

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

HENRY MCMASTER, in his official capacity as  
Governor of the State of South Carolina, and  
SOUTH CAROLINA DEPARTMENT OF LABOR,  
LICENSING & REGULATION,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF LABOR;  
MARTIN J. WALSH, in his official capacity as  
Secretary of Labor; OCCUPATIONAL SAFETY  
AND HEALTH ADMINISTRATION; and DOUGLAS  
PARKER, in his official capacity as Assistant  
Secretary for Occupational Safety and Health,

*Defendants.*

Civil Action No.: 3:22-cv-2603-SAL

**Complaint  
for Declaratory and Injunctive Relief**

**COME NOW** Plaintiffs Henry McMaster, in his official capacity as Governor of the State of South Carolina, and the South Carolina Department of Labor, Licensing & Regulation (“LLR”) (collectively, “Plaintiffs”), by and through the undersigned counsel, complaining of Defendants United States Department of Labor; Martin J. Walsh, in his official capacity as Secretary of Labor; Occupational Safety and Health Administration; and Douglas Parker, in his official capacity as Assistant Secretary for Occupational Safety and Health (collectively, “Defendants”), bring this action to challenge the requirement that the South Carolina State Plan increase its civil penalties to match the increased federal civil penalties that the Occupational Safety and Health Administration imposed in Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2022, 87 Fed. Reg. 2328, 2331–32 (Jan. 14, 2022) (“2022 Adjustment”), and hereby demand judgement against Defendants and, in support thereof, allege and say as follows:

**PARTIES AND JURISDICTION**

1. Henry McMaster is Governor of the State of South Carolina and brings this suit in his official capacity.

2. Governor McMaster is the “Chief Magistrate” of South Carolina with “supreme executive authority” in the State, S.C. Const. art. IV, § 1, and he is charged with the constitutional duty to “take care that the laws be faithfully executed,” *id.* art. IV, § 15. The Governor has authority over cabinet agencies. *See* S.C. Code Ann. § 1-30-10. Governor McMaster has an interest in ensuring that all state laws, including the South Carolina Constitution and Code of Laws, are executed, rather than subverted through federal overreach.

3. The South Carolina Department of Labor, Licensing & Regulation is a department within the executive branch of state government, *id.* § 1-30-10(A)(12), and its director “supervise[s] the department under the direction and control of the Governor and shall exercise other powers and perform other duties as the Governor requires,” *id.* § 40-1-40(D).

4. LLR administers South Carolina’s state OSHA plan (“State Plan”).

5. The United States Department of Labor was created in 1913, *see* Act of Mar. 4, 1913, 37 Stat. 736, and serves to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.

6. Martin J. Walsh serves as the Secretary of Labor and is sued in his official capacity.

7. The Occupational Safety and Health Administration (“OSHA”) was created in 1971 and seeks to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education, and assistance.

8. Douglas Parker serves as the Assistant Secretary for Occupational Safety and Health and is sued in his official capacity.

9. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 because the claims asserted herein arise under and pursuant to the Administrative Procedure Act.

10. Venue is proper in this District and Division under 28 U.S.C. § 1391(b)(2), 28 U.S.C. § 121, and Rule 3.01 of the Local Civil Rules (D.S.C.) because Plaintiffs are located in this District and Division and because a substantial portion of the wrongs, transactions, and acts complained of herein occurred in this District and Division.

### **FACTUAL BACKGROUND**

#### **A. The OSH Act**

11. Congress enacted the Occupational Safety and Health Act of 1970, Pub. L 91-596, 84 Stat. 1590 (Dec. 29, 1970) (“OSH Act”).

12. As part of the OSH Act, the Secretary of Labor is required to promulgate standards for safety and health in workplaces. *See* 29 U.S.C. § 655.

13. The OSH Act imposes civil and criminal penalties for violations of these standards. *See id.* § 666.

14. The OSH Act also gives the Secretary of Labor the authority to promulgate rules and regulations to carry out his responsibilities under the Act. *See id.* § 657(g)(2).

