

CENTER FOR INDIVIDUAL RIGHTS

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July 22, 2024

The Honorable Douglas L. Parker
Assistant Secretary for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Submitted via www.regulations.gov

RE: Comments of the Center for Individual Rights in Opposition to OSHA's
Proposed Emergency Response Standard (Docket No. OSHA-2007-0073)

Dear Secretary Parker:

The Center for Individual Rights (CIR) respectfully submits these comments in opposition to the Occupational Safety and Health Administration's proposed Emergency Response Standard (Docket No. OSHA-2007-0073). The statute that OSHA relies on for authority to issue general workplace safety standards is constitutionally defective. But even if OSHA had constitutional authority to issue general workplace safety standards, the proposed rule would be unlawful and unworkable for other reasons described herein.

CIR is a national nonprofit public interest law firm that litigates to defend constitutional protections for individual rights. To that end, CIR represents individuals *pro bono* in courts throughout the United States. CIR has seven appearances and five victories in the Supreme Court of the United States and numerous victories in other courts throughout the United States. CIR focuses on constitutional guarantees for civil liberties that protect individual rights and promote human flourishing. Those guarantees come in part from structural limits on government, such as the separation of powers and federalism.

CIR submits this comment letter to highlight problems with the proposed Emergency Response Standard. Promoting the health and safety of emergency responders is undoubtedly important, but OSHA lacks the legal authority to issue the proposed Emergency Response Standard. Moreover,

even if OSHA had broad authority to issue such standards, the proposal would be unlawful for other reasons, and it is not economically feasible for many small and volunteer fire companies to comply and could result in some shutting down.

Beyond the foundational issue of whether OSHA has lawful authority to issue general workplace safety standards, there are several other serious problems with the above-referenced rule. First, the incorporation by reference of numerous private industry consensus standards that are not practically available, violates both statutory and constitutional protections. Second, the proposed rule is an improper attempt to extend federal control over states that have assumed responsibility for occupational safety issues through a dubious form of pre-emption analysis. Rather than implement this costly and illegal standard, OSHA should return to the drawing board after receiving lawful authority and proper limits on its regulatory discretion from Congress.

I. OSHA’s Promulgation of the Emergency Response Standard is an Unlawful Exercise of Legislative Power that Violates the U.S. Constitution.

The United States Constitution provides in its first substantive sentence that “[a]ll legislative powers herein granted” to the federal government by the people are vested in Congress. U.S. Const. Art I § 1. As part of the executive branch, OSHA can only engage in lawful regulation that fills in small gaps (what is also referred to as “interstitial” regulation) when Congress has first laid down the general legal standard that binds the public in law. Even explicit attempts by Congress to delegate its broad lawmaking power over particular subjects, like workplace safety, to executive agencies is unconstitutional because Congress cannot sub-delegate (or re-delegate) the lawmaking power the sovereign people have exclusively delegated to Congress. *Gundy v. United States*, 588 U.S. 128, 132 (2019) (“The nondelegation doctrine bars congress from transferring its legislative power to another branch of Government.”). *See also id.* at 153 (“Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.”) (Gorsuch, J., dissenting).

At least five members of the current Supreme Court have expressed an interest in reconsidering the proper standard for determining whether Congress has attempted an unconstitutional delegation of its lawmaking power to an executive agency. *See Gundy*, 588 U.S. at 179 (“In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s

chief prosecutor the power to write his own criminal code. That is delegation running riot.”) (Gorsuch, J., dissenting, joined by Robert, C.J., and Thomas, J.); *id* at 149 (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); (Alito, J. concurring); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (noting that “Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”) (Kavanaugh, J., concurring in denial of *certiorari*). But even under existing standards that allow exceedingly broad delegations, Congress must set out an “intelligible principle” that provides the agency with the “general policy” of the statute, the agency which is to apply it, and the boundaries of this authority. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1946). These boundaries must meaningfully constrain the agency’s discretion, and the amount of authority claimed must be proportionate to the guidance Congress provided. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 476 (2001), *Touby v. United States*, 500 U.S. 160, 166 (1991). Action which fails to comply with these restrictions violates the constitutional separation of powers. *Mistretta*, 488 U.S. at 372-73.

