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Essentially Expendable: The Failure of Preemptive Agency Space to Protect Farmworkers from Dangerous Pesticides

Laurie Jamile Beyranevand

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ESSENTIALLY EXPENDABLE:
THE FAILURE OF PREEMPTIVE
AGENCY SPACE TO PROTECT
FARMWORKERS FROM
DANGEROUS PESTICIDES

Laurie Jamile Beyranevand†

“Policy. To fulfill our Nation’s promises of justice, liberty, and equality, every person must have clean air to breathe; clean water to drink; safe and healthy foods to eat; and an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure. Restoring and protecting a healthy environment—wherever people live, play, work, learn, grow, and worship—is a matter of justice and a fundamental duty that the Federal Government must uphold on behalf of all people.”¹

CONTENTS

INTRODUCTION..... 614

I. REGULATORY BACKDROP..... 619

 A. *OSH Act*.....619

 B. *Federal Insecticide, Fungicide, and Rodenticide Act*.....623

 1. Amendments to FIFRA.....624

 2. Pesticide Registration Improvement Act.....627

 C. *Section 4(b)(1)—OSHA’s Federal Preemption Clause*.....628

 D. *Worker Protection Standard*.....630

 1. History of the Standard.....631

 2. Challenges to the Standard—the *Organized Migrants* Litigation....632

 3. The Standard as It Exists Now.....635

II. THE PERILS OF PREEMPTIVE AGENCY JURISDICTION..... 638

† Laurie Jamile Beyranevand is a Professor and the Director of the Center for Agriculture and Food Systems at Vermont Law and Graduate School. With enormous gratitude for the daily sacrifice farmworkers make to put food on our plates each and every day, she hopes that law and policymakers will begin to create a law and policy landscape that sincerely recognizes how essential these individuals are and ensures their health, safety, and dignity.

1. Exec. Order No. 14,096, 88 Fed. Reg. 25251, 25251 (Apr. 21, 2023).

A. *Potential for Conflicts of Interest*.....641
B. *Inequity, Inconsistency, and Enforcement Challenges*642
C. *Inefficiency and Inconsistent Data Collection*.....644
III. EXECUTIVE BRANCH AUTHORITY TO ENSURE CONSISTENCY AND
PROTECTION FOR WORKERS..... 646
CONCLUSION 648

INTRODUCTION

In late July 2023, amid the earth’s hottest summer on record² and one marked by extreme weather across the United States, farmworkers pleaded with members of Congress to include protections for them in the upcoming farm bill.³ As one worker testified, “They call us essential. In reality, we are disposable.”⁴ The plight of farmworkers in the United States has long been marginalized. Law and policymakers refer to our nation’s farmworkers as “essential,”⁵ yet persistently fail to devote meaningful resources to improve conditions for them, signaling they are not essential but expendable. Just months after proclaiming farmworkers essential,⁶ the Trump administration attempted to reduce the wages of migrant farmworkers, who were already earning lower wages than

2. Karen Fox, Aries Keck & Jacob Richmond, *NASA Announces Summer 2023 Hottest on Record*, NASA (Sept. 14, 2023), <https://www.nasa.gov/news-release/nasa-announces-summer-2023-hottest-on-record> [<https://perma.cc/2N79-PJVU>].
3. Grey Moran, *Threatened by Climate Change, Food Chain Workers Demand Labor Protections*, CIVIL EATS (July 31, 2023), <https://civileats.com/2023/07/31/threatened-by-climate-change-food-chain-workers-demand-labor-protections/> [<https://perma.cc/N7Z9-69P5>].
4. *Id.*
5. See e.g., Jessica Looman & Doug Parker, *Honoring and Protecting Farmworkers, Always Essential*, U.S. DEP’T OF LAB. BLOG (Mar. 29, 2022), <https://blog.dol.gov/2022/03/29/honoring-and-protecting-farmworkers-always-essential> [<https://perma.cc/N8UZ-XJFG>]; *Farm Labor*, USDA, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> [<https://perma.cc/HW9M-95SM>] (last updated Aug. 07, 2023); Helena Bottemiller Evich & Liz Crampton, *Trump Deems Farmworkers ‘Essential’ but Not Safety Rules for Them. That Could Threaten the Food Supply*, POLITICO (May 12, 2020), <https://www.politico.com/news/2020/05/12/trump-farmworkers-essential-coronavirus-safety-250142> [<https://perma.cc/WXN5-LKFH>].
6. Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response from Christopher C. Krebs, Dir., Cybersecurity and Infrastructure Security Agency (CISA) (Mar. 19, 2020), <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> [<https://perma.cc/FV34-3H93>].

production workers in other sectors, while at the same time allocating massive federal bailouts to farm owners.⁷ This incongruity between official statements acknowledging the fact that farmworkers are the mainstay of a trillion dollar industry and the consistent failure to enact and enforce meaningful laws and policies to protect them is simultaneously unconscionable and at odds with administrations' priorities.

For too long, farmworkers have been largely invisible to the vast majority of Americans. As the backbone of our food system, they spend their days in blazing hot fields, often lacking access to sufficient shade and water while suffering routine exposure to hazardous pesticides. Each year, anywhere from 20,000–300,000 agricultural workers experience pesticide poisoning.⁸ Many of them live and work in the same place, meaning the pesticide exposure continues long after the workday.⁹ Typically, farmworker housing is substandard, which exacerbates their health risks.¹⁰ These workplace hazards occur at levels that far surpass those for other types of workers¹¹ and are compounded by the fact that farmworkers are subject to unsuitable housing, unreliable access to affordable healthcare, high rates of food and nutrition insecurity, and rampant wage theft by their employers.¹²

Workers from groups that have been socially marginalized, including those who are foreign born, are disproportionately exposed to

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7. Daniel Costa, *Trump Administration Looking to Cut the Already Low Wages of H-2A Migrant Farmworkers While Giving Their Bosses a Multibillion-Dollar Bailout*, ECON. POL'Y INST. (Apr. 14, 2020, 3:42 PM), <https://www.epi.org/blog/trump-administration-reportedly-looking-to-cut-the-already-low-wages-of-h-2a-migrant-farmworkers-while-giving-their-bosses-a-multibillion-dollar-bailout/> [https://perma.cc/83LU-WZVP].
 8. *EPA Issues New Proposal on Pesticide Protections*, FARMWORKER JUST., <https://www.farmworkerjustice.org/news-article/epa-issues-new-proposal-on-pesticide-protections/> [https://perma.cc/45TV-VBBP].
 9. See, e.g., Thomas A. Arcury, Chensheng Lu, Haiying Chen & Sara A. Quandt, *Pesticides Present in Migrant Farmworker Housing in North Carolina*, 57 AM. J. INDUS. MED. 312, 313 (2014).
 10. LAURIE J. BEYRANEVAND, *ESSENTIALLY UNPROTECTED: A FOCUS ON FARMWORKER HEALTH LAWS AND POLICIES ADDRESSING PESTICIDE EXPOSURE AND HEAT-RELATED ILLNESS* 6–7 (2021), <https://www.vermontlaw.edu/sites/default/files/2021-04/Essentially-Unprotected-FINAL.pdf> [https://perma.cc/23WQ-V7KP].
 11. *Id.* at 6.
 12. See generally SARAH GOLDMAN, ANNA ASPENSON, PRASHASTI BHATNAGAR & ROBERT MARTIN, *JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, ESSENTIAL AND IN CRISIS: A REVIEW OF THE PUBLIC HEALTH THREATS FACING FARMWORKERS IN THE US* (2021), <https://clf.jhsph.edu/sites/default/files/2021-05/essential-and-in-crisis-a-review-of-the-public-health-threats-facing-farmworkers-in-the-us.pdf> [https://perma.cc/4PYE-RTB8].

structural disadvantages associated with other social determinants of occupational safety and health that workplace health and safety standards in the United States fail to address.¹³ Recent gestures from the Biden administration to ensure racial equity and promote environmental justice¹⁴ provided some hope, yet farmworkers have not benefited from increased workplace safety or otherwise during President Biden's tenure. According to the U.S. Department of Agriculture, women working as crop farmworkers (as compared to livestock workers) constitute 30 percent of the workforce, over half are non-white with 54 percent considered "Hispanic: Mexican origin," half of all crop farmworkers do not have a high school diploma, and almost half are undocumented workers.¹⁵ These statistics likely underestimate the true numbers because data is inconsistently gathered and farmworkers are understandably hesitant to provide certain demographic and other information. Based on the goals elucidated in the Biden administration's various executive orders,¹⁶ many crop farmworkers comprise the underserved communities and populations those executive orders were designed to support.

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13. Scholars have identified that the overlap of different structural vulnerabilities compound the occupational risks experienced by many farmworkers:

For example, immigrants and racialized/ethnic minorities are overrepresented in contingent work arrangements and foreign-born workers are overrepresented in small construction firms and receive less training and less overall safety communication than those employed by large companies. These overlapping structural vulnerabilities result in what Gravel and Dubé have termed "cumulative precarity," meaning social and structural factors interact to create risks greater than the sum of the risk from each individual factor. Overlapping structural vulnerabilities, and the ways they create cumulative precarity, need to be systematically investigated to bring a more complete picture of how occupational health inequities operate.

- Michael A. Flynn, Pietra Check, Andrea L. Steege, Jacqueline M. Sívén & Laura N. Syron, *Health Equity and a Paradigm Shift in Occupational Safety and Health*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 349, 351–52 (2021) (citing Sylvie Gravel & Jessica Dubé, *Occupational Health and Safety for Workers in Precarious Job Situations: Combating Inequalities in the Workplace*, E-J. INT'L & COMPAR. LAB. STUD., Sept.–Oct. 2016, at 2).
14. See Exec. Order No. 13,985, 3 C.F.R. 409 (2022); Exec. Order No. 14,091, 88 Fed. Reg. 10825 (Feb. 16, 2023); Exec. Order No. 14,096, 88 Fed. Reg. 25251 (Apr. 21, 2023); Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63750 (Sept. 15, 2023) (to be codified at 20 C.F.R. pts. 651, 653, 655, 658).
15. *Farm Labor*, *supra* note 5.
16. See *supra* note 14 and accompanying text.