15. OSHA was created to implement the requirements of the OSH Act and to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education, and assistance.

16. Under the OSH Act, States can allow the federal government to regulate and enforce workplace safety standards in the State directly, or States can submit a state-specific plan

for the development and enforcement of state safety and health standards that are at least as effective as the federal standards. *See id.* § 667; *see also* 29 C.F.R. § 29.1902.1 *et seq.* (providing criteria and procedure for approval of state plans).

**B. Federal civil penalties**

17. The OSH Act established the original amounts of federal civil penalties. *See* OSH Act, § 17, 84 Stat. at 1606–07.

18. The maximum amounts of federal civil penalties in the OSH Act were amended in 1990. *See* Omnibus Reconciliation Act of 1990, Pub. L. 101-508, Title III, § 3101, 104 Stat. 1388, 1388-29 (Jan. 23, 1990).

19. The maximum amounts of federal civil penalties in the OSH Act have remained unchanged since 1990. *See* 29 U.S.C. § 666.

20. Congress passed the Federal Civil Penalties Inflation Adjustment Act of 2015, Pub. L. 114-74, Title VII, 129 Stat. 584, 599 (Nov. 2, 2015) (“2015 Federal Penalties Act”).

21. The 2015 Federal Penalties Act requires annual adjustments for federal civil penalties. *See id.* § 701(b)(1)(A), 129 Stat. at 599.

22. The 2015 Federal Penalties Act required OSHA to make a one-time adjustment to the amounts of federal civil penalties “through an interim final rulemaking.” *Id.* § 701(b)(1)(D), 129 Stat. at 599.

23. OSHA issued this interim final rule in July 2016. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43,430 (July 1, 2016).

24. After that one-time adjustment, the 2015 Federal Penalties Act requires OSHA to make annual adjustments to the amounts of federal civil penalties. These annual adjustments for

inflation to federal civil penalties are exempt from 5 U.S.C. § 553's notice-and-comment requirements. *See id.*

25. OSHA has published such annual adjustments to federal civil penalties every year since 2017, each time as a final rule without that rule going through the notice-and-comment process. *See* 2022 Adjustment, 87 Fed. Reg. 2328; Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021, 86 Fed. Reg. 2964 (Jan. 14, 2021); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292 (Jan. 15, 2020); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213 (Jan. 23, 2019); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 Fed. Reg. 7 (Jan. 2, 2018); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373 (Jan. 18, 2017).

**C. Federal regulations related to state civil penalties**

26. Federal regulations originally required only that a state plan “[p]rovides effective sanctions against employers who violate State standards and orders, such as those provided in the Act.” State Plans for the Development and Enforcement of State Standards, 36 Fed. Reg. 20,751, 20,754 (Oct. 29, 1971) (codified at 29 C.F.R. § 1902.4(c)(2)(xi)).

27. OSHA amended 29 C.F.R. § 1902.4(c)(2)(xi) as part of the one-time adjustment required by the 2015 Federal Penalties Act to add the cross-reference to 29 C.F.R. § 1903.15(d). *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. at 43,439.

28. This 2016 amendment to § 1902.4(c)(2)(xi) was adopted as an interim final rule, without any notice-and-comment process under 5 U.S.C. § 553.

29. Section 1902.4(c)(2)(xi) now requires that a state plan must “[p]rovide[] effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, and in 29 CFR 1903.15(d).”

**D. The South Carolina State Plan**

30. Among other things, a state plan must provide “for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated” by OSHA. 29 U.S.C. § 667(c)(2).

31. South Carolina chose to create the State Plan.

32. The State Plan received initial approval in 1972, certification in 1976, and final approval in 1987.

33. The South Carolina State Plan is administered by LLR.

34. LLR has successfully run the South Carolina State Plan for more than four decades.

35. South Carolina’s civil penalties are set by statute at \$70,000 and \$7,000 depending on the type of violation. *See* S.C. Code Ann. § 41-15-320.