Here, OSHA’s promulgation of the proposed Emergency Response Standard is an exercise of legislative power in violation of the nondelegation doctrine even under the lax “intelligible principle” standard. OSHA states the legal basis for the proposed rule is the responsibility delegated to the Secretary of Labor by the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, and the legal authority for issuing safety and health standards found in 29 U.S.C. § 655. In the OSH Act, Congress delegated its entire power to legislate workplace safety standards to OSHA. OSHA has unbounded discretion to impose virtually any workplace safety rule, for any given business or industry based solely on the subjective judgment of the Secretary of Labor that a particular rule is “reasonably necessary *or* appropriate.” 29 U.S.C. § 652(8) (emphasis supplied). There is absolutely no guidance in the statute regarding when a particular standard is or is not “appropriate.” How could there be when such intentionally capacious language is employed? “No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope” Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1448 (2008). Indeed, OSHA gets to determine not only when a safety risk is significant enough to warrant a rule, but also whether the costs imposed by the rule are worth the benefits, all without any guidance whatsoever from Congress. *See id.*

Further, in proposing the standard here, OSHA asserted power grossly disproportionate to what little guidance Congress provided. Narrow delegations of authority are permissible, but Congress must provide

substantial guidance when giving an agency power to set “standards that affect the entire national economy.” *Whitman*, 531 U.S. at 475. Here, OSHA is exercising virtually unlimited power to impose immense costs, both in time and economic resources on fire companies that provide vital services. And of the 29,452 fire departments in the United States, approximately 24,000 have all or mostly all-volunteer forces.¹ Many are small, underfunded, and rural. The statutory authority OSHA relies upon lacks any true guidance to support a rule with such wide-ranging implications. The delegation of such broad legislative power under the OSH Act is clearly unconstitutional, and no narrowing interpretation can save it. *See Whitman. v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

Just last month, two members of the Supreme Court raised precisely this concern. *See Allstates Refractory Contractors, LLC v. Su*, 603 U.S. ____ (2024) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). As Justice Thomas observed, “The Occupational Safety and Health Act may be the broadest delegation of power to an administrative agency found in the United States Code. If this far-reaching grant of authority does not impermissibly confer legislative power on an agency, it is hard to imagine what would. It would be no less objectionable if Congress gave the Internal Revenue Service authority to impose any tax on a particular person that it deems ‘appropriate,’ and I doubt any jurist would sustain such a delegation.” *Id.* at *2-3 (citations omitted).

While the Court ultimately declined to review the OSH Act in that case, other vehicles remain. Should OSHA insist on its misguided proposal here, CIR will not hesitate to present the Court with another opportunity to rule on this important constitutional issue.

II. The proposed Emergency Response Standard’s Widespread Use of Private Standards Incorporated by Reference Makes it Virtually Opaque to a Large Number of Fire Companies.

A. The Proposed Rule Outsources Lawmaking to Private Organizations.

In the proposed rule, OSHA’s starting premise is sound—first responders face extraordinary safety challenges as a part of their work. 89

1. <https://www.nvfc.org/wp-content/uploads/2022/12/NVFC-Volunteer-Fire-Service-Fact-Sheet.pdf>

Fed. Reg. at 7792. And naturally, these dangers affect both career and volunteer emergency responders. *See id.*

To address these concerns, however, OSHA looked to more than 20 “consensus standards” for best practices, set by private organizations, the National Fire Protection Association (NFPA), the American National Standards Institute (ANSI), and the International Safety Equipment Association (ISEA). *Id.* Confusingly, rather than set out a set of *rules* that regulated parties must follow, OSHA has explained that “relevant portions” of “certain” standards will be “incorporated by reference” into a final rule, but never set them out in full. *Id.* at 7792-93. Additionally, regulated entities could, sometimes, comply with the proposed rule by complying with yet other private standards that are “equivalent to those in the consensus standard.” *Id.* at 7793.

The incorporation of these standards by reference poses a number of problems. First, many of these standards are updated every few years. If a current standard is incorporated by reference into the proposed standard, it will remain fixed in the regulations. Moreover, the NFPA is currently consolidating many of its standards, a project it expects to complete in 2025, and it is not clear how the particular standards OSHA incorporated by reference will be affected. Indeed, OSHA acknowledges that “NFPA is currently in the process of combining many of their standards into larger consolidated standards,” yet it has still pressed forward with its proposal. 89 Fed. Reg. at 7795.

