17 of the OSH Act." 79 Fed. Reg. at 47,608, Ex. 3, AR00036 (emphasis added). At bottom, OSHA seeks to side-step what it believes to be a weak and cumbersome requirement for employees under Section 11(c). The Agency prefers an

enforcement mechanism so that it can bypass the necessary element of an employee complaint and the statutory timeframes specifically established by Congress. OSHA would prefer to decide when employers are engaging in adverse action rather than waiting for an employee to allege such action in a complaint. *OSHA cannot simply rewrite the Act more to its liking*.

In sum, the plain language of the Statute, the overall structure and context of the Statute, and the legislative history, coupled with the fact that the issue of retaliation is not one that Congress would leave to the Agency to "gap fill," unequivocally establish that the regulations promulgated are inconsistent with Congress's express desires and must be rejected.

B. Even Assuming Congress's Intent is Not Clear, Section 1904.35(b)(1)(iv) and Revised Section 1904.36 Fail as They are Not Based Upon a Permissible Construction of the Statute and Frustrate Congressional Intent.

Because Congress did not explicitly authorize OSHA to craft an extra-statutory enforcement scheme to address retaliation, the appropriate "Step 2" inquiry, if required at all, is whether OSHA's interpretation of the Statute is reasonable. Only where the statutory language is ambiguous with respect to the question raised – which it is not in this case – does the court proceed to determine if an agency's interpretation is subject to deference. And even then, the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The purpose is not to determine whether the agency's statutory interpretation is the "best" one; rather, it is enough that the agency's interpretation is a reasonable one. *Id*. at 843. If the gap left by

Congress is explicit, there is an express delegation of authority to the agency to fill it, and such regulations are given controlling weight where they are not "arbitrary, capricious or manifestly contrary to the statute." *Id*. at 843-44 (citations omitted). But, where the legislative delegation to the agency is implicit rather than explicit, the court may substitute its own construction of a statutory provision if the regulation is unreasonable and frustrates congressional intent. *See id*. at 844 (citations omitted). For several reasons, OSHA's interpretation of the Act *is* unreasonable and frustrates Congress's intent.

First, for the reasons set forth in Section I.A above, the Secretary's interpretation of the Act and its authority to issue the regulation leads to multiple, potentially inconsistent administrative and judicial processes to pursue alleged discrimination complaints. OSHA's interpretation frustrates and nullifies Congress's intent that discrimination complaints be handled exclusively through the Section 11(c) process.

Second, OSHA's interpretation turns its authority to issue recordkeeping regulations into a remedial tool. The OSH Act's language regarding recordkeeping emphasizes the need for the Secretary to work in conjunction with the Secretary of Health and Human Services to ensure the collection of information regarding workplace injuries and illnesses (*see, e.g.*, 29 U.S.C. § 673(a)), not to provide back pay, reinstatement, or other remedies to employees who allegedly are discriminated against for reporting injuries and illnesses.

In the preamble, OSHA cites to *United Steelworkers of America v. St. Joe Resources*, 916 F.2d 294 (5th Cir. 1990), to support its claims that "[w]here retaliation threatens to undermine a program that Congress required the Secretary to adopt, the

Secretary may proscribe that retaliation through a regulatory provision." 81 Fed. Reg. at 29,627, Ex. 1, AR08971. OSHA's reliance on *St. Joe Resources*, however, is misplaced.

There, the court examined the extent to which the Agency could order back pay under the medical removal protection ("MRP") provision of OSHA's lead standard. *St. Joe Res.*, 916 F.2d. at 298-299. That provision requires employers to maintain pay and benefits to employees who must be removed from work for elevated blood lead levels. 29 C.F.R. § 1910.1025(k). The purpose of the provision is preventative, to secure worker cooperation in medical examinations, examinations that are expressly authorized by Congress under Section 6(b) of the Act.[3] *St. Joe Res.*, 916 F.2d at 298. The MRP requirements were not a means to prevent retaliation; they were a means to ensure worker cooperation for medical examinations. *See id*. ("We noted in *Schuylkill Metals* that '[a] central goal of the lead standard's MRP benefits was to secure worker-cooperation with the medical surveillance component of the rule.'"). Indeed, the employees in *St. Joe Resources* were not discriminated against for reporting an injury or illness. Rather, the employer in that case simply did not follow the language of the standard to ensure pay and benefits were maintained. The court held that since Section 11(c) addressed different types of conduct (discrimination) than what the MRP provisions addressed (assurance of worker