**E. The 2022 Adjustment**

36. OSHA published the 2022 Adjustment on January 14, 2022.

37. The 2022 Adjustment increased federal civil penalties to \$145,027 (up from \$70,000 in 2015) and \$14,502 (up from \$7,000 in 2015). *See* 87 Fed. Reg. at 2336.

38. The 2022 Adjustment provides that “State Plans are *required* to increase their penalties in alignment with OSHA’s penalty increases.” *Id.* at 2332 (emphasis added).

39. Previous annual adjustments from 2017, 2018, 2019, 2020, and 2021 contained similar or identical language.

40. South Carolina’s penalties are set by statute, and the General Assembly did not amend that statute before it adjourned its regular session in 2022.

41. Plaintiffs have reason to believe that OSHA may attempt to revoke South Carolina’s State Plan if South Carolina does not increase its civil penalties to match the 2022 Adjustment.

42. OSHA has already begun the process to revoke Arizona’s state plan based in part on Arizona’s refusal to establish or impose civil penalties with maximum amounts that are not at least as great as the federal civil penalties. *See Arizona State Plan for Occupational Health and Safety; Proposed Reconsideration and Revocation*, 87 Fed. Reg. 23,783, 23,786–87 (Apr. 21, 2022).

43. On August 4, 2022, OSHA issued the FY 2021 Comprehensive Federal Annual Monitoring (“FAME”) Report.

44. The 2021 FAME Report includes a finding that the “State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.” 2021 FAME Report, at 18.

45. Findings in a FAME Report are significant because they are “limited to those issues that warrant corrective action by the State Plan to ensure it is [at least as effective]” as the federal standards. OSHA, *State Plan Policies and Procedures Manual* 74 (May 6, 2020), <https://tinyurl.com/2p93wtfv>. South Carolina is similarly situated to Arizona to the extent that both state plans have maximum civil penalties that are not at least as great as the federal civil penalties.

**CAUSES OF ACTION**

**COUNT ONE**

**(Declaratory Judgment – Violation of 5 U.S.C. § 706(2)(D))**

46. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.
47. A reviewing court “shall” “hold unlawful and set aside agency action” that was taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).
48. The 2022 Adjustment was enacted without going through 5 U.S.C. § 553’s notice-and-comment process.
49. The 2015 Federal Penalties Act applies only to federal civil penalties.
50. The 2015 Federal Penalties Act gives OSHA no authority to require anything of state plans regarding their civil penalties.
51. The plain text of §1902.4(c)(2)(xi) does not require state civil penalties to be equal to or greater than federal civil penalties.
52. OSHA lacked the authority under the 2015 Federal Penalties Act or 5 U.S.C. § 553 to amend §1902.4(c)(2)(xi) in an interim final rule.
53. 29 C.F.R. § 1902.37(b)(12) does not require that States establish or impose civil penalties that are identical to or greater than federal civil penalties or that state civil penalty structures be identical to the federal civil penalty structure.
54. OSHA has no legal basis in the 2022 Adjustment for requiring state plans “to increase their penalties in alignment with OSHA’s penalty increases.” 87 Fed. Reg. at 2332.

**COUNT TWO**

**(Declaratory Judgment – Violation of 5 U.S.C. § 706(2)(A))**

55. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

56. Agency action cannot survive if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A).

57. An agency’s rulemaking “must give adequate reasons for [the agency’s] decisions.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

58. The 2022 Adjustment includes no explanation for why state plans must “increase their penalties in alignment with OSHA’s penalty increases.” 87 Fed. Reg. at 2332.

59. The South Carolina State Plan is at least as effective as the federal standards.

60. When an agency changes its position on an issue, the agency must “display awareness that it is changing position” and “provide a reasoned explanation for the change.” *Encino Motorcars, LLC*, 579 U.S. at 221.

61. Prior to 2015, nothing that had the force of law expressly required state civil penalties to be equal to or greater than federal civil penalties.

62. South Carolina’s civil penalties are identical to the civil penalties codified in the United States Code. *Compare* S.C. Code Ann. § 41-15-320, *with* 29 U.S.C. § 666.