Moreover, many of the standards incorporated by reference refer to other standards not mentioned in the rule itself, meaning that in reality there are far more private standards incorporated than those explicitly listed. For example, NFPA 1021, a standard for professional fire officer qualification, incorporates by reference ten other NFPA publications, and NFPA 1001 incorporates eleven. So, in reality there are far more than 20 private standards incorporated by reference in the Emergency Response Standard.

Most importantly, these private standards are anything but readily accessible. While NFPA standards are technically available to view for free online, they cannot be downloaded, printed, copied, screenshot, or shared in any way. Any further access must be purchased, often at prices unaffordable to small or volunteer fire companies. Indeed, the purchase price for *each* standard is typically \$149.00. Yet the mere *list* of applicable NFPA standards comprises more than three pages in the Federal Register, meaning that the final costs will certainly be significant. *See* 89 Fed. Reg. at 7792-96. This is by design, as NFPA has a profit motive in issuing and selling its

standards. As NFPA says, “It is essential that NFPA maintain copyright and the ability to charge for the codes and standards.”²

ANSI standards are not even viewable without purchasing. For example, ANSI/ISEA 207, a standard for high visibility safety vests, is available as an online “preview,” allowing the user to view just the table of contents and the first page of the standard. But if a user wants to see the actual substantive requirements for new safety vests, he is forced to pay at least \$60 for the standard. Thus, even if a small fire company has money in their budget to purchase new safety vests, it would be forced to pay an outside organization an extra \$60 just to make sure that they are compliant with the standard.

Such thorough reliance on incorporated private standards renders the Emergency Response Standard virtually opaque to all but the most sophisticated or economically privileged fire companies. By incorporating standards by reference, these private standards will become binding public law without ever being published in the Federal Register or the C.F.R. And while OSHA has recognized that many stakeholders “expressed concern with the potential expense of time and money in having to comply with the provisions in NFPA standards,” it has done nothing to remedy this problem. *See* 89 Fed. Reg. at 7795.

B. The Proposed Rule’s Incorporation by Reference Is Unlawful.

Concerns about affordability and access aside, the Proposed Rule’s reliance on incorporation of the consensus standards is unlawful in at least two important ways. First, such incorporation violates the Freedom of Information Act (FOIA) provisions of the Administrative Procedure Act (APA), and its requirement that every agency must “make available to the public” all “substantive rules of general applicability adopted as authorized by law.” 5 U.S.C. § 552(a)(1)(D). Second, and perhaps more significantly, hiding binding law behind a paywall violates core principles of due process and fair notice.

1. Incorporation By Reference Violates FOIA

The Freedom of Information Act (FOIA) is part of the Administrative Procedures Act (APA). It requires, among other things, that agencies “make available to the public” all “substantive rules of general applicability adopted

2. <https://www.nfpa.org/for-professionals/codes-and-standards/list-of-codes-and-standards/free-access>

as authorized by law,” by “separately stat[ing] and currently publish[ing] in the Federal Register for the guidance of the public.” 5 U.S.C. § 552(a)(1)(D). This publication requirement implicates the right of affected persons to have notice of the law: “a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.” *Id.* at 552(a).

These provisions were designed to ensure that regulatory requirements would be publicly and freely available in a single place—the Code of Federal Regulations. The New Deal created massive amounts of new administrative regulations that were mostly available only in “separate paper pamphlets,” which created “chaos” because the regulated public lacked easy access to its legal obligations. Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 199, 204-05 (1934). The situation was so bad that even the *government* lacked notice of regulatory requirements, and “was seriously embarrassed” when it brought major prosecutions to enforce regulations that were actually repealed or altered. *The Federal Register & the Code of Federal Regulations—A Reappraisal*, 80 Harv. L. Rev. 439, 440-41 (1966). In one such instance, the Supreme Court observed, “Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412 (1935). Publication in a single, freely available source was meant to solve this problem. *A Reappraisal*, 80 Harv. L. Rev. at 440-41.

