IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXO ABC/AGC, INC.; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS; GREAT AMERICAN INSURANCE COMPANY; ATLANTIC PRECAST CONCRETE, INC.; OWEN STEEL COMPANY; and OXFORD PROPERTY MANAGEMENT, LLC; Plaintiffs, v. THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor; DAVID MICHAELS, Assistant Secretary of Labor, Occupational Safety and Health Administration; and OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, United States Department of Labor, Defendants.	Civil Action No. 3:16-cv-1998

SUPPLEMENTAL BRIEF ON THE APPROPRIATE SCOPE OF ANY PRELIMINARY INJUNCTIVE RELIEF

As Defendants argued in their Opposition, Plaintiffs are not entitled to a preliminary injunction in this case. Congress delegated OSHA extremely broad authority to take any steps it deemed necessary to ensure accurate injury records. OSHA's use of that authority in the Recordkeeping Rule's anti-retaliation provision ("Rule") is just as reasonable as the overlapping anti-retaliation remedies the Fifth Circuit approved in *United Steelworkers v. St. Joe Resources*, 916 F.2d 294, 298-99 (5th Cir. 1990). Plaintiffs' challenges to the preamble are neither reviewable, nor ripe, nor correct on the merits. Injunctive relief should be denied altogether.

If injunctive relief were granted, though, it should extend no further than necessary to protect Plaintiffs from any irreparable harm they establish. This principle is deeply rooted in our legal order. As a matter of Article III jurisdiction, courts may only award relief that redresses the actual injuries facing the parties to a case or controversy. As a matter of equitable discretion, preliminary injunctions exist solely to preserve the status quo between the parties, by preventing interim harm that cannot be repaired later. To that end, courts may not award preliminary relief beyond what is necessary to prevent irreparable harm to the parties. This principle aligns equitable remedies with other pillars of our legal system: It ensures that plaintiffs do not obtain class-wide relief without certifying a class under Rule 23; it ensures that preliminary injunctions do not frustrate multi-circuit review of difficult legal questions; and it accords with prudential standing limits against third-party remedies. As the Supreme Court has long cautioned, "[t]he desire to obtain sweeping relief cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that *his individual need* requires the remedy for which he asks." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (emphasis added). The only harms Plaintiffs have alleged pertain to themselves, their members, and their insureds. A preliminary injunction, if any, should extend no further than those employers.

I. The Court Only Has Article III Authority to Redress Plaintiffs' Injuries in Fact

Under Article III, the Court may order relief that redresses the injuries Plaintiffs establish, but it may not redress injuries solely faced by *other* parties, unconnected to Plaintiffs. Plaintiffs lack standing to seek relief beyond themselves, their members, and possibly their insureds.

To invoke the power of an Article III court, plaintiffs must demonstrate that they face an injury-in-fact that a favorable ruling will redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As the Supreme Court has stressed, "a plaintiff must demonstrate standing *separately* for each form of relief sought." *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000) (emphasis added); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). This means that Plaintiffs can only seek relief that redresses the harm that they themselves face. Their right to prevent their own injuries does not give them the right to prevent *others'* injuries, because "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *id.* at 357 (plaintiffs cannot simply "demonstrate[] harm from one particular inadequacy" and then seek "to remedy *all* inadequacies").[1] And as a matter of prudential standing, even a plaintiff with Article III standing may only "assert his own legal rights and interests," not those "of third parties." *U.S. v. Johnson*, 632 F.3d 912, 919-20 (5th Cir. 2011); *see Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). In sum, only actions that would "harm[] a[] plaintiff in this lawsuit" can be a "proper object of this District Court's remediation." *Lewis*, 518 U.S. at 358.

[1] The breadth of this rule is demonstrated by the narrowness of its exceptions. *See, e.g.*, *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 623 n.3 (1989) (allowing plaintiff to remedy non-plaintiff's injury only where the litigation directly affects the non-plaintiff, the non-plaintiff lacks the ability "to advance his own rights," *and* there is a close relationship—like attorney-client, or doctor-patient—between the party and non-party); *Regan v. Time, Inc.*, 468 U.S. 641, 651 n.8 (1984) (First Amendment overbreadth doctrine—"an exception to the normal rules of standing").

II. Equitable Relief Must Be No More Burdensome than Necessary to Prevent Irreparable Harm to Plaintiffs

The Supreme Court and Fifth Circuit have repeatedly affirmed the "general rule" that "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *see Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (same); *Gearhart Indus. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984) (same). "[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir.1996). It should only apply beyond Plaintiffs to the extent necessary to prevent Plaintiffs' own irreparable harm.[2]

The scope of the Court's remedial authority will depend on what irreparable harm, if any, Plaintiffs establish. *See Lewis*, 518 U.S. at 357 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). Defendants do not believe that Plaintiffs' declarations establish *any* harm, because the Rule merely incorporates an already-existing legal duty. *See* PI Opp., ECF No. 23, at 33-36 & n.32. But even if the Court disagrees, the most that Plaintiffs have even alleged is that (1) the Rule's *existence* will cause increased inspections for Atlantic Precast Concrete, Owen Steel, Oxford Property Management, and for association plaintiffs' members, and (2) the preamble's discussion of drug testing and incentive programs will cause new injuries for those plaintiffs and Great American's insureds. *See*