Undeniably, the issues impacting farmworker health and safety have not been adequately addressed in the United States. Fear mongering and racist tropes depicting untruths about the dangers presented by immigrants and migrant workers obscure the fundamental question of how to ensure safe, equitable, and livable working conditions for farmworkers while also protecting farm viability and the production of affordable food. Each of these issues is worth its own discussion; however, this Article focuses on one of the greatest occupational hazards facing farmworkers because it illustrates larger questions for legislators and regulators given the current regulatory scheme—pesticide exposure. Despite the fact that pesticide exposure is one of the most dangerous workplace hazards for farmworkers, the workplace standards to address it are not set by the agency created to protect workers in the United States—the Occupational Health and Safety Administration (OSHA). Rather, they are set by the agency charged with approving and registering pesticides for use—the Environmental Protection Agency (EPA).¹⁷ While this may seem practical given EPA’s expertise on pesticide safety, it is not an agency that places *worker* safety at the forefront of its decision-making.¹⁸ And, in many ways, given the agency’s role working with the pesticide industry to register pesticides for use, EPA’s simultaneous setting of standards for workers exposed to pesticides raises the specter of potential conflict or, at the very least, a set of trade-offs between pesticide approvals and usage and worker safety.¹⁹

This Article analyzes the Occupational Safety and Health Act’s (OSH Act)²⁰ preemption provision, which prevents OSHA from developing workplace standards when another federal agency has already done so.²¹ Consequently, the analysis highlights the problems inherent in a regulatory scheme that creates the potential for inconsistent regulation, which is an issue of particular concern in this era of perceived deregulation.²² First, this regulatory scheme creates the opportunity for an agency with jurisdiction that presents a potential conflict to regulate worker safety when safety is not its top priority or

17. JERRY H. YEN & ROBERT ESWORTHY, CONG. RSCH. SERV., RL31921, PESTICIDE LAW: A SUMMARY OF THE STATUTES 1 (2012).

18. *See Our Mission and What We Do*, EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> [<https://perma.cc/4QBG-6HUW>] (May 23, 2023).

19. *See infra* notes 73–77 and accompanying text.

20. 29 U.S.C. §§ 651–678.

21. *Id.* § 653(b)(1).

22. Michael Waldman, *Supreme Court’s Next Target: The Regulatory State*, BRENNAN CTR. FOR JUST. (May 2, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-next-target-regulatory-state> [<https://perma.cc/UV79-XUJ>].

specifically considered as part of its mandate. The second issue is the inefficiency created by such a scheme. While it may be beneficial to have an agency with some degree of subject-matter expertise regarding the particular workplace hazard develop the regulations, a better approach would be to require coordination between that agency and OSHA in developing the standard rather than having the agency fully supplant OSHA and creating the potential for multiple agencies to regulate the same space. A final concern created by this regulatory scheme is the potential for inconsistency or inequity in the creation or enforcement of workplace standards by agencies other than OSHA that do not prioritize worker safety.

This Article posits that both lawmakers and regulators must consider these challenges as they grapple with the issues related to farmworker safety, in particular. If these types of regulations address large aspects of the economy, including the food system, they may raise major questions;²³ and while OSHA has been given clear authority to protect workers,²⁴ EPA's authority is much less clear.²⁵ And even with OSHA's broad grant of authority to protect workers, the U.S. Supreme Court has narrowed that grant of authority in response to nondelegation concerns.²⁶ If these concerns are valid, the combination of OSHA's unusual statutory scheme with regulators seeking to regulate in an area where they lack expertise may lead to deregulation in an area that desperately needs meaningful regulation. As pointed out by scholars and recognized by the Court, the OSH Act may lack the requisite intelligible principle to survive a nondelegation challenge to actions undertaken by OSHA.²⁷ This highlights the particular challenge presented by EPA acting as the agency responsible for setting pesticide-related workplace standards for farmworkers under its general authority to protect human health given the Court's recent jurisprudence on the major questions doctrine.²⁸

23. When an agency is addressing an issue of “vast ‘economic and political significance’” and Congress has not clearly given the agency the jurisdiction or authority to address the issue, the Court has struck down the agency action. KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 1 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

24. 29 U.S.C. § 651(b).

25. See *Laws and Executive Orders*, EPA, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> [<https://perma.cc/B67F-H8VD>] (July 3, 2023).

26. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

27. Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1429 (2008).

28. See, e.g., *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665–66 (2022) (per curiam) (holding OSHA's emergency temporary COVID-19

In Part I, this Article traces the origins of the exemption included within the OSH Act, noting the legislative compromise inherent in the legislation. This Part explores EPA's assumption of jurisdiction over creating workplace safety standards for pesticide exposure and the resulting consequences to farmworkers. Part II analyzes the perils associated with preemptive agency jurisdiction, particularly when agencies rely on broad delegations to assume authority over an issue area for which another agency was created and mandated to address. Finally, Part III concludes with a set of recommendations for law and policymakers as they consider how to rectify this particular challenge.

I. REGULATORY BACKDROP

A. OSH Act

After a long-fought battle, Congress enacted the OSH Act in 1970 with the stated purpose of assuring “so far as possible every working man and woman in the Nation safe and healthful working conditions.”²⁹ The OSH Act applies to nearly all privately employed workers,³⁰ regardless of immigration status.³¹ OSHA is the designated agency responsible for enforcing the Act although it shares jurisdiction with state agencies in states with OSHA-approved state plans.³² OSHA estimates that approximately eight million workplaces fall under the

vaccination requirement invalid due to its economic and political significance); *West Virginia v. EPA*, 142 S. Ct. 2587, 2603, 2605, 2615–16 (2022) (rejecting EPA's authority to promulgate regulations of greenhouse gas emissions based on the shifting of electricity from high- to low-emitting sources because the issue was one of political and economic significance).

29. Pub. L. No. 91–596, 84 Stat. 1590, 1590 (1970) (codified as amended at 29 U.S.C. § 651(b)).
30. OSHA, U.S. DEP'T OF LAB., WORKERS' RIGHTS 1, 5 (2017), <https://www.osha.gov/Publications/osh3021.pdf> [<https://perma.cc/WR54-L223>].
31. NAT'L EMP. L. PROJECT, NAT'L IMMIGR. L. CTR. & OSH L. PROJECT, FAQ: IMMIGRANT WORKERS' RIGHTS AND COVID-19 1, 2 (2020), <https://www.nelp.org/publication/faq-immigrant-workers-rights-and-covid-19/> [<https://perma.cc/3TZF-7PKU>].
32. 29 U.S.C. § 667(e) (“After the Secretary approves a State plan . . . he may, but shall not be required to, exercise his authority . . . with respect to comparable standards . . . until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied”); *State Plans*, OSHA, <https://www.osha.gov/stateplans> [<https://perma.cc/DM5X-U5BR>]. Twenty-one states and Puerto Rico have OSHA-approved state plans—Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. *Id.*

agency's jurisdiction—but in 2019, the agency inspected only 33.393 of these workplaces.³³ This co-regulatory structure irked labor advocates given the fact that inadequate state action prompted the federal law into existence.³⁴ Additionally, advocates worried that the program would be fragmented, inefficient, and ineffective if authority was delegated to the states since they were not required to cover all workplace hazards and the statute did not permit concurrent federal enforcement.³⁵ As discussed in more detail below, while the OSH Act was an overall win for labor advocates, there are critical limits on OSHA's authority to prioritize worker safety. These limits have existed since the statute's passage. Almost immediately upon enactment, President Nixon developed a review process that required OSHA to submit any significant regulations to an interagency review process to "reduce the burdens OSHA rules placed on industry."³⁶

Congress intended the OSH Act to support states in administering and enforcing their own occupational health and safety laws through grants and approved state plans that are "at least as effective" as federal law.³⁷ State laws and regulations addressing occupational health and safety are not displaced or preempted by the OSH Act when (1) they have been developed as part of an OSHA-approved state plan; (2) there is no OSHA standard in effect addressing the specific workplace hazard covered by the law or regulation; and (3) the law or regulation protects the general public, and the specific protection of workers is secondary to the purpose.³⁸ However, if an OSHA standard

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33. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-122, WORKPLACE SAFETY AND HEALTH: ACTIONS NEEDED TO IMPROVE REPORTING OF SUMMARY INJURY AND ILLNESS DATA 7 (2021).
 34. David P. Currie, *OSHA*, 1 AM. BAR FOUND. RSCH. J. 1107, 1111–12 (1976).
 35. See, e.g., *id.* at 1110 (reasoning that if the states covered different standards than the federal government then both levels of government would be required to inspect facilities thereby exacerbating inefficiencies).
 36. Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. 199, 212 (2021) (citing Memorandum from George P. Shultz, Dir., Office of Mgmt. & Budget, to Heads of Dep'ts & Agencies (Oct. 5, 1971), <https://thecre.com/ombpapers/QualityofLife1.htm> [<https://perma.cc/9GF7-DZSS>]).
 37. 29 U.S.C. § 651(b)(11). "Effective" is not defined by the statute. Caroline Grueskin, *At Least as Effective: OSHA, the State Plans, and Divergent Worker Protections from COVID-19*, 21 YALE J. HEALTH POL'Y, L. & ETHICS 228, 240 (2023).
 38. JANE FLANAGAN, TERRI GERSTEIN & PATRICIA SMITH, HARV. L. SCH. LAB. AND WORKLIFE PROGRAM, NAT'L EMP. L. PROJECT, HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH 1 (2020), https://lwp.law.harvard.edu/files/lwp/files/state_local_workplace_protection_lwp_nelp.pdf [<https://perma.cc/E6FX-9TQZ>].

exists for a specific activity or workplace hazard, and a state wants to assume responsibility for implementation and enforcement, they must submit a state plan to OSHA detailing how they intend to address that standard.³⁹ Unlike many environmental laws that delegate authority to the states but enable the federal government to step in at any time or veto inadequate state measures, the OSH Act prevented OSHA from enforcement unless and until the agency successfully engaged in a formal proceeding finding the state failed to meet the Act's requirements.⁴⁰

States with OSHA-approved plans do not necessarily fall along political or industrial lines.⁴¹ Rather, it is more likely that a state will have an approved plan where the state intends to provide more stringent protection than OSHA or less stringent oversight through state inspections.⁴² While most states have OSHA-approved plans that cover both public- and private-sector workers, some state plans only cover public-sector workers.⁴³ In these states, private-sector workers remain under the jurisdiction of the federal OSH Act.⁴⁴ The OSH Act prohibits employers from retaliating against employees who exercise their rights by filing a safety or health complaint, raising concerns directly with their employer, complying with an OSHA inspection, or reporting an injury or illness related to work.⁴⁵ Importantly, however, OSHA has interpreted the Act in a manner that does not provide employees with the right to walk off the job when there are potentially unsafe workplace conditions.⁴⁶ Consequently, employers can discipline

39. *Id.* at 3.