[3]Section 6(b)(7) of the OSH Act states: "In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure." 29 U.S.C § 655(b)(7).

cooperation for medical examinations), the remedial purposes of the OSH Act would be undermined by presuming that Section 11(c) was the only mechanism for allowing back pay as a remedy. *Id*. No part of the court's decision can be read to claim that Section 11(c) is not an exclusive remedy for retaliation.[4] *Id*. ("All of the statutes cited by appellees, including the OSHA provision in 29 U.S.C. § 660(c), address employment discrimination. Federal employment discrimination laws clearly "redress different misconduct" than general health and safety provisions. And "the remedial purposes of [OSHA] would be undermined by a presumption of exclusivity.") (internal quotation mark omitted). The regulations here are entirely aimed at preventing retaliation or discrimination, activity that is squarely covered by Section 11(c).

Third, OSHA's interpretation of the Act, in effect, impermissibly turns "recordkeeping" from a "regulation" into a "standard." "The OSH Act authorizes the Secretary of Labor to issue two types of occupational safety and health rules: standards and regulations. Standards, which are authorized by Section 6 of the Act, specify remedial measures to be taken to prevent and control employee exposure to identified occupational hazards, while regulations are the means to effectuate other statutory purposes, including

[4] To further support its position, OSHA distorts the rationale and the quote it relies on in *St. Joe Resources.* The Agency states that the court held "11(c) was not an exclusive remedy, because otherwise the remedial purposes of the MRP would be underminded." 81 Fed. Reg. at 29,627. But in *St. Joe Resources*, appellees argued the application of the statutory construction tool, *expressio unius est exclusio alterius* (the expression of one is the exclusion of others). They argued that the express inclusion of back pay in Section 11(c) precluded the agency from reading other portions of the statute, including Section 6(c), to allow back pay as a form of abatement. *St. Joe Resources*, 916 F.2d at 298.

the collection and dissemination of records of occupational injuries and illnesses." 81 Fed. Reg. at 29,626, Ex. 1, AR08970. A regulation "is a purely administrative effort designed to uncover violations of the Act and discover unknown dangers." *Id.*

The distinction is important. Congress established a specific rulemaking procedure that must be followed by the Agency when promulgating safety and health standards under Section 6. 29 U.S.C. § 655(b). This involves notice and an opportunity to comment and a public hearing presided over by an Administrative Law Judge. *See* 29 U.S.C. § 655(b)(2) and § 655(b)(3); 29 C.F.R. § 1911.5(a)(3)(b) ("Although any hearing shall be informal and legislative in type, this part is intended to provide more than the bare essentials under 5 U.S.C. § 553.") The Agency must also establish the existence of a significant risk of harm before promulgating any safety and health standard under Section 6, *see* 29 U.S.C. § 652(8), Control of Hazardous Energy Source (Lockout/Tagout) Supplemental Statement of Reasons, 58 Fed. Reg. 16612, 16614 (Mar. 30, 1993). Congress placed these added rulemaking requirements on the Agency to ensure that it only promulgated safety and health standards that were reasonably necessary and appropriate to address a true safety and health hazard in the workplace.

OSHA is not required to follow the strict rulemaking procedures in Section 6 when promulgating regulations, however. That is generally appropriate because regulations are administrative in nature and do not directly affect workplace safety and health policies. Here, though, OSHA has promulgated a regulation that addresses safety and health conditions in the workplace through its prohibition on employer policies such as safety

incentive programs and workplace drug testing programs (*see* discussion below). OSHA did so without following the strict Section 6(b) rulemaking procedures and meeting the legal tests required by Congress for safety and health standards. *See* 81 Fed. Reg. at 29,626, Ex. 1, AR09070. This is improper. OSHA's interpretation of the OSH Act as permitting it to regulate workplace safety and health conditions through a recordkeeping regulation promulgated outside of Section 6 is unreasonable and contrary to the will of Congress.