Thus, “the fundamental purpose of the Federal Register Act” was “to eliminate the problem of secret law” and “provid[e] public access to what has been published in the Federal Register.” *Cervase v. Office of the Fed. Register*, 580 F.2d 1166, 1169, 1171 (3d Cir. 1978). An agency’s failure to provide interested persons with the means to retrieve documents codified in the Federal Register undermines Congress’ purpose of eliminating secret law. *Id.*

Congress later added FOIA’s specific provisions, 5 U.S.C. § 552, because it believed that governmental disclosure of information to the public was inadequate. *OSHA Data/CIH, Inc. v. Dep’t of Labor*, 220 F.3d 153, 160 (3d Cir. 2000). “[T]he clear legislative intent” of FOIA was “to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 365-66 (1976). “Congress therefore structured FOIA to reflect ‘a general philosophy of full agency disclosure unless information exempted under clearly delineated statutory language.’” *OSHA Data*, 220 F.3d at 160 (quoting S. REP. NO. 89-813, at 3 (1965), as quoted in *Rose*, 425 U.S. at 360-61). To

further FOIA's purpose, the Supreme Court has dictated that courts broadly construe FOIA's disclosure requirements and narrowly construe its exemptions. *Rose*, 425 U.S. at 366. FOIA's "recognized principal purpose" requires courts "to choose that interpretation most favoring disclosure." *Id.*

There is, however, an exception to FOIA's general requirement that agencies must publish the full text of substantive rules. Section 552(a) creates a presumption that "a person has actual and timely notice" of a rule if the agency incorporates a provision by reference and makes that provision "reasonably available to the class of persons affected thereby . . . with the approval of the Director of the Federal Register." Yet this reasonable availability exception has swallowed the rule in situations like this, where private citizens must *pay* for access to binding legal rules.

"Having to purchase access to the proposal and the likely unavailability of its supporting materials has conflicted sharply with both the contemporary law of rulemaking and the developments that have made access to data costless for all, once material is placed online." Peter L. Strauss, *Private Standards Organizations & Public Law*, 22 WM. & MARY BILL RTS. J. 497, 520 (2013). Congress expected standards that agencies incorporated by reference "would be widely available in law libraries open to public use." *Id.* at 519. Indeed, the primary purpose of allowing incorporation by reference was "to protect the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages[.]" *Id.* at 502. Congress assumed, however, that "standards made law by incorporation would be published by commercial law publishers operating in the competitive market for their services[.]" which would be carried in public libraries. *Id.* & n.150 (citing S. REP. NO. 88-1219, at 5 (1964)).

The proposed rule violates both the letter and spirit of the statute. Here, OSHA has locked up *legal obligations* behind nearly two-dozen individual consensus standards (themselves incorporating many more standards), each at a significant cost to the regulated public. It requires first responders, including volunteer organizations on which large numbers of rural populations depend for vital public services, to pay for the privilege of complying with legal mandates. And even if some, but not all, can be viewed in read-only format, it can hardly be said that they are "reasonably available" to emergency services workers, who must pore over complex technical requirements in dozens of voluminous sources. Congress designed the CFR and the related FOIA provisions to avoid precisely this outcome.

2. *Forcing the Public to Pay for Access to the Law Is Unconstitutional*

The regulated public has a due process right to fair notice so as to know and understand their legal obligations. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality) (“It is difficult for [the People] to accept what they are prohibited from observing.”). “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Dictators hide the law. See Suetonius, *The Lives of the Twelve Caesars, Caligula* 470 (1907) (“When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offences were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy.”). “Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

In a recent copyright dispute, the Court of Appeals for the D.C. Circuit specifically acknowledged the “serious constitutional concerns” raised by the unavailability of consensus standards incorporated into the law through administrative regulations. *Am. Soc’y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 447 (D.C. Cir. 2018) (“*ASTM I*”). The court, however, avoided those constitutional concerns and limited its decision to the fair-use doctrine. *Id.* at 453. The D.C. Circuit held that, depending on the nature of the standard at issue, “it may be fair use . . . to reproduce part or all of a technical standard in order to inform the public about the law.” *Id.* at 453. Judge Katsas wrote separately to enunciate that reprinting a copyrighted standard is likely a fair use “when an incorporated standard sets forth binding legal obligations, and when the defendant does no more and no less than disseminate an exact copy of it.” *Id.* at 459 (Katsas, J., concurring). In “the unlikely event that disseminating ‘the law’ might be held not to be fair use,” Judge Katsas concluded, the court would address the constitutional issues inherent in denying free access to the law. *Id.* After a remand for further analysis, the court ultimately avoided answering the question when it held that non-commercial publication of private standards by a non-profit third party constituted a fair use under the Copyright Act. See *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1265 (D.C. Cir. 2023) (*ASTM II*).