40. Currie, *supra* note 34, at 1111.

41. Grueskin, *supra* note 37, at 237–38. “States and territories with comprehensive plans covering private and public sector workers are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.” *Id.* at 238 n.46.

42. GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY* 173–74 (2007).

43. *Frequently Asked Questions: What Is an OSHA-Approved State Plan?*, OSHA, <https://www.osha.gov/stateplans/faqs> [<https://perma.cc/W3PK-VRDZ>]. These states are Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the Virgin Islands. *Id.*

44. *Id.*

45. 29 U.S.C. § 660(c).

46. 29 C.F.R. § 1977.12(b)(1) (2022) (stating that employers must be given the opportunity to correct the hazard).

employees for failing to perform job functions even when the employee has valid safety or health concerns.

The Act is enforced through both occupational safety and health standards, which consist of the specific duty standards and the general duty clause. The general duty clause functions as a regulatory stopgap because it applies when there is no existing occupational safety or health standard.⁴⁷ Pursuant to the general duty clause, every employer must ensure the workplace does not contain recognized hazards that are causing, or are likely to cause, serious injury or death to employees.⁴⁸ An employer can violate the general duty clause even when no employee has been injured if there is a recognized hazard that the employer feasibly could have addressed, but failed to. Both the general duty clause and health and safety standards are legally enforceable. Employers that violate the standards can challenge citations through the Occupational Safety and Health Review Commission—an independent adjudicatory body that acts as a “neutral arbiter” and has occasionally offered interpretations of statutory provisions that conflict with OSHA.⁴⁹

OSHA standards require employers to adopt specific practices to ensure employee safety and safe workplaces that fall into six categories—recordkeeping, general industry, maritime, construction, agriculture, and state plans.⁵⁰ However, in most states, small farms are exempt from OSHA regulation. The agency is not permitted “to enforce any standard, rule, regulation, or order under the OSH Act which is applicable to any person who is engaged in a farming operation which employs 10 or fewer employees and does not maintain a temporary labor camp.”⁵¹ According to the 2017 U.S. Census of Agriculture, 93 percent

47. 29 U.S.C. § 654(a)(1) (“Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . .”).

48. Recognized hazards are those the employer knew or should have known will cause injury to employees. OSHA, U.S. DEP’T OF LAB., OSHA INSTRUCTION: FIELD OPERATIONS MANUAL, at 4-11 (2020) [hereinafter OSHA FIELD OPERATIONS MANUAL], https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_2.pdf [<https://perma.cc/UGK7-K3EY>].

49. 29 U.S.C. § 659(c); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 152 (1991) (quoting *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985)).

50. *Safety and Health Standards: Occupational Safety and Health*, U.S. DEP’T OF LAB.; EMP. L. GUIDE, <https://webapps.dol.gov/elaws/elg/osha.htm> [<https://perma.cc/7JH3-26HN>] (Feb. 2024).

51. Letter from Richard E. Fairfax, Dir., Directorate of Enf’t Programs, to Michael J. Frenzel, CSP, Associated Safety Consultants Inc., (Jul. 16, 2007), <https://www.osha.gov/laws-regs/standardinterpretations/2007-07-16>

of farms, collectively employing 1.2 million workers, meet these criteria, meaning they are completely exempt from OSHA enforcement and investigation.⁵² States with OSHA-approved plans can enforce standards, rules, and regulations while also providing training and consultations on exempt small farms, but are prohibited from using any federal funding for these activities.⁵³ Small farms are not exempt from enforcement by state OSHA plans in California, Oregon, and Washington. In these states, agricultural injury rates are lower, likely due to the fact that they do not have a small-farm exemption.⁵⁴ Notably, this exemption has been misconstrued by some small farms in exempt states, which assume other federal agencies also cannot exercise jurisdiction over them, including EPA.⁵⁵

B. Federal Insecticide, Fungicide, and Rodenticide Act

The roots of federal pesticide regulation date back to 1910 when Congress enacted the Federal Insecticide Act.⁵⁶ Congress repealed this Act in 1947 when it enacted the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),⁵⁷ which originally placed jurisdiction over pesticides in the hands of the Department of Agriculture.⁵⁸ Industry

[<https://perma.cc/E5R2-BUML>]; OSHA FIELD OPERATIONS MANUAL, *supra* note 48, at 10-2. Small farms are also exempt from the Fair Labor Standards Act meaning farmworkers on farms that qualify for these definitions lack protection under multiple sources of federal law. *See, e.g.*, Julie Solis-Alvarado, *From Fields of Opportunity to Fields De Calzones: Workplace Sexual Violence in America's Agricultural Industry*, 25 DRAKE J. AGRIC. L. 293, 305, 309 (2020).

52. NAT'L AGRIC. STAT. SERV., USDA, 2017 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 339 (2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [<https://perma.cc/B9Y4-EGLV>]; Eli Wolfe, *Death on a Small Farm*, THE ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/11/congress-exempts-small-farm-deaths-osha-inspection/576010/> [<https://perma.cc/U4GE-TDG7>].
53. OSHA FIELD OPERATIONS MANUAL, *supra* note 48, at 1-6.
54. Phillip D. Somervell & George A. Conway, *Does the Small Farm Exemption Cost Lives?*, 54 AM. J. INDUS. MED. 461, 465 (2011).
55. *See* CTR. FOR AGRIC. AND FOOD SYS., HARV. L. SCH. FOOD L. AND POL'Y CLINIC, FARMWORKER JUST., PRECARIOUS PROTECTIONS: ANALYZING COMPLIANCE WITH PESTICIDE REGULATIONS FOR FARMWORKER SAFETY 69 (2023), <https://www.vermontlaw.edu/sites/default/files/2023-12/precious-protection.pdf> [<https://perma.cc/HV8D-DXAZ>].
56. Insecticide Act, Pub. L. No. 61-152, 36 Stat. 331 (1910) (repealed 1947).
57. Pub. L. No. 80-104, 61 Stat. 163 (1947) (codified as amended at 7 U.S.C. §§ 136-136y).
58. *Id.* § 11, 61 Stat. at 169.

lobbied hard for passage of the 1947 Act given the significant growth and nationalization of pesticide production.⁵⁹ Costly compliance with a patchwork set of inconsistent state laws led to increased support for a federal law. Additionally, the House Committee on Agriculture recognized the need for the 1947 Act due to “great changes . . . in the field of economic poisons [making] the present law . . . inadequate.”⁶⁰ However, following the enactment of FIFRA and prior to its first amendments, “sales of synthetic organic pesticides rose 90 per cent from 1960 to 1965 and the value of all pesticides (domestic and export) rose 46 per cent from 1960 to 1964.”⁶¹ After World War II, the Department of Agriculture promoted widespread use of pesticides to control insects and increase agricultural production, which some members of Congress viewed as a path toward increased national security.⁶² The 1947 Act forms the basis of FIFRA as it currently exists. This Act added coverage of rodenticides and herbicides and required premarket registration of pesticides before they could be shipped interstate.⁶³ Once EPA was created in 1970, jurisdiction under FIFRA shifted from the Department of Agriculture to EPA.⁶⁴

1. Amendments to FIFRA

FIFRA was amended in 1972 through the Federal Environmental Pesticide Control Act (FEPCA),⁶⁵ which required EPA to reregister already registered products under newer and more rigorous standards.⁶⁶ However, Congress chose not to include any provisions including

59. Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides, & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 FORDHAM ENV'T L. REV. 1, 9 (2002).

60. Douglass F. Rohrman, *The Law of Pesticides: Present and Future*, 17 J. PUB. L. 351, 356 (1968) (quoting H.R. REP. NO. 80-313, at 2 (1947), as reprinted in 1947 U.S.C.C.A.N. 1200, 1201).

61. *Id.* at 355.

62. Morriss & Meiners, *supra* note 59, at 8.

63. R.E. SELTZER, CLAUDE L. FLY & EDWIN O. SCHNEIDER, EPA, INCREMENTAL COST IMPACTS OF THE 1972 FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT AS AMENDED 2 (1976), <https://nepis.epa.gov/Exe/ZyPDF.cgi/91012OJP.PDF?Dockey=91012OJP.pdf> [<https://perma.cc/6NQC-ANA8>].

64. YEN & ESWORTHY, *supra* note 17, at 2.

65. Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified as amended at 7 U.S.C. §§ 136–136y).

66. 7 U.S.C. § 136(a); YEN & ESWORTHY, *supra* note 17, at 2–4.

protections specific to farmworkers.⁶⁷ In 1975, Congress again amended the law to require EPA to consult with the Secretary of Agriculture before restricting or canceling the use of certain pesticides or finalizing regulations, and to consider the economic impacts of these actions on “crop production and prices, retail food prices, and the general agricultural economy.”⁶⁸ Following these amendments, Congress amended FIFRA several more times in the 1970s and 1980s to quicken the pace of reregistration due to the volume of pesticides in need of agency review.⁶⁹ These amendments demonstrate a regulatory structure that signals broad support for the use of pesticides in the agricultural sector which largely continues to this day.⁷⁰

FIFRA is considered a co-regulatory law in the sense that it lays out a set of uniform federal standards but gives states the authority to regulate the sale and use of pesticides.⁷¹ Specifically, states can enact laws restricting the use and application of certain pesticides or restrict their use altogether, but they cannot create different labeling requirements.⁷² The current Act and accompanying regulations require that, prior to distribution or sale, all pesticides must be registered with EPA.⁷³ Applicants must demonstrate that the pesticide “will not

67. Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 451 (2004).