Assuming that congressional intent is not clear, the Secretary's interpretation of the Act is unreasonable. It frustrates congressional intent and turns a regulation, intended to be administrative in nature, into a remedial standard. As such, no deference should be afforded to the Secretary's interpretation of his authority under the Act.

II. Sections 29 C.F.R. §§ 1904.35(b)(1)(i) And (iv) And The Revision To 29 C.F.R. § 1904.36 Are Unsupported By The Rulemaking Record In Violation of the APA (Second Cause of Action).

A rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. v. State Farm, et al*., 463 U.S. 29 (1983); *see also Mkt. Synergy Grp., Inc. v. United States Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018).

Here, OSHA overlooked significant and contrary evidence in the record and failed to consider important aspects of the "problem" it purports to be remedying. The entire

Rule hinges on OSHA's belief that employers are under-recording work-related injuries and illnesses and that certain policies are the cause of that under-recording. The record never establishes that under-recording is a problem, but more importantly, even if it did, the record never establishes a correlation between under-recording and various policies and procedures such as safety incentive policies, drug testing, or disciplinary policies. In fact, the evidence in the record shows the contrary.

A. Evidence in the Record Fails to Establish Employers are Under-Recording Work-Related Injuries and Illnesses or a Correlation Between Under-Recording and Certain Employer Policies.

The record does not support the Agency's decision to require employers to implement reporting procedures that meet the Agency's amorphous and undefined requirement that they be "reasonable" or to defy the express intent of Congress by creating an extra-statutory mechanism for citing employers who allegedly discriminate against employees for reporting injuries and illnesses. To support adding these requirements, OSHA cites commenters who suggested that employees are deterred from reporting injuries and illnesses through burdensome processes or other programs and policies that serve to discourage reporting. *See* 81 Fed. Reg. at 29,670-29,674, Ex. 1, AR09014-AR09018. OSHA further cites to commenters who alleged that the new electronic submission requirements would cause employers to adopt policies and procedures that might deter reporting, thus creating the need for the provisions at issue. *Id*. at AR09013. In effect, OSHA claims: (1) employers routinely engage in practices that discourage employees from reporting and thus there is under-recording that occurs, and (2) OSHA's

own rule requiring electronic submission of injury and illness information and the subsequent publication of that information will encourage employers to engage in further discriminatory practices. The record does not support OSHA's position.

The record does not demonstrate that under-recording of injuries and illnesses is rampant. OSHA relies principally on anecdotal comments from only a handful of the over 2,000 public comments to support its position that there is under-recording of injuries and illnesses. *See id*. at AR09013. These few commenters pointed largely to alleged instances where employees were discouraged from reporting injuries and illnesses. Although Plaintiffs do not question the sincerity of these commenters, Plaintiffs respectfully disagree that these anecdotes can be generalized across all of United States industry to support the Rule.

The best evidence related to alleged under-recording is OSHA's own Recordkeeping National Emphasis Program ("NEP"), which involved a comprehensive, multi-year investigation of whether there was widespread, pervasive underreporting by employers and whether various policies and procedures caused incomplete reporting of injuries and illnesses by employees. The NEP involved inspections at hundreds of facilities in high-hazard industries that reported low injury and illness rates. *See Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping*, Docket ID No. OSHA-2013-0023-1835, Ex. 6, AR00875 ("ERG Analysis"). At the conclusion of this multi-year effort, the Agency found very little in the way of under-recording. *Id*. at AR00883. Indeed, after the close of the comment period in the rulemaking, OSHA submitted evidence on the

NEP initiative into the rulemaking record. *Id*. at AR00875. Unbeknownst to stakeholders throughout the comment period, a third-party contractor, "ERG," performed a significant analysis of the initiative. *Id*. ERG purported to analyze the extent of under-recording by employers as found in the NEP, as well as the correlation between under-recording and certain safety incentive programs, disciplinary programs, or programs requiring post-injury drug testing and inaccuracy of records. *Id*. at AR00882. This analysis and data directly addressing the issue the Agency alleged was a problem existed and never was made available for meaningful comment.