The Supreme Court has also underlined the public’s right to *freely* access law in *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020). There the Court rejected Georgia’s attempt to privatize ownership of

annotations to the State’s statutory code. *Id.* at 1512-13. Georgia’s legislature had contracted with LexisNexis to draft the annotations, subject to the approval of a legislative commission. *Id.* at 1505. The contract provided that LexisNexis retained an exclusive right to sell, distribute, or publish the annotated code. *Id.* The Court held, however, that the annotated code could not be copyrighted. *Id.* at 1506. Although the Court decided the case on copyright grounds, Chief Justice Roberts, writing for the Court, reinforced a “judicial consensus” dating back to the 19th Century that “authentic expression and interpretation of the law, which, binding every citizen, is free for publication to all.” *Id.* at 1506-07 (quoting *Banks v. Manchester*, 128 U.S. 244, 253 (1888)) (emphasis omitted).

The “animating principle” behind the Court’s decision there was “that no one can own the law.” *Id.* at 1507. Every citizen “should have free access’ to [the law’s] contents.” *Id.* Finally, the Chief Justice warned that a contrary holding would allow the government “to offer a whole range of premium legal works for those who can afford the extra benefit,” or the government “might even launch a subscription or pay-per-law service.” *Id.* at 1512-13.

Here, the proposed Emergency Response Standard relies on precisely this kind of “pay-per-law service,” at the threat of public safety. OSHA insists that first responders will be held to the consensus standards, yet they are expected to pay for any meaningful access.

* * *

If OSHA adopts the Emergency Response Standard without addressing these problems, it will be vulnerable to a challenge under the Administrative Procedures Act. 5 U. S. C. §706(2)(A). A regulation is arbitrary or capricious within the meaning of the APA if it is not “reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 592 U. S. 414, 423 (2021). OSHA cannot simply “ignore an important aspect of the problem.” *Ohio v. EPA*, 603 U.S. ___, ___ (slip op. at 12) (2024). Likewise, the APA directs courts to set aside agency action that is “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

In OSHA’s haphazard attempt to create a one size fits all set of rules, the Emergency Response Standard is over two hundred pages and incorporates by reference thousands of pages of NFPA and ANSI standards. Those standards themselves reference an untold number of other standards. It is quite far from being reasonably explained, and it is inconsistent with FOIA and Due Process to hold the regulated public to law accessible only by those who pay a premium.

III. The Proposed Rule Improperly Purports to Force Certain States to Automatically Extend Federal Standards to Volunteers Not Covered by the OSH Act.

As many volunteer fire and emergency services companies have already explained to OSHA, one of the proposed rule's most pernicious aspects is the agency's insistence that it can force more than half of the states to extend *federal* standards to volunteers who are unequivocally outside of OSHA's jurisdiction. Not only would this have disastrous practical consequences, but OSHA's legal reasoning is dead wrong.

OSHA has jurisdiction over safety standards for "employees." The Act defines an "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. 652(6). If nothing else, this circular definition implies that the OSH Act applies only to individuals who are *paid* for their work. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.") (cleaned up); accord *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) ("The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation.' American Heritage Dictionary 604 (3d ed. 1992).") (emphasis added).

In the proposed rule, OSHA acknowledges this premise and its consequences for the huge number of emergency responders who volunteer their services. Under the proposed definition, some "volunteer" first responders *may* be deemed employees if they receive benefits like health insurance coverage, retirement benefits, or uniform allowances, but the prevailing view is that they do not become employees for federal purposes. 89 Fed. Reg. at 7796. However, "volunteer emergency responders may be deemed employees under State law in States with occupational safety and health plans approved by OSHA under section 18 of the Act." *Id.*

In addition to delegating to OSHA the authority to establish federal regulations, the OSH Act "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws," 29 U.S.C. § 651(b)(11), and to "provide[] for the development and enforcement of safety and health standards relating to one or more safety or health issues" covered by the Act. 29 U.S.C. § 667(c)(2). To assume this responsibility, the State must submit—and OSHA must approve—a "State Plan" which guarantees standards "at least as effective in providing safe and healthful employment" as those developed by the OSH

Act. *Id.* A State Plan must also “provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the Act, and provide assurances that the State’s enforcement program will continue to be at least as effective as the Federal program.” 29 C.F.R. § 1902.3(d)(1).