68. Memorandum from Jim Cannon to The President (Nov. 28, 1975), <https://www.fordlibrarymuseum.gov/library/document/0055/1669131.pdf> [<https://perma.cc/J2JD-SME4>] (page 7 of the PDF).

69. YEN & ESWORTHY, *supra* note 17, at 3.

70. Scholars have criticized EPA’s hands-off approach to pesticide regulation: As a direct result of the EPA’s laissez-faire regulatory approach, in 2019 the U.S. used over 70 agricultural pesticides that were banned in the European Union, amounting to 322 million pounds used each year. That means over a quarter of all U.S. agricultural pesticide use was from pesticides that all EU member states have prohibited.

Nathan Donley, *How the EPA’s Lax Regulation of Dangerous Pesticides Is Hurting Public Health and the U.S. Economy*, BROOKINGS INST. (Sept. 29, 2022), <https://www.brookings.edu/articles/how-the-epas-lax-regulation-of-dangerous-pesticides-is-hurting-public-health-and-the-us-economy/> [<https://perma.cc/RPS6-SKDZ>].

71. 7 U.S.C. § 136v; *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, EPA, <https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities> [<https://perma.cc/CSG8-PKML>] (Feb. 15, 2024) [hereinafter *FIFRA and Federal Facilities*].

72. 7 U.S.C. § 136v(a)–(b).

73. *FIFRA and Federal Facilities*, *supra* note 71.

generally cause unreasonable adverse effects on the environment.”⁷⁴ In determining whether an adverse effect is unreasonable, EPA is required to consider the pesticide’s economic, social, and environmental risks and benefits to people.⁷⁵ EPA interprets this mandate to mean it is not required to “balance the risks and benefits for each exposed group individually,” noting that a pesticide may present a high risk to workers or handlers, but those risks must be balanced against the economic benefits to society.⁷⁶ In particular, the 1975 amendments required EPA to consider the adverse economic impacts to the agricultural sector.⁷⁷

EPA does not, however, consider chronic exposure for certain industries, risks specific to pregnant women and children, or the interactions between multiple pesticides when engaging in risk assessment.⁷⁸ More generally, EPA’s risk assessment process focuses on “active” ingredients in pesticide product formulations, but many formulations contain multiple inert and inactive ingredients that together can substantially increase the product’s risk profile.⁷⁹ Farmworkers are at heightened risk given their routine exposure to pesticides, particularly when considering (1) EPA’s “less rigorous” approach to occupational versus dietary exposures; (2) use of data from studies focused on active ingredients rather than product formulations to “estimate[] . . . dermal absorption rates”; (3) assumptions that personal protective equipment and adherence to handling instructions are sufficient or provided for; and (4) regulatory acceptance that farmworkers can or should be subject to higher risks as compared to the general public.⁸⁰ As far back as the 1980s, EPA recognized that the

74. *Id.* (quoting 7 U.S.C. § 136a(c)(5)).

75. *FIFRA and Federal Facilities*, *supra* note 71; 7 U.S.C. § 136(bb).

76. Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68760, 68762 (Dec. 29, 2020) (to be codified at 40 C.F.R. pt. 170).

77. Federal Insecticide, Fungicide, and Rodenticide Act Extension, Pub. L. No. 94-140 § 1, 89 Stat. 751, 751 (codified as amended at 7 U.S.C. § 136d).

78. GOLDMAN ET AL., *supra* note 12, at 40–41; *See Revised Methods for Worker Risk Assessment*, EPA, <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/revised-methods-worker-risk-assessment> [<https://perma.cc/RJ6U-MVBH>] (Mar. 13, 2024).

79. Charles Benbrook et al., *Commentary: Novel Strategies and New Tools to Curtail the Health Effects of Pesticides*, 20 ENV’T HEALTH, no. 87, Aug. 3, 2021, at 1, 3.

80. *Id.*

burdens of pesticide use are disproportionately borne by farmworkers through acute and chronic illness.⁸¹

After registration, pesticides are subject to additional requirements related to labeling,⁸² packaging,⁸³ storage, disposal, and transportation.⁸⁴ Additionally, as discussed in more detail below, EPA has interpreted FIFRA to require the development of agricultural workplace practice standards “to reduce the risks of illness or injury resulting from workers’ and handlers’ occupational exposures” to pesticides.⁸⁵ EPA’s regulations also include specific interpretations of label claims, such as provisions of personal protective equipment (PPE),⁸⁶ application notifications, and warning signs.⁸⁷ Finally, EPA’s Worker Protection Standard prohibits agricultural employers from preventing or discouraging employees’ compliance with the law or retaliating against them when they do so.⁸⁸

2. Pesticide Registration Improvement Act

The Pesticide Registration Improvement Extension Act (PRIEA)⁸⁹ is one of a series of appropriations acts that amended FIFRA and set the fee schedules for registering pesticides.⁹⁰ However, the registration process is controversial—some have suggested that because it requires the production of so much data, it often winds up incomplete and results in a compromise that EPA feels like it can live with.⁹¹ Moreover, the pesticide registration process does not include an adversarial mechanism that some suggest would be beneficial because it could allow

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81. Cunningham-Parmeter, *supra* note 67, at 447–48. Unfortunately, “decades later, the EPA has not yet implemented effective mechanisms for mitigating this disparity.” *Id.*
 82. *FIFRA and Federal Facilities*, *supra* note 71; 40 C.F.R. § 156.10(a) (2022).
 83. 40 C.F.R. §§ 157.20–157.36 (2022).
 84. 7 U.S.C. § 136q.
 85. 40 C.F.R. § 170.1 (2022).
 86. *Id.* § 170.112(c)(4).
 87. *Id.* § 170.120.
 88. *Id.* § 170.7(b).
 89. Pesticide Registration Improvement Extension Act of 2018, Pub. L. No. 116-8, 133 Stat. 484 (codified as amended at 7 U.S.C. §§ 136–136y).
 90. *PRIA Overview and History*, EPA, <https://www.epa.gov/pria-fees/pria-overview-and-history> [<https://perma.cc/A6SC-GNMW>] (June 28, 2023).
 91. Danica Li, *Toxic Spring: The Capriciousness of Cost-Benefit Analysis Under FIFRA’s Pesticide Registration Process and Its Effect on Farmworkers*, 103 CAL. L. REV. 1405, 1423–24 (2015) (“[A]pplication denials for insufficient data, which are common, are widely understood to be invitations to continue the discussion.”).

for data that demonstrates risk and potential harm.⁹² As the process exists currently, EPA relies almost exclusively on the information provided by the pesticide registrant.⁹³ Part of PRIEA allocates funding from registration fees for farmworker protection activities, including illness oversight and monitoring, training programs and materials, and surveys collecting data on “farm worker employment, health, living conditions, [and] demographics.”⁹⁴

C. Section 4(b)(1)—OSHA’s Federal Preemption Clause

While OSHA is the agency in the United States designated with jurisdiction to protect workers through the creation of workplace standards, the OSH Act contains an exception that prevents OSHA from exercising jurisdiction over workplaces and hazards already covered by other federal agencies.⁹⁵ Specifically, under section 4(b)(1) of the OSH Act, Congress provided that the Act does not “apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.”⁹⁶ The Act does not contain any language addressing what happens when OSHA is first in time to regulate or when OSHA is required by law to set a more stringent standard than that of the other agency. For example, when developing standards that address “toxic materials or harmful physical agents,” the agency is required to

[S]et the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.⁹⁷

92. Terence J. Centner, *Pesticide Registration Fails to Protect Human Health: Damages from Exposure to Glyphosate-Based Herbicides*, 36 J. ENV’T L. & LITIG. 69, 78–79 (2021) (“With the information provided by the registrant, the EPA conducts a pesticide’s cost-benefit analysis without the benefit of information from nongovernmental, disinterested, or opposing parties.”).

93. *Id.* at 78.

94. *PRIEA Overview and History*, *supra* note 90.

95. *EPA and OSHA on Pesticide Worker Safety*, ENVIRO.BLR.COM (Apr. 8, 2014), <https://enviro.blr.com/whitepapers/hazmat-and-chemicals/pesticide-manufacture-and-application/EPA-and-OSHA-on-Pesticide-Worker-Safety> [<https://perma.cc/9C7D-LG4X>].

96. 29 U.S.C. § 653(b)(1).

97. *Id.* § 655(b)(5).

Despite this provision's breadth and clear intent to protect workers when a standard is feasible and supported by the best available science, a plurality of the Supreme Court determined otherwise. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute* ("*Benzene*"),⁹⁸ the Court determined that OSHA is required to make a threshold determination that a "significant risk of material health impairment" exists before developing occupational health and safety standards for toxic substances.⁹⁹ Discussed in further detail below, the *Benzene* case was a harbinger of things to come, as cases that considered regulations with a major impact on the economy are "linear descendants"¹⁰⁰ of the *Benzene* case in the sense that, absent a clear statement from Congress, the Court will not defer to an OSHA interpretation that imposes such severe costs on industry even when the requirements are technically feasible.¹⁰¹

According to OSHA, a two-prong test applies to determine whether section 4(b)(1) preempts OSHA from issuing workplace health and safety standards.¹⁰² First, has Congress delegated authority to another federal agency to "prescribe or enforce standards or regulations affecting occupational safety or health," and second, "[h]as the other federal agency exercised its statutory authority over the particular working condition?"¹⁰³ Moreover, another federal agency's regulations preempt OSHA even when the other regulations generally protect public health and safety so long as the protection of occupational safety and health is not incidental.¹⁰⁴ In OSHA's field manual, the agency provides specific examples of other federal agencies that have preempted OSHA to eliminate confusion and assist OSHA staff.¹⁰⁵

98. 448 U.S. 607 (1980).