Notwithstanding this procedural flaw, the ERG Analysis simply confirmed what many stakeholders know to be true: there is simply not pervasive, widespread under-recording of injuries and illnesses. In fact, the Agency found recordkeeping errors at only about half of the establishments inspected and these errors were often not significant. *Id*. Out of approximately 550 inspections, only ten inspections resulted in ten or more violations. *Id*. And the violations were not widely distributed across industries. *Id*. This hardly demonstrates a massive under-recording problem across the country justifying these new requirements.

The Rule's foundation is so weak that in summarizing its benefits, OSHA stated it "*expects* that enforcement of the provisions in the final rule will improve the rate and accuracy of injury and illness reporting." 81 Fed. Reg. at 29,672, Ex. 1, AR09016 (emphasis added). This expectation is built on mere speculation and conjecture. OSHA readily acknowledges that 29 C.F.R. § 1904.35(b)(1)(iv) would only likely impact a

minority of employers, since a majority of employers do not retaliate against reporting work-related injuries and illnesses. *Id*.

But even assuming OSHA is correct about the extent of under-recording, the NEP found no correlation between alleged retaliatory policies and inaccurate recordkeeping. The ERG Analysis found "that between establishments that did or did not have a special program in place, the percents are fairly close for those where not-recorded cases were found."[5] *Id*. at AR00913. In other words, OSHA's own contractor found that inaccuracies in recordkeeping are not correlated to the types of programs the Agency seeks to prohibit here across all industries. In the final Rule the Agency fails to examine this contrary evidence and chooses instead to rely on anecdotal statements from a handful of commenters.

In addition, an April 2012 U.S. Government Accountability Office ("GAO") Report on Workplace Safety and Health ("GAO Report"), "Better OSHA Guidance Needed on Safety Incentive Programs," summarized a study it conducted of the effect of workplace safety incentive programs and other workplace safety policies on injury and illness reporting. *See* Docket ID No. OSHA-2013-0023-1695, Ex. 7, AR07111-07908. The GAO found:

> Of the six studies GAO identified that assessed the effect of safety incentive programs, *two analyzed the potential effect on workers' reporting of injuries*

[5]"Special programs" consisted of recordkeeping-related incentive programs, disciplinary programs, or programs requiring post-injury drug testing. *Id*.

> *and illnesses, but they concluded that there was no relationship between the programs and the injury and illness reporting.*

Id. at AR07662 (emphasis added). The GAO Report also highlighted that most of the recordkeeping errors found by the Agency during the NEP were minor and did not reflect significant under-recording. *Id*. at AR07685. Not surprisingly, OSHA never seriously discusses these contrary conclusions in the final Rule. Rather, OSHA cherry-picks from the Report to suggest that rate-based incentive programs *may* discourage reporting. 81 Fed. Reg. at 29,673, Ex. 1, AR09017. Again, even if true, this still fails to establish that such programs discourage accurate recordkeeping, and the GAO Report identified two studies that concluded there was *no* relationship between such programs and injury and illness reporting.

OSHA also failed to address comments from stakeholders either pointing out the lack of correlation or suggesting that to the extent there is under-recording it is the result of other factors not addressed by the Rule. *See, e.g.*, Docket ID OSHA-2013-0023-1669 (Ex. 8, AR06706-AR06709), 1678 (Ex. 9, AR06771-AR06789), 1656 (Ex. 10, AR06627-AR06643). For example, ORCHSE Strategies, LLC, an international occupational safety, health and environmental consulting firm with over 120 large companies as members, noted that employers are "not the only source of bias that can impact the reporting and recording of cases; there are multiple sources of bias that affect the recordkeeping process." Docket ID OSHA-2013-0023-1555, pg. 3, Ex. 11, AR05909. ORCHSE identified 20 different sources of bias, claiming that "several sources of bias are inadvertent and probably can't be addressed by regulation." *Id*. at AR05911. OSHA essentially ignored

this evidence because it failed to support the Agency's objective. Rather, OSHA sought a solution for a problem that did not, and does not, exist. *See Butte Cty. v. Hogen*, 613 F. 3d 190, 194 (D.C. Cir. 2010) (rejecting agency finding under APA substantial evidence standard where agency "ignore[d] evidence contradicting its position" (internal quotation marks and citations omitted)").