Thus, the proposed rule states that even though “OSHA does not regulate volunteers, [] some State Plan states . . . have laws that treat volunteers as employees for occupational safety and health purposes. Therefore, in those situations, State Plans would have to cover those volunteers.” 89 Fed. Reg. at 7851. According to OSHA, the “states and territories that are assumed to classify volunteers as covered employees include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Michigan, Minnesota, Nevada, Oregon, Puerto Rico, South Carolina, Washington, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and U.S. Virgin Islands.” *Id.* at 7852. In the agency’s view, “Regardless of whether these volunteers are considered employees under Federal law, such States must treat them as it does other emergency response workers under its analogue to any final standard resulting from this rulemaking.” *Id.* at 7799.

OSHA recognizes the obvious problem that arises from its reasoning. Imposing the final rule’s obligations in these states will have “undesirable impacts on volunteer organizations.” *Id.* These “negative financial impacts on volunteer emergency response entities could have undesirable public safety implications.” *Id.*

Initially, OSHA is flat wrong in its assertion that each of the listed states “must” treat volunteers the same as “other emergency response workers under [their] analogue to any final standard resulting from this rulemaking.” *See id.* Consider a concrete example—Connecticut’s treatment of volunteer firefighters. Connecticut treats volunteer firefighters as employees for purposes of workers’ compensation, should they be injured on the job. Conn. Gen. Stat. § 7-314a(a). But Connecticut’s state OSHA plan *excludes* those same volunteers. *Mayfield v. Goshen Volunteer Fire Co.*, 22 A.3d 1251, 1257 (Conn. 2011). As the Connecticut Supreme Court explained, different laws treat volunteers differently—“While the classification of volunteer firefighters as municipal employees for purposes of workers’ compensation provides evidence of the legislature’s desire to protect volunteer firefighters, it offers no basis for characterizing the fire company as a political subdivision [subject to the state OSHA plan].” *Id.* Indeed, the Connecticut court relied on the federal *exclusion* of volunteer firefighters as *evidence* that the state plan would not likewise cover them. *See id.* at 752 (“While we are not bound to apply federal interpretations of parallel provisions of federal law to [the state OSHA plan], in the interest of

coordination between the comparable federal and state regulatory regimes, we do not overlook this final source of legislative context.”). OSHA is certainly wrong when it lists Connecticut as one of the states that will be forced to apply the proposed standard to volunteer fire companies. *See* 89 Fed. Reg. at 7852.

Even states that *have* explicitly extended state OSHA coverage to some volunteer first responders did so in ways that do not mean that every volunteer company is automatically obligated to follow OSHA standards. New York, for instance, considers volunteer firefighters “employees” for purposes of workers’ compensation, meaning that “where a volunteer firefighter sustains an injury in the line of duty, the injured firefighter is barred from seeking recovery against either a fire company with which he or she had an employer/employee relationship.” *Knipper v. Drill Team of Lindenhurst Fire Dep’t, Inc.*, A.D.3d 725, 727 (App. Div. 2nd Dept. 2024) (citing NY CLS Vol. Fire Ben. § 19). Volunteer ambulance workers have similar, but not identical treatment as a matter of workers’ compensation law. *See* NY CLS Vol. Amb. Work. Ben. § 19 (Exclusiveness of Remedy). New York’s volunteer fire companies were held to be regulated by the state OSHA plan, but it is hardly clear that this reasoning applies to volunteer ambulance workers, or other first responders. *See Hartnett v. Ballston Spa*, 152 A.D.2d 83, 86 (App. Div. 3rd Dept. 1989) (“we conclude that volunteer firefighters are included within the PESH Act [NY CLS Labor § 27-a 4] definition of ‘employees’”). These questions are all decided by the interplay of various state laws as they relate to the state OSHA plan, but there is certainly no automatic extension of coverage. *See id.*

Perhaps OSHA is simply being imprecise, and its “assum[ptions]” about state coverage aren’t meant to be given any weight. *See* 89 Fed. Reg. at 7852. But surely the agency *can* be more careful, and obviously *should* take care before announcing what appear to be radical changes that preempt state and local law in more than 20 jurisdictions.