99. *Id.* at 639–40.

100. Christopher H. Marraro & Gary C. Marfin, *The High Court's Benzene Decision at 40: Will It Rise if Chevron Falls?*, WASH. LEGAL FOUND. (Jan. 31, 2020), https://www.wlf.org/wp-content/uploads/2020/01/1312020MarraroMarfin_LB.pdf [<https://perma.cc/MD8M-M3NC>].

101. *Benzene*, 448 U.S. at 641 ("But we think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy an entire industry.").

102. OSHA FIELD OPERATIONS MANUAL, *supra* note 48, at 17-1.

103. *Id.* at 17-2.

104. *Id.*

105. *Id.* at 17-5. These agencies include: Department of Transportation, Federal Motor Carrier Safety Administration, Pipeline and Hazardous Materials Safety Administration, Department of Labor, Mine Safety and Health Administration, Environmental Protection Agency, the Nuclear Regulatory Commission, Department of Energy, Department of

In addition to the limit on OSHA's jurisdiction, when another agency chooses to develop workplace standards under a different statute that gives them jurisdiction to do so, nothing in the law ensures those standards are at least as protective as standards that would otherwise have been created by OSHA, unless required by the other agency's enabling legislation.¹⁰⁶ This is a bit confounding. When OSHA is setting the standards, the Act requires that, if there are conflicts between existing national standards and standards OSHA might set, OSHA is required to "promulgate the standard which assures the greatest protection of the safety or health of the affected employees."¹⁰⁷ Consequently, when OSHA acts to protect worker safety, it may be subject to a more stringent requirement to protect workers than another federal agency seeking to promulgate occupational health and safety standards.

D. Worker Protection Standard

The issue of workplace standards for farmworker pesticide exposure highlights the jostling that can occur when Congress fails to fully consider the ramifications of legislative compromise. The story of this particular issue began to take shape in December 1971, when the White House asked the Council on Environmental Quality to assess the feasibility of addressing worker exposure to organophosphates under the OSH Act.¹⁰⁸ Labor advocates noted the glaring failure of OSHA to enact standards to protect agricultural workers a year after the OSH Act was passed despite the fact that it was and remains one of the most dangerous occupations.¹⁰⁹ In 1972, President Nixon's environmental message informed Congress that protecting agricultural workers was integral to "sound pesticide policy."¹¹⁰ Simultaneously, he asked the newly appointed and relatively inexperienced Secretary of Labor to develop workplace standards protecting workers from pesticide

Homeland Security, United States Coast Guard, Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, and Department of Interior, Bureau of Safety and Environmental Enforcement. *Id.* at 17-5-10.

106. *Id.* at 17-2.

107. 29 U.S.C. § 655(a).

108. U.S. GOV'T ACCOUNTABILITY OFF., MWD-75-55, EMERGENCY TEMPORARY STANDARDS ON ORGANOPHOSPHORUS PESTICIDES 2 (1975).

109. George H. R. Taylor, *The Occupational Safety and Health Act—One Year Later*, 14 J. OCCUPATIONAL MED. 773, 774 (1972).

110. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 108, at 2.

exposure.¹¹¹ As part of this effort, the Secretary of Labor created the OSHA Standards Advisory Committee on Agriculture—an effort strongly criticized by labor advocates as meaningless, ineffective, and beholden to the Department of Agriculture.¹¹²

1. History of the Standard

In May 1973, OSHA promulgated an emergency temporary standard focused on the safety of twenty-one different organophosphate pesticides and reentry intervals (periods of time during which it is illegal to access an area treated by pesticides) to protect farmers and farmworkers.¹¹³ In so doing, the agency recognized that commonly used pesticides on farms are organophosphates, which have “a chemical similarity to commonly used agents of chemical and biological warfare.”¹¹⁴ Once a temporary standard has been issued, the Secretary of Labor is required to promulgate a final standard within six months.¹¹⁵ However, two months after OSHA issued the temporary emergency standard, EPA published notice of public hearings “on the question of farm worker protection and on the proposed standards contained” within the notice.¹¹⁶ EPA’s notice stated,

The Environmental Protection Agency will be cooperating with OSHA in these hearings with EPA’s intent of issuing, based upon *combined* hearing records, standards for the specific organophosphate chemicals deemed, as a result of such hearings, to require standards prior to the 1974 growing season. EPA will, in consultation with OSHA, USDA and other interested Agencies, promulgate such standards. *OSHA in consultation with EPA may issue standards on such crops and organophosphate chemicals as deemed necessary and appropriate under the OSH Act.* In those cases where standards of the two agencies are directed at protecting workers from the same hazard, the two standards will not conflict.¹¹⁷

111. *Id.*; *John Stender Administration, 1973-1975: OSHA Becomes an Agency in Crisis*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/history/osha13stender> [<https://perma.cc/EJM4-RERT>].

112. Taylor, *supra* note 109, at 774.

113. Emergency Temporary Standard for Exposure to Organophosphorus Pesticides, 38 Fed. Reg. 10715, 10715–17 (May 1, 1973).

114. *Id.* at 10715.

115. 29 U.S.C. § 655(c)(3).

116. Public Hearing Notice, 38 Fed. Reg. 20362 (July 31, 1973).

117. *Id.* (emphasis added).

EPA maintained it had jurisdiction over the issue because FIFRA requires it to register and properly label pesticides.¹¹⁸ In making these determinations, EPA must evaluate and assess the risk a particular pesticide poses to those applying and handling pesticides, among others.¹¹⁹ In the notice, EPA maintained that it had long considered the potential workplace hazards presented by pesticides to farmworkers under its mandate included in FIFRA's legislative history, stating that sections 2 (definitions) and 3 (provisions relating to registration of pesticides) of the Act were "designed to protect all men."¹²⁰

In 1974, EPA issued its proposed workplace standard governing farmworker reentry times on fields that had been treated with pesticides.¹²¹ Just a few months later, in what might be regarded as record time for a rulemaking based on a complex set of data, EPA finalized the standard.¹²² Accordingly, because FIFRA addresses farmworker pesticide safety and EPA had exercised that authority through the Worker Protection Standard, OSHA withdrew its temporary standard and has not developed occupational health and safety standards addressing these issues because of the OSH Act's preemption provision.¹²³ While FIFRA preempts states from creating labeling requirements that differ from those provided in the federal law, states are permitted to regulate both the sale and use of federally registered pesticides, leaving them free to develop their own standards to address workplace hazards related to pesticide use.¹²⁴ However, OSHA is precluded from doing so.

2. Challenges to the Standard—the *Organized Migrants* Litigation

Decided in 1975 by the D.C. Court of Appeals, *Organized Migrants in Community Action v. Brennan*¹²⁵ was the first case to interpret OSHA's federal preemption clause. The case was brought by a group of farmworker organizations and a farmworker seeking to compel OSHA to promulgate a permanent pesticide exposure standard after EPA

118. *Id.* at 20363.

119. *Id.*

120. *Id.*

121. Farm Workers Dealing with Pesticides, 39 Fed. Reg. 9457 (proposed Mar. 11, 1974) (to be codified at 40 C.F.R. pt. 170).

122. Worker Protection Standards for Agricultural Pesticides, 39 Fed. Reg. 16888 (May 10, 1974) (to be codified at 40 C.F.R. pt. 170).

123. *Id.*

124. 7 U.S.C. § 136v(a)–(b).

125. 520 F.2d 1161 (D.C. Cir. 1975).

issued regulations addressing pesticide exposure under FIFRA.¹²⁶ In that case, the court determined that because EPA promulgated regulations addressing farmworker exposure to pesticides, it preempted OSHA from doing so.¹²⁷ In the opinion, the court notes that the legislative history demonstrates Congress's recognition "that the Secretary's broad authority under OSHA might conflict with other agencies that regulated occupational health and safety."¹²⁸ Interestingly, however, the history of the standards at issue was not so simple and section 4(b)(1) of the OSH Act did not specifically address the situation at issue in the case, consideration of which led to the regulatory framework we continue to have in place to this day.

In the case, the farmworkers argued that EPA lacked jurisdiction to develop or enforce occupational health standards because the statute they cited as providing them the authority to do so—the Federal Environmental Pesticide Control Act (FEPCA)—was not intended to address worker health and safety.¹²⁹ Citing to various sections of FEPCA and the statute's legislative history, the court disagreed and noted the statute's purpose to protect "man and his environment," the labeling and registration provisions that required EPA to consider risk, and the fact that prior to the statute's enactment EPA interpreted the labeling provisions as enabling it to "require field re-entry limitations for many pesticides."¹³⁰ Additionally, the court cited two committee reports for the proposition that Congress meant to give EPA the authority to regulate farmworker exposure to pesticides, which is technically correct; however, Congress's discussion focused on the fact that the labeling and registration requirements required EPA to consider the health of farmworkers when registering certain pesticides for use and when developing the labels explaining safe usage.¹³¹ The

126. *Id.* at 1161–62; Comment, *Interpreting OSHA's Pre-Emption Clause: Farmworkers as a Case Study*, 128 U. PA. L. REV. 1509, 1510 (1980) [hereinafter *Interpreting OSHA's Pre-Emption Clause*].

127. *Brennan*, 520 F.2d at 1163.

128. *Id.* (citing SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 997 (1971)).

129. *Id.* at 1164.

130. *Id.* at 1165–66 (citing Worker Protection Standards for Agricultural Pesticides, 39 Fed. Reg. 16888 (May 10, 1974) (to be codified at 40 C.F.R. pt. 170) ("Concern for the protection of all persons, including farm workers, who might be exposed to pesticides during and after application has been an integral part of the FIFRA registration process for many years. Restrictions against workers entering treated fields have been required for many pesticide products.")).