B. Subsequent Agency Action Further Undermines OSHA's Rationale for the Requirements.

Further, OSHA's primary justification for reporting procedures and the extra-statutory, anti-discrimination provision no longer exists. The driver behind these requirements was OSHA's initial proposal to require certain employers to submit injury and illness information to OSHA, which the Agency would then make publicly available on its website. As OSHA stated in the Supplemental Notice:

> At a public meeting on the proposal, many stakeholders expressed concern that the proposal [to electronically submit and publish injury and illness records] could motive employers to under-record their employees' injuries and illnesses. They expressed concern that the proposal could promote an increase in workplace policies and procedures that deter or discourage employees from reporting work related injuries and illnesses. These include adopting unreasonable requirements for reporting injuries and illnesses and retaliating against employees who report injuries and illnesses.

79 Fed. Reg. at 47605, Ex. 3, AR00035. OSHA feared its electronic submission and publication requirement would push employers to under-record. To prevent that from happening OSHA added the requirements to have "reasonable" reporting procedures and the anti-discrimination provisions.

After finalizing the Rule, however, OSHA decided to re-assess requiring electronic submission of Forms 300 and 301. OSHA also re-evaluated its previous determination to make all of the information publicly available. Citing privacy concerns, the Agency amended the Rule to remove electronic reporting for these forms. 84 Fed. Reg. at 380. It also determined that making injury and illness information publicly available was inappropriate. *Id*. at 383.

In sum, the reason and rationale for OSHA adding the provisions for "reasonable" reporting procedures and the anti-discrimination provision were removed by OSHA. Even if one were to assume that the electronic submission and posting requirements justified these unlawful provisions, it is clear that the removal of the electronic submission and posting requirements undermines OSHA's rationale for adding them in the first instance.[6]

[6] OSHA's actions are also inconsistent with prior agency action and OSHA has failed to explain adequately its deviation. "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Comm. for Cmty. Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). In 2001, when OSHA significantly revised its recordkeeping rules, some labor unions proposed language that would clarify reporting an injury was an exercise of an employee's right under the Act and therefore was protected under Section 11(c) of the Act and "recommended that the rule contain a prohibition against retaliation or discrimination that would be enforced in the same manner as other violations of the recordkeeping rule. (Ex. 15:418)." 66 Fed. Reg. at 6052. OSHA rejected this recommendation, choosing instead to simply clarify the application of Section 11(c) to cases of alleged retaliation for reporting injuries and illnesses. *Id.* at 6053. In the final Rule at issue here, the Agency ignores its previous determinations regarding the same issue and does not explain why it changed its position. When an agency changes its existing policy, it must provide a reasoned explanation for the change. *See Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005); *Grace Petroleum Corp. v. F.E.R.C.*, 815 F.2d 589, 591 (10th Cir. 1987).

III. OSHA's Enactment Of §§ 1904.35(b)(1)(i) And (iv) And The Revision To § 1904.36 Did Not Follow Proper Observance Of Procedure Required By Law In Violation Of The APA (Third Cause of Action).