[2] The Fifth Circuit reaffirmed this rule in *United States v. Texas*, 809 F.3d 134, 188 (5th Cir. 2015) (allowing preliminary injunction to apply to non-parties only in "appropriate circumstances"), where it affirmed a nationwide injunction for reasons that only apply to immigration: It explained that a plaintiffs-only injunction "would be ineffective" in protecting the plaintiffs, "because DAPA beneficiaries would be free to move between states," carrying their beneficiary status with them. *Id.* No corresponding concern exists here. The court also noted that, in immigration law, a national uniformity imperative was written directly into the Constitution. *See id.* (quoting U.S. Const. art. I, § 8, cl. 4). No such imperative exists as to injury records. *Cf. United States v. Mendoza*, 464 U.S. 154, 160-64 (1984).

PI Mem., ECF No. 9-1, at 30-32 (entire harm section); PI Reply, ECF No. 29, at 13-14 (same). The scope of any injunction will depend on which of those claims both carries a likelihood of success and involves irreparable injury. In contrast, Plaintiffs have not even tried to establish that they would be injured by the Rule's enforcement against *other* employers beyond themselves, their members, and possibly (based on the preamble claims) their insureds. They therefore lack standing to seek—and the Court lacks discretion to grant—injunctive relief as to any additional employers.

The Fifth Circuit has not hesitated to correct injunctions whose scope was broader than necessary to prevent harm to plaintiffs. *See, e.g.*, *Lion Health*, 635 F.3d at 703 (holding abuse of discretion where injunction was "broader and more burdensome than necessary to afford Lion full relief"); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying overbroad injunction to "apply to [plaintiff] only"); *Gearhart*, 741 F.2d at 715 (same); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (same). Neither has the Supreme Court. *See, e.g.*, *DoD v. Meinhold*, 510 U.S. 939, 939 (1993) (staying nationwide injunction except as to plaintiff); *Lewis*, 518 U.S. at 359 (reversing statewide injunction because the district court "imposed a systemwide remedy" "[i]nstead of tailoring a remedy commensurate" with plaintiffs' demonstrated harms).[3]

It is irrelevant that Plaintiffs in this case "are located . . . nationally." PI Reply 15. The core principle, under both Article III and principles of equity, is that a preliminary injunction should prevent irreparable harm to plaintiffs—wherever they reside—and no more. It may not go further to prevent harm to non-plaintiffs, even if they happen to reside in the same "jurisdiction," *id.*, be it a city, state, district, circuit, or anything else. The principle is thus not primarily a function

[3] Other circuits routinely do the same. *See, e.g.*, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) ("national injunction was too broad" because injunction limited to plaintiff "would have afforded the plaintiff complete relief"); *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170 (3d Cir. 2011); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds, The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *see also Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) ("[I]njunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law.") (quotation marks omitted).

of geography, despite the nomenclature of "nationwide" injunctions. Rather, it is a function of the specific harms established by specific plaintiffs. As the Supreme Court explained in *Yamasaki*, "the scope of injunctive relief is dictated by the extent of the violation established" by the plaintiffs—there, a properly certified nationwide class—"not by the geographical extent of the plaintiff class." 442 U.S. at 702. Thus, even a nationwide class generally cannot seek relief as to non-class-members residing in the same places as class members—that is, relief "more burdensome than necessary to redress *the complaining parties*." *Id*. (emphasis added). The relevant distinction is between party and non-party relief. A remedy that applies in multiple parts of the country does not justify a remedy that applies to non-parties who are unrelated to Plaintiffs.

The district courts in this Circuit that issued nationwide preliminary injunctions in 2016 did not explain why non-party relief accorded with the necessity analysis required by *Yamasaki* and *Lion Health*. *See Assoc. Builders v. Rung*, No. 16-425, ECF No. 22, at 32 (E.D. Tex. 2016); Clarif. Order, *Texas v. U.S.*, No. 16-54, ECF No. 86, at 2-4 (N.D. Tex. 2016); *id.*, 2016 WL 4426495, at *17 (N.D. Tex. 2016); *NFIB v. Perez*, 2016 WL 3766121, at *46 (N.D. Tex. 2016). Instead, they seem to have assumed that any time a court preliminarily enjoins a national policy as to *any* regulated parties, it should automatically enjoin that policy as to *all* regulated parties. *See also* ECF No. 31, at 2 (same). That is emphatically not the law, and this Court should not follow suit. The Supreme Court and courts of appeals have repeatedly rejected such relief in the context of national policies. *See Meinhold*, 510 U.S. at 939; *L.A. Haven Hospice*, 638 F.3d at 665; *Hernandez*, 91 F.3d at 781; *Va. Soc'y for Human Life*, 263 F.3d at 393. Automatic non-party relief cannot be reconciled with the Supreme Court's and Fifth Circuit's clear commands to ensure that equitable relief is no more burdensome than necessary to protect plaintiffs.[4]