131. *Id.* at 1666. ("The Act's legislative history buttresses our conclusion that Congress meant to give EPA authority to regulate farmworker exposure

court also dismissed the plaintiffs' second claim: that even if EPA had statutory authority to promulgate the regulations, that did not prohibit OSHA from developing its own pesticide exposure standards given the fact that OSHA is the agency to which Congress delegated the authority to set occupational health and safety standards.¹³²

In the court's view, the OSH Act clearly expressed Congress's intent to preempt OSHA from regulating when another agency acted pursuant to statutory authority to develop workplace standards.¹³³ While the court recognized that a statute's plain language should not be followed when it contradicts a statute's clearly expressed purpose, the court did not "find even a glimmer in OSHA's legislative history that Congress did not mean what it said in section 4(b)(1); nor [could it] infer from FEPCA and its legislative history an intention not to preempt the Secretary of Labor."¹³⁴ However, the legislative history addressing the preemption clause is anything but clear. During the debates, Congress questioned whether the provision meant only to apply to existing standards developed by other agencies or whether it also meant to apply prospectively now that OSHA was created and mandated to promulgate occupational health and safety standards to protect worker safety.¹³⁵ The court acknowledged that the legislative history did not resolve the question squarely one way or another, but it did reach the conclusion that Congress intended one or the other agency to regulate, but not both—i.e., it did not intend for agencies to develop duplicative regulations.¹³⁶ In other words, Congress intended for federal agencies without an explicit mandate to protect workers to preempt the agency created for the express purpose of protecting workers.¹³⁷

to pesticides. Since we discuss FEPCA's legislative history more fully *infra*, we will only note here that both the Senate Commerce Committee and Agriculture and Forestry Committee engaged in an extensive colloquy over whether to include specific language in FEPCA indicating that farmworkers were protected. While the Commerce Committee thought that specific language would further the Act's purposes and the Agriculture and Forestry Committee did not, both Committees agreed that farmworkers were among the beneficiaries of the Act, even without specific language to that effect. . . . In sum, EPA had ample statutory authority to promulgate and enforce occupational health and safety standards for farmworkers.") (internal citations omitted).

132. *Id.*

133. *Id.*

134. *Id.* at 1167.

135. *Id.*

136. *Id.* at 1168.

137. One scholar has offered an alternative set of tests that could be used whenever a case arises questioning whether OSHA should be preempted from setting occupational health and safety standards. See *Interpreting*

3. The Standard as It Exists Now

Since promulgating the Agricultural Worker Protection Standard (WPS) in 1974, EPA has amended it several times, most recently in 2015.¹³⁸ The WPS is the main federal law that addresses risks associated with pesticide-related illness and injury among farmworkers. States have primary authority for enforcing the WPS, with the exception of Wyoming,¹³⁹ but EPA is required to ensure the states are adequately monitoring compliance with the standard.¹⁴⁰ This co-regulatory structure presents its own set of challenges because states are not required to report data on exposure incidents and, for those that do, there is no consistency in how information is reported.¹⁴¹ While some states gather data and information provided to EPA through cooperative agreements, the Government Accountability Office (GAO) found that EPA does not collect information regarding the use of the designated representative provision nor does it coordinate with the states to do so.¹⁴² EPA itself has determined that access to information that could address “even a small number of pesticide exposure-related illnesses” would be useful given the substantial costs associated with treatment for pesticide exposure-related chronic illness.¹⁴³ Relatedly, in 2017, the Office of the Inspector General found that EPA’s implementation management controls for the WPS were insufficient, in large part due to the agency’s inability to gather data regarding agricultural

OSHA’s Pre-Emption Clause, *supra* note 126, at 1521 (“Three alternative tests for determining whether non-OSHA regulation triggers section 4(b)(1) pre-emption can be articulated: (1) pre-emption will occur only when the sole purpose of the legislation is occupational safety and health; (2) pre-emption will occur when one of the purposes of the legislation is occupational safety and health; or (3) pre-emption will occur whenever employees are merely within the class of persons who benefit from the statute.”).

138. *Agricultural Worker Protection Standard (WPS)*, EPA, <https://www.epa.gov/pesticide-worker-safety/agricultural-worker-protection-standard-wps> [<https://perma.cc/WM7Y-6GW4>] (Feb. 22, 2024).

139. *Pesticide Dashboard Help*, EPA, <https://echo.epa.gov/help/pesticide-dashboard-help#WPS> [<https://perma.cc/PE4L-3PH6>] (Oct. 10, 2023).

140. 7 U.S.C. § 136w(a)(1).

141. OLIVIA N. GUARNA, EXPOSED AND AT RISK: OPPORTUNITIES TO STRENGTHEN ENFORCEMENT OF PESTICIDE REGULATIONS FOR FARMWORKER SAFETY 25 (2022), <https://www.vermontlaw.edu/sites/default/files/2022-09/Exposed-and-At-Risk.pdf> [<https://perma.cc/K92S-84JB>].

142. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-63, FARMWORKERS: ADDITIONAL INFORMATION NEEDED TO BETTER PROTECT WORKERS FROM PESTICIDE EXPOSURE 7 (2021).

143. *Id.* at 11.

pesticide exposure incidents.¹⁴⁴ Generally speaking, EPA fails in its mandate to ensure states are adequately enforcing the WPS because it lacks the data needed to make these determinations.

EPA estimates that the WPS covers approximately 2 million farmworkers at over 600,000 farms in the United States.¹⁴⁵ In its economic analysis of the proposed WPS revisions in 2015, EPA cited data that was over a decade old to document the number of pesticide exposure incidents related to the agricultural sector, noting that incidents are underreported and acknowledging “[o]ccupational incidents are probably indicative of a larger number of cases where pesticide safety practices are not fully followed resulting in higher levels of pesticide exposure to agricultural workers.”¹⁴⁶ Moreover, EPA admits that “[e]ven such minor errors are likely to lead to chronic exposure to pesticides, which is associated with long-term health issues that are potentially severe.”¹⁴⁷

Generally, the standard sets out a series of obligations for agricultural employers whose employees come into contact with pesticides. It requires employers to ensure that pesticides are applied according to the instructions on the labels and to provide employees with information about the protections available to them under the WPS.¹⁴⁸ Additionally, the WPS requires agricultural employers to provide pesticide safety training and pesticide safety information “in a manner that . . . workers can understand.”¹⁴⁹ This is a particular challenge when farmworkers speak an Indigenous language or their spoken language does not have a written analogue.¹⁵⁰ The WPS also requires specific field reentry restrictions after application with oral and written notification to workers, provision of PPE, and decontamination supplies.¹⁵¹ Employers are to provide decontamination supplies at the worksite and emergency assistance to workers injured by pesticides.¹⁵² Finally, the standard sets out requirements for employers of pesticide

144. *Id.*

145. *Id.* at 1.

146. BIOLOGICAL & ECON. ANALYSIS DIV., OFFICE OF PESTICIDE PROGRAMS, EPA, ECONOMIC ANALYSIS OF THE PROPOSED AGRICULTURAL WORKER PROTECTION STANDARD REVISIONS 1 (2014).

147. *Id.*

148. 40 C.F.R. § 170.7 (2022).

149. *Id.* § 170.401(c)(1).

150. *See generally* Stephanie Farquhar et al., *Recruiting and Retaining Indigenous Farmworker Participants*, 16 J. IMMIGRANT & MINORITY HEALTH 1011 (2014).

151. 40 C.F.R. §§ 170.150–170.160 (2022).

152. *Id.*

handlers, such as providing training in pesticide use precautions, access to pesticide labeling information, PPE, and medical evaluations for those who regularly handle certain pesticides.¹⁵³ Importantly, the WPS prohibits employers from retaliating against employees or pesticide handlers who refuse to engage in work they believe is in violation of the standard, file complaints related to noncompliance, and assist EPA or the relevant state agency with investigations and compliance.¹⁵⁴

The WPS was amended in 2015 and includes new requirements related to annual safety training for workers and handlers, a minimum age of eighteen for pesticide handlers and early-entry workers, enhanced hazard communication and safety information, prohibitions on entry for certain outdoor areas during outdoor pesticide application, and the designated representative provision.¹⁵⁵ Additionally, EPA updated the WPS in 2020 in response to two petitions regarding requirements related to the “application exclusion zone” (AEZ). Specifically, the WPS mandated employers to keep workers and others out of an area 25 to 100 feet wide designated as the AEZ during outdoor pesticide application, including aerial applications.¹⁵⁶ EPA revised this requirement in October 2020 by significantly restricting the AEZ to include only the areas on the employer’s property.¹⁵⁷ A coalition of advocates and attorneys general challenged the agency’s rollback of the requirements, which resulted in a stay of implementation that remains

153. *Id.* §§ 170.202–170.260.

154. PESTICIDE EDUC. RES. COLLABORATIVE & EPA, HOW TO COMPLY WITH THE 2015 REVISED WORKER PROTECTION STANDARD FOR AGRICULTURAL PESTICIDES: WHAT OWNERS AND EMPLOYERS NEED TO KNOW 33 (2017), <https://www.pesticideresources.org/migrated/wps/htc/htcmanual.pdf> [<https://perma.cc/G3L2-4ETM>].

155. *See* Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67496, 67496–97 (Nov. 2, 2015) (to be codified at 40 C.F.R. pt. 170). The designated representative provision allows farmworkers to identify a person who can request specific pesticide information, including what pesticides are applied and the hazards associated with those pesticides, from their employer on the worker’s behalf. *Id.* at 67496. This can be useful in situations where there is a language barrier, a worker has moved to a different site and no longer has access to information, or a caseworker needs information about an employee.

156. Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68760, 68761 (Oct. 30, 2020) (to be codified at 40 C.F.R. pt. 170).

157. *Summary Table Comparing the 2015 and 2020 WPS Application Exclusion Zone (AEZ) Provisions to the 2023 Proposed Rule: “Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments (RIN 2070-AK92),”* EPA, <https://www.epa.gov/system/files/documents/2023-02/2023-AEZ-Reconsideration-NPRM-%20Summary-Table-Graphic.pdf> [<https://perma.cc/LK22-JLF9>].

in effect currently.¹⁵⁸ In March 2023, EPA issued a proposed rule to consider the 2020 revisions, much of which proposes reinstating the 2015 requirements that the 2020 revisions sought to undo.¹⁵⁹

Given the co-regulatory structure of FIFRA which leads to inconsistent implementation and enforcement of the WPS, with multiple agencies engaged at the state level, the requirements are often inadequately enforced. Although EPA is the agency with primary jurisdiction, it lacks the ability to exercise authority over the states if they are not adequately administering the program—in a manner similar to how OSHA is prevented from ensuring adequate state administration.¹⁶⁰ This structure differs from the agency's relationship with the states under other environmental laws.¹⁶¹ This problem of too many cooks in the kitchen, and potentially the wrong cooks, leads to significant gaps in protections for farmworkers.