Under the APA, an agency must provide notice and an opportunity to comment on its proposed rules. 5 U.S.C. § 553(c). Simply providing general notice that a new standard will be adopted "affords [] parties scant opportunity for comment." *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (notice was inadequate because it failed to indicate the form in which the "ultimate standard" might take). Similarly, a "general request for comments is not adequate notice of a proposed rule change." *United Church Bd. for World Ministries v. S.E.C.*, 617 F. Supp. 837, 840 (D.D.C. 1985). Notice of regulatory changes must "describe the range of alternatives being considered with reasonable specificity." *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3d. Cir. 2011) (FCC's notice only asked two general questions relating to the proposed rule and failed to provide adequate information or intent to "allow for meaningful comment"). Without such specificity, interested parties may not know what to comment on, and notice will not lead to better-informed agency decision-making." *Id*.; *see also Horsehead*, 16 F.3d at 1268; *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 170 (2d Cir. 2013) (held that FCC's solicitations of whether to adopt additional rules to protect networks from potential retaliation if they filed a complaint were "too general to provide adequate notice" that a standstill rule was under consideration as a means to provide such protection). OSHA failed to provide an adequate opportunity to meaningfully comment on the "supplemental" portion of the Rule.

The Supplemental Notice published in this matter was only six pages in the *Federal Register*. It provided no regulatory text for the public's consideration, but simply suggested OSHA was considering "adding provisions that will make it a violation for an employer to discourage employee reporting in [certain ways]." 79 Fed. Reg. at 47,605, Ex. 3, AR00035. Plaintiffs understand that the Agency is not required to provide proposed regulatory text for stakeholder consideration to meet the requirements of the APA. However, the Supplemental Notice was so sparse in terms of information that employers had insufficient notice regarding how to intelligently comment. *Fertilizer Institute v. E.P.A.*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (the agency must provide "sufficient detail and rationale for the rule to permit interested parties to comment meaningfully") (quoting *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989)).

The Supplemental Notice itself essentially was comprised of a series of questions seeking information "about such practices and policies, and their effect on injury and illness records." 79 Fed. Reg. at 47,607, Ex. 3, AR00037. These questions included generally:

- Are you aware of situations where employers have discouraged the reporting of injuries and illnesses? If so, describe any techniques, practices, or procedures used by employers that you are aware of. If such techniques, practices, or procedures are in writing, please provide a copy.

- Will the fact that employer injury and illness statistics be publically available on the internet cause some employers to discourage their employees from reporting

injuries and illnesses? Why or why not? If so, what practices or policies do you expect such employers to adopt?

- Are you aware of any studies or reports on practices that discourage injury and illness reporting? If so, please provide them.

Id.

The Supplemental Notice then switches to identifying policies and practices that OSHA believes could discourage injury and illness reporting or that some commenters identified as problematic, including the following: reporting an injury or illness in person at a distant location from the worksite; penalizing an employee for not reporting within a specific time frame; disciplining or taking adverse action against an employee who reports an injury or illness, including termination, reduction in pay, reassignment to a less desirable position; requiring employees who reported an injury to wear fluorescent vests; disqualifying employees who reported two injuries or illnesses from their current job; requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use; and automatically disciplining those who seek medical attention, and enrolling employees who report an injury in an "Accident Repeater Program." OSHA also discusses disciplining employees for violation of a safety rule or for violating vague safety rules as a pretext for disciplining employees who are injured. *Id*. at AR00037-AR00038.

The Supplemental Notice mentions these but does not definitively state that the Agency is proposing to prohibit the practices or under what circumstances they would be prohibited. *Id*. Seeking ideas from stakeholders on what could be problematic is not giving

notice to stakeholders as to what conduct the Agency proposes to prohibit or providing the public a meaningful opportunity to comment.

Because the Agency did not give sufficient notice, stakeholders were not able to comment on the wide range of activities that OSHA has suggested in various guidance documents are now prohibited. For example, *there is no mention of safety incentive programs* in the Supplemental Notice. *Id.* Stakeholders were given no notice that OSHA would promulgate a rule that could abolish safety incentive programs that have some relationship to injury and illness rates, something that many employers throughout the country have implemented. But that is what it did. *See* 81 Fed. Reg. at 29,674, Ex. 1, AR09018.

The only mention of a drug testing program in the Supplemental Notice referenced a comment from a participant during the "public meeting." 79 Fed. Reg. at 47,608, Ex. 3, AR00038. OSHA did not seek comment on specific drug testing programs, state and federal requirements for drug testing, or the benefits of workplace drug testing programs. *Id*.