63. Even the amended version of § 1902.4(c)(2)(xi) does not expressly require state civil penalties to be equal to or greater than federal civil penalties.

64. The 2022 Adjustment does not explain why OSHA now contends that the state plans must have civil penalties that are equal to federal civil penalties.

65. States serve “as laboratories for devising solutions to difficult legal problems,” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 817 (2015), and federal agencies must account for States’ special role in our constitutional system, *see* Executive Order 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

66. The 2022 Adjustment has only one paragraph discussing federalism, which claims that the 2022 Adjustment “does not have federalism implications.” 87 Fed. Reg. at 2332.

67. OSHA failed to consult with the States regarding the 2022 Adjustment.

68. The 2022 Adjustment’s discussion of federalism fails to take into account the role that state plans can play in determining how different civil penalty amounts and structures might promote safer workplaces.

**COUNT THREE**  
**(Preliminary and Permanent Injunctive Relief)**

69. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

70. Plaintiffs have a meritorious argument that OSHA lacks legal authority to impose penalty increases to South Carolina’s state plan by publishing a notice in the Federal Register and bypassing the notice-and-comments requirements under the APA.

71. Plaintiffs will suffer irreparable harm without injunction relief because, among other things, they will be forced to change state law based on an invalid federal requirement, the State’s sovereignty will be infringed, and businesses will, if violations are found, be subject to increased penalties that the State would not have adopted but for the 2022 Adjustment.

72. The balance of the hardships and the public interest favor Plaintiffs because leaving an invalid federal regulation in effect benefits no one, requiring the federal government to follow proper procedures benefits everyone, and OSHA has not sought to enforce similar adjustments in previous years.

**RELIEF REQUESTED**

**WHEREFORE**, Plaintiffs respectfully request the Court:

- A. Declare that the 2022 Adjustment violates 5 U.S.C. § 706(2)(D);
- B. Declare that the 2022 Adjustment violates 5 U.S.C. § 706(2)(A);

- C. Preliminarily enjoin Defendants from:
- i. Requiring the State Plan to impose or enforce civil penalties identical to the federal penalties provided in the 2022 Adjustment or to otherwise require the State Plan or LLR to enforce the 2022 Adjustment;
  - ii. Requiring the State Plan to impose or enforce civil penalties identical to the federal penalties provided in any previous annual inflation adjustments, *see* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021, 86 Fed. Reg. 2964 (Jan. 14, 2021); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292 (Jan. 15, 2020); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213 (Jan. 23, 2019); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 Fed. Reg. 7 (Jan. 2, 2018); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373 (Jan. 18, 2017); Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43,430 (July 1, 2016); and
  - iii. Publishing in the Federal Register any proposal to reconsider and revoke OSHA’s final approval of South Carolina’s State Plan or otherwise taking any adverse action against the State Plan during the pendency of this action, whether based on the 2022 Adjustment or any other annual adjustments that OSHA has issued since 2016, or otherwise.

D. Permanently enjoin Defendants from:

- i. Requiring the State Plan to impose or enforce civil penalties identical to the federal penalties provided in the 2022 Adjustment or to otherwise require the State Plan or LLR to enforce the 2022 Adjustment;
- ii. Requiring the State Plan to impose or enforce civil penalties identical to the federal penalties provided in any previous annual inflation adjustments, *see* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021, 86 Fed. Reg. 2964 (Jan. 14, 2021); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292 (Jan. 15, 2020); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2019, 84 Fed. Reg. 213 (Jan. 23, 2019); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 Fed. Reg. 7 (Jan. 2, 2018); Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373 (Jan. 18, 2017); Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43,430 (July 1, 2016); and
- iii. Publishing in the Federal Register any proposal to reconsider and revoke OSHA's final approval of South Carolina's State Plan or otherwise taking any adverse action against the State Plan during the pendency of this action, whether based on the 2022 Adjustment or any other annual adjustments that OSHA has issued since 2016, or otherwise.

E. Grant any further relief the Court deems equitable and just.

Respectfully submitted,

s/Wm. Grayson Lambert

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