II. THE PERILS OF PREEMPTIVE AGENCY JURISDICTION

While it is tempting to argue that OSHA's assuming full jurisdiction over federal standards addressing farmworker exposure to pesticides would remedy the issues, OSHA faces its own set of challenges. As identified in the Department of Labor's Equity Action Plan, the broader agency recognizes a set of practical long-standing barriers in providing support and enforcing standards for "traditionally underserved communities" due to language access, fear of retaliation, and underrepresentation of workers' voices in the setting of standards.¹⁶² Bigger picture, the breadth of OSHA's delegation is a cause of concern

158. *See, e.g.*, Plaintiff's Proposed Order to Show Cause for Emergency Relief Pursuant to Fed. R. Civ. P. 65 and 5 U.S.C. § 705 at 1, *Rural & Migrant Ministry, Inc. v. EPA*, No. 1:20-cv-10645-LJL (S.D.N.Y. Dec. 18, 2020), https://earthjustice.org/sites/default/files/files/20cv10645_order_12.18.2020.pdf [<https://perma.cc/6H5N-V682>]; Complaint for Declaratory and Injunctive Relief at 1, *New York v. EPA*, No. 1:20-cv-10642 (S.D.N.Y. Dec. 16, 2020), https://www.courthousenews.com/wp-content/uploads/2020/12/ny_v_epa_complaint.pdf [<https://perma.cc/5S5D-ZDS4>]; *Worker Protection Standard Application Exclusion Zone*, EPA, <https://www.epa.gov/pesticide-worker-safety/worker-protection-standard-application-exclusion-zone> [<https://perma.cc/39QZ-WAFX>] (Feb. 21, 2024).

159. Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments, 88 Fed. Reg. 15346, 15346–47 (proposed Mar. 13, 2023) (to be codified at 40 C.F.R. pt. 170).

160. *See supra* note 40 and accompanying text.

161. 7 U.S.C. § 136w-2(b).

162. U.S. DEP'T OF LAB., DEPARTMENT OF LABOR EQUITY ACTION PLAN 4 (2022), <https://www.dol.gov/sites/dolgov/files/general/equity/DOL-Equity-Action-Plan.pdf> [<https://perma.cc/3Q26-A46L>].

for the Court, as reflected by the *Benzene* case.¹⁶³ Some have argued the courts should be more aggressive about interpreting the “reasonably necessary or appropriate” language in the OSH Act’s core mandate to require a cost-benefit analysis.¹⁶⁴ Although the Court as a whole has been pretty adamant in its reluctance to strike down legislation on the basis of an unconstitutional delegation of legislative authority to the executive branch,¹⁶⁵ it has not been shy about engaging other tools to avoid the constitutional issues, narrow the breadth of questionable delegations, and enable other agencies to develop workplace standards that may be less protective.

Some scholars refer to the statutory scheme reflected in OSHA’s preemption provision as duplicative agency delegation.¹⁶⁶ In other words, Congress enacted statutory language that could be interpreted as giving “the same regulatory authority to different agencies.”¹⁶⁷ These types of delegations are contrasted with (1) joint delegations where Congress has delegated authority to multiple agencies with instructions about how each agency is supposed to exercise authority; (2) consultative delegations where one agency is required to consult with another before acting; and (3) fragmented delegations that grant authority to multiple agencies to address a single issue, where each has

163. *Supra* notes 98–101 and accompanying text.

164. Sunstein, *supra* note 27, at 1411 (quoting Indus. Union Dep’t, AFL-CIO v. Am. Petrol Inst. 448 U.S. 607, 667 (1980) (Powell, J., concurring)) (“On a plausible view, a regulation is not ‘reasonably necessary’ if the benefits do not justify the costs, and the word ‘appropriate’ plainly suggests balancing. One version of this approach would require the agency to use cost-benefit analysis as the rule of decision, so that regulations could go forward only if the monetized benefits exceed the monetized costs. But in the context of workplace safety, where distributional concerns are obviously relevant, a strict monetary test would run into serious problems. A softened and preferable version would require the Secretary to calculate both costs and benefits and to find a ‘reasonable relationship’ between the two.”).

165. The Court has only found unconstitutional delegations of lawmaking authority to the executive branch in two instances—*Panama Refining and Schechter Poultry*. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418, 433 (1935) (finding the provision in the National Industrial Recovery Act of 1933 (NIRA) unconstitutional because it gave the President authority to prohibit the distribution of oil produced when it exceeded a quota); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 534 (1935) (finding a different provision in the NIRA unconstitutional because it delegated the authority to define “unfair methods of competition” if the President approved the proposal).

166. See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 187 (2011).

167. *Id.*

a distinct role.¹⁶⁸ As some scholars have suggested, however, decisions about preempting agency authority should be aimed at “maximizing occupational safety and health,” with reducing duplication ancillary to that.¹⁶⁹

Like all arrangements that involve multiple agencies, duplicative agency delegations have pros and cons. On the one hand, an agency with particular expertise in a given industry may be better suited than OSHA to develop workplace standards for that sector. And, if the agency coordinates with OSHA when doing so, workers receive the benefit of two agencies sharing their collective knowledge of industry and worker safety to develop what presumably could be standards superior to those developed by OSHA alone. Moreover, if the other agency has more resources to engage in implementation and enforcement, workers have a better chance at having safe workplaces. Alternatively, the two agencies could fail to coordinate, the agency with industry expertise may also be balancing industry needs with worker safety (like EPA does under FIFRA and the WPS), and implementation and enforcement may not be a priority for the non-OSHA agency.

While it makes some sense to refer to the statutory scheme at issue here as duplicative—and perhaps it is, in the instances where Congress has clearly delegated authority to another agency to develop workplace health and safety standards—it is more appropriate to refer to it as preemptive. Put simply, OSHA is not *sharing* regulatory authority with other agencies—the exemption very clearly states that OSHA is not permitted to regulate when another agency is lawfully doing so.¹⁷⁰ As demonstrated in the *Organized Migrants* case, however, that question boils down to whether the agency seeking to promulgate a workplace standard was delegated that authority.¹⁷¹ In that case, the court determined that another overly broad delegation, but this time to EPA, supplied that authority.¹⁷² There are certainly instances where OSHA has been more than happy to relieve itself of the obligation to promulgate and enforce standards when another agency has indicated the willingness to take that on. The WPS provides such an example since the issue was ultimately resolved by an interagency memorandum

168. *Id.* at 189–90 (citing William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323 (2005) and Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005) for discussions of fragmented agency delegations).

169. *Interpreting OSHA’s Pre-Emption Clause*, *supra* note 126, at 1518.

170. 29 U.S.C. § 653(b)(1).

171. *See supra* Part I.D.2.

172. *Organized Migrants in Cmty. Action, Inc. v. Brennan*, 520 F.2d 1161, 1169 (D.C. Cir. 1975).

of understanding.¹⁷³ Yet, the issues presented by the preemption provision, as applied by some federal agencies and interpreted by some courts, creates avoidable jurisdictional challenges that, if corrected, could better protect workers while promoting administrative efficiency.

A. Potential for Conflicts of Interest

One of the most challenging issues created by the preemption provision is the lack of guardrails to prevent an agency from issuing workplace health and safety standards under the auspices of a broad delegation that may actually conflict in some way with the protection of workers. Delegation of authority for workplace health and safety standards to EPA to address farmworker pesticide exposure provides the perfect example of this. As discussed above, EPA's general mandate "is to protect human health and the environment."¹⁷⁴ In theory, this sounds similar to OSHA's mandate to "ensure safe and healthful working conditions."¹⁷⁵ However, each agency has a very different directive from Congress regarding how it is supposed to protect public health.

Undeniably, the WPS originally promulgated by EPA was less protective than the standard OSHA proposed.¹⁷⁶ While there were allegations of agency capture and capitulation to industry,¹⁷⁷ this issue

173. *Memorandum of Understanding Between the U.S. Department of Labor Occupational Safety and Health Administration and the U.S. Environmental Protection Agency Office of Enforcement*, OSHA (Feb. 13, 1991), <https://www.osha.gov/laws-regs/mou/1991-02-13> [<https://perma.cc/6VS9-2QSA>].

174. *Our Mission and What We Do*, *supra* note 18.

175. *About OSHA*, OSHA, <https://www.osha.gov/aboutosha> [<https://perma.cc/3UN6-V6YZ>].

176. *See Interpreting OSHA's Pre-Emption Clause*, *supra* note 126, at 1512–13 (quoting 40 C.F.R. § 170.3(b)(1) (1979)) ("Some comparisons may help to illustrate the difference between EPA's relatively weak pesticide protection—in terms of standard-setting and enforcement power—and the potentially strong protection which OSHA could provide if not preempted. . . . For example, EPA's pesticide regulations set re-entry times for twelve specified pesticides at lengths of either twenty-four or forty-eight hours. Otherwise, re-entry is prohibited to workers not wearing protective clothing only 'until sprays have dried or dusts have settled.' The pesticide regulations originally issued by OSHA, by contrast, covered 21 pesticides and set all re-entry periods at a minimum of two days and usually much longer.").