The proper approach by OSHA – and the approach required by the APA – would have been to take the information received by the Agency through the Supplemental Notice, consider it, and then issue a new proposed rule that would have clearly identified those programs that OSHA preliminarily concluded should be unlawful and given stakeholders the opportunity to comment on them. OSHA did not do that.

OSHA's approach created a second procedural flaw. In the final Rule, OSHA relies on material that was not made available to the public to comment on. For example, in an attempt to support the purported under-recording problem, as discussed above OSHA relies on the ERG Analysis. That report was not mentioned in the Supplemental Notice, even though it was prepared almost a year in advance. *See Id*. at AR00035-AR00040. More importantly, it was not entered into the rulemaking record until November 6, 2015, almost 13 months after the close of the comment period. *See* Ex. 12. *See Conn. Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *see also Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007).

In short, OSHA promulgated a rule with significant consequences for all of U.S. industry without providing even a basic level of stakeholder participation.

IV. OSHA's Requirement That Employers Have "Reasonable" Reporting Procedures And The Anti-Discrimination Requirements Deprive Employers Of Adequate Notice Of Their Compliance Obligations In Violation Of The Fifth Amendment, And Thus The APA (Fourth Cause Of Action).

It is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 107 (1972). Regulated parties "should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *F.C.C. v. Fox Television Stations, Inc.*, 567

U.S. 239, 239 (2012); *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997) (regulation must be sufficiently specific so that interested party "familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require"). The Rule's requirement that employers adopt "reasonable" reporting procedures and the anti-discrimination provisions fail this test. They are so vague and ambiguous as to deprive employers of notice of their basic compliance obligations.

As an initial matter, the text of 29 C.F.R. § 1904.35(b)(1)(i) provides no definition of what a "reasonable" reporting procedure is. The Rule states: "You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." 29 C.F.R. § 1904.35(b)(1)(i). In justifying the provision, OSHA states that "[t]he 'reasonable person' standard is an objective standard that is well-established and applied in many areas of the law, and which can be applied by lay people without the use of experts." 81 Fed. Reg. at 29,671, Ex. 1, AR09015 (citation omitted). Then the Agency summarily concludes, "OSHA believes the final rule's requirement that employers establish a reporting procedure that would not deter or discourage a reasonable employee from reporting work-related injuries and illnesses is sufficiently clear to notify employers of their obligations under the

rule while giving employers flexibility to design policies that make sense for their workplaces." *Id.*

Contrary to the Agency's view on this, there is nothing in the regulatory text itself that would provide any notice to employers regarding the types of policies that the Agency believes deter or discourage a reasonable employee from reporting work-related injuries and illnesses. A small employer that opens the Code of Federal Regulations and reads this requirement would have absolutely no idea of the types of programs, policies, and procedures that OSHA believes unreasonable.

That small business would need to turn to the preamble in the *Federal Register* and multiple guidance documents[7] to have any idea of their obligations and what is presumably allowable or prohibited, and even that guidance is vague and ambiguous. For example, in a memorandum from Dorothy Dougherty, Deputy Assistant Secretary to Regional Administrators explaining the provisions "in more detail," OSHA simply explains what is "reasonable" by reference to the term "reasonable." *See* https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html, Ex. 13 ("For a reporting procedure to be *reasonable*, and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a *reasonable* timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a *reasonable* manner.") (emphasis added).

[7]The guidance documents referenced in this Memorandum are all publicly available. Plaintiffs attach copies for ease of reference.

Even where OSHA goes further in attempting to explain "reasonable" reporting procedures, OSHA's guidance remains vague. OSHA states that it would "not be reasonable to require employees to take unnecessarily cumbersome steps or an excessive number of steps to report." *Id*. But the Agency does not define what is a "cumbersome step" or an "excessive number of steps" to report. *Id*.