OSHA’s broader assumptions about preemption are also wrong in that the agency thinks that a state’s voluntary effort to extend coverage to certain volunteers means that it *must* also extend each and every new standard to the same extent. State plans must be “at least as effective in providing safe and healthful employment” as those developed by the OSH Act. 29 U.S.C. § 667(c)(2). Once approved, a state’s “development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated,” will “preempt applicable Federal standards.” 29 U.S.C. § 667(b). In other words, once a state takes responsibility for occupational safety and health standards, it can preempt other parts of OSHA’s oversight.

The Supreme Court considered the scope of Section 667(b)'s language concerning when a state that has not adopted a state plan may regulate within the same area as a federal OSHA standard. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). In articulating a standard for deciding when conflict between state and federal regulation arises, a plurality of the Court concluded that "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act," even if it also has "a nonoccupational impact." *Id.* at 107-08 (plurality op.). The full Court did not accept this somewhat confined view of the conflict between state and federal authority though. Indeed, Justice Kennedy's concurring opinion, which supplied the narrowest rationale for the Court's decision, and thus is controlling, rejected the notion that the OSH Act impliedly pre-empted all relevant state law, instead concluding simply that state "occupational safety and health standards" were pre-empted to the extent they directly conflicted with federal standards. *Id.* at 110-11 (Kennedy, J., concurring). He concluded that "the pre-emptive scope of the Act is also limited to the language of the statute." *Id.*

Even applying a narrow view of a state's authority to regulate on the same subject matter as a federal standard, lower courts have since readily concluded that the presence of a federal standard does not automatically displace state regulation on other issues that touch on workplace safety. *See Steel Inst. of N.Y. v. City of N.Y.*, 716 F.3d 31, 39 (2d Cir. 2013) (city crane regulations were "laws of general applicability, not directed at the workplace, that regulate workers as members of the general public, and are therefore saved from preemption"); *Stansbury v. Sewell Cadillac-Chevrolet*, No. 02-cv-3470, 2003 U.S. Dist. LEXIS 1682, at *8-9 (E.D. La. Feb. 4, 2003) (OSHA does not establish "field preemption" over all issues of worker safety, and issues of remedies were not preempted). As the Supreme Court of Montana has explained: "In *Gade*, the United States Supreme Court clearly evinced Congress' intent in the OSH Act to preserve state authority to promulgate standards in the absence of OSHA regulations on a specific occupational safety and health issue, *as well as preserving state workers' compensation law and common law and statutory rights, duties or liabilities of employers and employees.*" *Dukes v. Sirius Constr.*, 73 P.3d 781, 788 (Mont. 2003) (emphasis added).

The upshot is that the states with approved plans must adopt the federal "standards," but otherwise have wide latitude to adopt their own enforcement provisions or change the scope of an Act's application. Thus, while a state like New York would be required to adopt the proposed rule's standards, and it currently applies all OSHA standards to volunteer

firefighters, there is no legal reason it would be forced to adopt a final state standard that applied with the same *scope*. In other words, New York could adopt the proposed emergency standards and simultaneously carve out volunteer firefighters from that standard, while remaining fully compliant with the OSH Act. OSHA's contrary assertions in the proposal are, at best, incomplete, and, more accurately, simply wrong. Should OSHA proceed with its proposal, it must correct this misleading analysis.

IV. Conclusion

As many commenters have already noted, aside from the seriously problematic consequences for volunteer first responders, the incorporation by reference problem, and its violation of the nondelegation doctrine, the proposed standard would impose substantial burdens in documentation, training, time, equipment, and medical requirements for individual fire fighters, as well as increased risks of civil liability for fire companies. Many small fire departments will find these costly financial barriers challenging if not outright impossible. Some will be forced to disband.

Emergency responder safety is undeniably important; but, the States remain best positioned to address these concerns, especially with regard to the wide variety of volunteer first responder units that each state fosters. Indeed, some of the most harmful results of the proposal arise from OSHA's assertion that it can and will alter careful decisions about risk and liability under state law. A federal response should only come from Congress directly, and, even then, should not repeat the same mistakes that have plagued this proposal, such as reliance on private standards inaccessible to the regulated public. In short, the proposed rule should be withdrawn.

Sincerely,



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