[4] The 2016 decisions also relied on a number of inapposite cases that did not involve preliminary injunctions, and so did not address the scope of irreparable harm at all. *See* Wright & Miller, Fed. Practice & Proc., § 2944 ("[I]rreparable

The APA does not weaken that command. Even though a final judgment under the APA might "set aside" an agency action, 5 U.S.C. § 706(2); *but see Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (holding that courts can also remand without vacatur), preliminary injunctions have a much narrower purpose and are governed by different standards. *See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) ("The substantive prerequisites for obtaining an equitable remedy . . . depend on traditional principles of equity jurisdiction."). A preliminary injunction's "limited purpose" is "merely to preserve the relative positions *of the parties* until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added); *see Justin Indus., Inc. v. Choctaw Sec.*, 920 F.2d 262, 269 (5th Cir. 1990) (purpose is simply to "prevent irreparable injury" pending merits adjudication). The same cannot be said of vacatur. For this reason, the *Yamasaki* necessity rule applies with "particular[]" force where "a preliminary injunction is involved." *Zepeda*, 753 F.2d at 729 n.1. Indeed, the APA itself affirms that courts should tailor interim relief to the plaintiffs' showing of irreparable harm. *See* 5 U.S.C. § 705 ("[T]o the extent *necessary to prevent irreparable injury*, the reviewing court . . . may issue all necessary and appropriate process" to preserve status quo).[5]

injury is not an independent requirement for obtaining a *permanent* injunction."). Most involved company-wide permanent injunctions granted to the Secretary of Labor. *See Brennan v. J.M. Fields, Inc.*, 488 F.32d 443, 449-50 (5th Cir. 1973); *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 826 (5th Cir. 1972); *see also Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964) (consent decree). The injunctions in those cases complied with the necessity rule, because company-wide relief was necessary to protect the Secretary from onerously "hav[ing] to maintain its surveillance over defendant." *Hodgson*, 455 F.2d at 826. The company-wide injunctions directly benefited the Secretary by "shift[ing] the responsibility for compliance onto the employer's shoulders" and thus promoting the "economy of the [Secretary's] administrative effort." *Brennan*, 488 F.2d at 449. The 2016 decisions also relied on out-of-circuit cases not involving preliminary injunctions or irreparable harm. *See Nat'l Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[T]here was no separate need to show irreparable injury."); *id.* at 1409-10 (relying on D.C. Circuit-specific factors); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.23 (D.C. Cir. 1989) (reviewing permanent injunction and explicitly declining to resolve the propriety of non-party relief).

[5] Plaintiffs have characterized their motion as requesting "an injunction that *vacates* the challenged Rule without limitation." ECF No. 31, at 1 (emphasis added). That confuses the difference between vacating a rule and enjoining its application. The former requires a final judgment on the merits, 5 U.S.C. § 706(2), whereas the latter is all that a preliminary injunction imposes, *id.* § 705. As the D.C. Circuit recently explained, "[a] preliminary injunction d[oes] not vacate" an administrative action, "but merely prohibits the [agency] from giving [it] effect, pending entry of final judgment." *League of Women Voters v. Newby*, 2016 WL 5349779, at *9 (D.C. Cir. 2016); *id.* (rejecting final-

A nationwide non-party injunction would contravene other basic features of our judicial system. First, it would award the equivalent of class-wide relief, even though Plaintiffs have not even tried to certify a class under Rule 23. Absent a certified class, "a court cannot grant relief on a class-wide basis." *Zepeda*, 753 F.2d at 729 n.1 (collecting cases). Plaintiffs cannot invoke the Court's equitable authority to circumvent the normal procedure for representative litigation.

Second, an injunction as to all employers in the country would mean, as a practical matter, that no other circuits would get to review the Rule's legality. The Supreme Court has strived to avoid that outcome. In *United States v. Mendoza*, the Court held that non-mutual collateral estoppel does not apply to the government, because Supreme Court review relies on the government's ability to litigate the same issue against multiple parties in multiple fora. 464 U.S. at 160-64. A limitless injunction would destroy the precise benefits the Court sought to preserve in *Mendoza*. *See id.* at 160 (refusing to "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue"); *id.* (refusing to "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *L.A. Haven*, 638 F.3d at 664; *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). Those benefits belie the 2016 decisions' misplaced concern for the "uniform application of national standards." Clarif. Order, *Texas*, No. 16-54, ECF No. 86, at 4; *see NFIB*, No. 16-425, ECF No. 22, at 32. Circuit splits are a beneficial feature of our legal system, not a problem to be avoided. They are resolved *ex post* through the appellate process, not *ex ante* through preliminary injunctions or collateral estoppel.

Thus, if this Court were to issue a preliminary injunction, it should craft that injunction to apply where necessary to prevent irreparable harm to Plaintiffs, but no further.

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judgment remedy at preliminary injunction stage). Thus, the standards for preliminary injunctions (which require a remedy tailored to irreparable harm) apply here, not the standards for vacatur or permanent injunctions (which do not).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, a copy of the foregoing Objection to Newly Requested Relief was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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