OSHA followed this initial guidance with a document entitled "Interim Enforcement Procedures for New Recordkeeping Requirements under 29 C.F.R § 1904.35." *See* https://www.osha.gov/dep/memos/recordkeeping_memo_11102016.html, Ex. 14. In this guidance, OSHA attempts to explain what is "reasonable" in terms of "time" and "means" of reporting. *Id*. The Agency states that "time" and "means" refers to "when" and "how" an employer's procedure requires employees to report injuries and illnesses. *Id*. Above all else the guidance simply continues OSHA's pattern of defining "reasonable" as something that is "reasonable":

> For a reporting procedure to be *reasonable* it must allow for reporting of work-related injuries and illnesses within a *reasonable* time after the employee has realized that he or she has suffered the kind of work-related injury or illness the employer's procedure requires employees to report.

Id. (emphasis added).

The small business that tries to understand its compliance obligations would be even further confused to learn that the anti-discrimination language in the Rule located in 29 C.F.R. § 1904.35(b)(1)(iv) and the revision to 29 C.F.R. § 1904.36 prohibits certain safety incentive programs and work-place drug testing programs. For example, in the preamble

to the Rule OSHA identifies the following as potentially deterring or discouraging reporting of injuries and illnesses:

- when reporting employees are "selectively disciplined for violation[s] of vague work rules such as 'work carefully' or 'maintain situational awareness'";
- policies "mandating automatic post-injury drug testing" or "blanket post injury drug testing policies"; and
- employee incentive programs, including an employer entering "all employees who have not been injured in the previous year in a drawing to win a prize," or "a team of employees might be awarded a bonus if no one from the team is injured over some period of time."

81 Fed. Reg. at 29,672-674, Ex. 1, AR09016-AR09018. But even these practices could be allowable, as OSHA states that the "specific rules and details of implementation of any given incentive program must be considered to determine whether it could give rise to a violation of [the regulation]." *Id.* at 29,674, Ex. 1, AR09018.

In other guidance posted on OSHA's website around the same time as the October 16, 2016 memorandum, OSHA provided additional information on disciplinary programs, safety incentive programs, and drug testing programs. *See* https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11, Ex. 15. Again, OSHA's interpretation of its requirements is vague at best and provides little meaningful guidance to employers. For example, OSHA states that a practice of giving a "substantial" cash prize to a group of employees if no employee sustains a lost-time injury over a certain period of time would be unlawful. *Id.* However, nowhere does OSHA explain what a "substantial" cash prize would be. *Id.*

The preamble guidance, as well as the subsequently issued interpretive guidance, provides no real information to employers regarding how to structure disciplinary programs, safety incentive programs, and drug testing programs in the real world and does not reflect that many of these programs are more complicated and intricate than OSHA suggests in the guidance documents.

In October of 2018, OSHA issued yet another memorandum, seeking to provide additional guidance to employers (and tacitly recognizing the vagueness of the requirements themselves). *See* https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11, Ex. 16. This memorandum seemingly takes the opposite position on certain acceptable policies and procedures. For example, in the October 19, 2016 memorandum, OSHA provided this example of a likely violative program:

> Consider the example of an employer promise to raffle off a $500 gift card at the end of each month in which no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury.

See Ex. 13. In the October 11, 2018 memorandum, however, OSHA seems to take the opposite position: "Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would *not* cite the employer under § 1904.35(b)(1)(iv) as long as the employer has implemented adequate precautions to ensure that employees feel free to

report an injury or illness." https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11, Ex. 16 (emphasis added). While OSHA does not define "adequate precautions" in the 2018 memorandum, that memorandum appears to back away from the bright line test set forth in the October 19, 2016 memorandum. The fact that OSHA can interpret the same requirement in two seemingly inconsistent ways shows just how vague and ambiguous the requirements at issue in this case truly are.

Despite multiple different guidance documents put forward by OSHA to explain the requirements, employers still do not know what it actually means to have a compliant procedure. And OSHA has shown that it can change its position at any time regarding its guidance. As OSHA states in its October 11, 2018 memorandum, "[t]o the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them." *Id.* This approach must be rejected.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant the Motion for Summary Judgment and grant the relief requested in Plaintiff's complaint filed in this matter.

Dated: May 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 17, 2019, a true, correct, and exact copy of the foregoing document was served via electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

/s/ Bradford T. Hammock
Bradford Hammock (*Pro Hac*)