177. *See e.g.*, Nathan Donley & Robert Bullard, *U.S. Pesticide Regulation Is Failing the Hardest-Hit Communities. It's Time to Fix It*, BROOKINGS INST. (Jan. 18, 2024), <https://www.brookings.edu/articles/us-pesticide-regulation-is-failing-the-hardest-hit-communities-its-time-to-fix-it/> [<https://perma.cc/7C2L-2P63>].

also relates to the authority under which each agency would act to set the standard. Under the OSH Act, as stated above, OSHA is required to set standards for toxic substances in a manner that attains the “highest degree of health and safety protection.”¹⁷⁸ The OSH Act contains no reference to cost-benefit analysis; however, it does reference feasibility, which the Court used to limit OSHA’s authority in the *Benzene* case.¹⁷⁹ In comparison, EPA’s jurisdiction under FIFRA is explicitly limited by cost-benefit analysis as the agency must consider unreasonable adverse effects to the environment balanced against “economic, social, and environmental” benefits.¹⁸⁰ Moreover, FIFRA requires EPA to consider the impacts to business when assessing penalties whereas OSHA is not subject to that same mandate.¹⁸¹

EPA’s role under FIFRA is to ensure the safe registration of pesticides if the applicant can demonstrate that the pesticide “will not generally cause unreasonable adverse effects on the environment.”¹⁸² EPA has been clear that when engaging in this process, it recognizes that particular pesticides may present significant risks to workers or handlers, but those risks must be balanced against the economic benefits to society.¹⁸³ While this may not appear to be an inherent conflict necessarily, it does raise the question of whether EPA is best suited to ensure worker safety particularly when it will have to balance their health and safety standards against economic benefits to the agricultural sector. The more rigorous the standard, the less likely economic benefits will be maximized. This begs the question—if OSHA was the agency setting the standard, would workers receive more protection?

B. Inequity, Inconsistency, and Enforcement Challenges

The issues related to inequity and inconsistency are directly related to those addressed in the preceding Subpart. If an agency issues occupational health and safety standards but its mandate is not directly tied to ensuring safe and healthy workplaces, it creates the potential that some categories of employees will receive better protections when OSHA developed those workplace protections without having to take into account competing concerns. In January 2021, President Biden

178. *Id.* (quoting 29 U.S.C. § 655(b)(5)).

179. *See supra* note 101 and accompanying text.

180. 7 U.S.C. § 136(bb).

181. Keith Cunningham-Parmeter, *supra* note 67, at 451–52.

182. *FIFRA and Federal Facilities*, *supra* note 71.

183. Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68760, 68762 (Oct. 30, 2020) (to be codified at 40 C.F.R. pt. 170).

issued the Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.¹⁸⁴ This order calls on the federal government to engage in equity assessments to identify barriers for underserved communities in accessing federal programs and for the Office of Management and Budget to identify areas for federal investment in underserved communities and individuals.¹⁸⁵

EPA has taken incremental steps toward advancing equity to ensure farmworkers are protected from pesticide exposure. For one, it reopened the comment period to reverse the rollbacks of 2020 that diminished the WPS, and expects to issue a rule in spring 2024.¹⁸⁶ In the notice of proposed rulemaking, EPA indicated it was interested in receiving comments related to concerns about state enforcement but failed to include any specific measures intended to address these issues.¹⁸⁷ Most recently, the agency announced a proposed rulemaking on pesticide product label accessibility to “help prevent pesticide exposure and assist in addressing long-standing environmental justice issues.”¹⁸⁸ Additionally, in response to EPA’s Equity Action Plan, the agency posted ten years of pesticide incident data on its website to increase transparency.¹⁸⁹ However, because OSHA is not the agency responsible for pesticide exposure, farmworkers lack the protection of the Hazard Communication Standard—a requirement that virtually all other workplaces in the United States must comply with.¹⁹⁰ Under the Hazard Communication Standard, employers are required to notify employees about hazards associated with chemicals in the workplace.¹⁹¹

184. Exec. Order No. 13,985, 3 C.F.R. 409 (2022).

185. *Id.* at 7010.

186. Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments, 88 Fed. Reg. 15346 (Mar. 13, 2023) (to be codified at 40 C.F.R. pt. 170).

187. *Id.* at 15352.

188. *EPA Seeks Public Comments to Ensure Information on Bilingual (Spanish) Pesticide Labels Reaches the Hands of America’s Farmworkers*, EPA (Aug. 3, 2023), <https://www.epa.gov/pesticides/epa-seeks-public-comments-ensure-information-bilingual-spanish-pesticide-labels-reaches> [https://perma.cc/957Y-7EZV]; Implementation of PRIA 5 Bilingual Labeling Requirements to Make Bilingual Pesticide Labeling Accessible to Farmworkers; Request for Comments, 88 Fed. Reg. 39845 (June 20, 2023).

189. *EPA Posts Pesticide Incident Data Publicly: Data Sets Include 10 Years of Incidents and Planned Monthly Updates*, EPA, (July 27, 2023) <https://www.epa.gov/newsreleases/epa-posts-pesticide-incident-data-publicly> [https://perma.cc/4KHC-5546].

190. See 29 C.F.R. § 1910.1200 (2022).

191. *Id.* § 1910.1200(a)(2).

Because pesticides are covered under the WPS, they are specifically excluded from the Hazard Communication Standard.¹⁹²

While EPA's actions represent laudable moves in the right direction, they fail to address fundamental challenges associated with enforcement and compliance that place workers at risk.¹⁹³ In particular, since enforcement of the WPS is largely accomplished at the state level and often through agencies of agriculture, there are competing concerns that require balance between supporting growers and protecting workers.¹⁹⁴ If OSHA were the agency engaged in enforcement and monitoring compliance, these competing concerns would ostensibly be eliminated.

C. Inefficiency and Inconsistent Data Collection

Every year, the GAO issues a report identifying opportunities to maximize efficiency in the federal government.¹⁹⁵ Numerous presidents have issued executive orders aimed at improving efficiency in federal government by avoiding duplication, increasing coordination, and assessing the need to continue long-standing and possibly outdated regulatory requirements.¹⁹⁶ However, the question of whether multiple federal agencies should promulgate and enforce occupational health and safety standards has not been an issue for review despite the tremendous inefficiencies created by such a scheme.

Additionally, the GAO already identified data challenges for both EPA and OSHA when it comes to workplace standards. For OSHA,

192. *Id.* 1910.1200(b)(5)(i).

193. *See* GUARNA, *supra* note 141, at 37–38.

194. *Id.*

195. *See e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, 2023 ANNUAL REPORT: ADDITIONAL OPPORTUNITIES TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE BILLIONS OF DOLLARS IN FINANCIAL BENEFITS (2023).

196. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638, 638 (1994) (“With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.”); Exec. Order No. 13,563, 3 C.F.R. 215, 216 (2012) (“Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.”).

certain employers failed to provide the information and OSHA was encouraged to engage in better outreach to inform employers of their obligation to report data, but also to issue more citations.¹⁹⁷ EPA has been warned on a few occasions that its lax oversight and failure to consistently collect data leave farmworkers at risk from pesticide exposure.¹⁹⁸ While there can be benefits associated with multiple agencies regulating the same broad issue—worker safety—there can also be significant drawbacks.

First, agencies may duplicate efforts, leading to wasted resources and confusion over which agency has primacy. While OSHA has tried to avoid this through internal guidance in its Field Operations Manual,¹⁹⁹ there may be instances when agency officials are unaware that another agency is working on workplace standards absent strong coordination across federal government. Second, when agencies are unsure who the regulator is, that can lead to abdication, which in the context of occupational health and safety can lead to injuries and fatalities. This issue is only compounded by the fact that many federal agencies engaged in these efforts have delegated a substantial amount of implementation and enforcement to state agencies but have failed to exercise meaningful oversight.²⁰⁰

Finally, there appears to be no centralized mechanism for OSHA to receive data regarding workplace injuries and fatalities for standards other federal agencies have issued. This presents a significant challenge for OSHA in the sense that it cannot consider issues comprehensively or arrive at solutions that benefit more than one sector after analysis of a complete and full dataset.

197. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-122, WORKPLACE SAFETY AND HEALTH: ACTIONS NEEDED TO IMPROVE REPORTING OF SUMMARY INJURY AND ILLNESS DATA (2021).

198. U.S. GOV'T ACCOUNTABILITY OFF., RCED-00-40, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARM WORKERS AND THEIR CHILDREN 4 (2000); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-63, FARMWORKERS: ADDITIONAL INFORMATION NEEDED TO BETTER PROTECT WORKERS FROM PESTICIDE EXPOSURE 12-14 (2021).

199. *See supra* notes 102-06 and accompanying text.

200. *See* Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. REG. 233, 237 (2018) ("Federal agencies struggle, or refuse, to adequately oversee subfederal parties responsible for basic regulatory duties, as [recently] dramatically demonstrated through the Flint crisis.").

III. EXECUTIVE BRANCH AUTHORITY TO ENSURE CONSISTENCY AND PROTECTION FOR WORKERS

The issue of agency coordination has been debated by scholars for decades.²⁰¹ Presidents have attempted to address the lack of coordination by developing policies and procedures, memoranda of understanding (MOUs), and executive orders, but examples abound where the failure to coordinate has led to dire consequences. The COVID-19 pandemic is one of the most recent examples where the failure to coordinate effectively and quickly led to fatalities, food shortages, and high rates of contraction, among other issues. The issue is particularly salient when an agency with jurisdiction over a specific area asserts jurisdiction in an area where another agency possesses expertise and then fails to effectively coordinate with the expert agency. This Article documents this in the context of workplace standards that have consistently failed to protect farmworkers from dangerous pesticides. As it exists presently, the preemptive provision in the OSH Act creates a set of challenges that should be addressed by Congress, but at the very least could easily be addressed by the executive branch's requiring greater coordination and collaboration and establishing a presumption that OSHA has authority over worker standards.

Recognizing the perils created by the OSH Act exemption as interpreted by some courts, the executive branch should consider its potential role in fixing the problem. Since the OSH Act preempts OSHA from enacting workplace standards when another federal agency has done so, the President can ensure the concerns addressed above are prevented or mitigated by issuing an executive order. The Executive has a strong interest in ensuring consistency across agencies, preventing inefficiencies and redundancy to conserve resources, and respecting the jurisdiction granted to each agency by Congress. It should take a closer look at the current regulatory scheme, which allows for a preemptive agency approach whereby one agency is permitted to usurp OSHA's authority under the auspices of a broad and general grant of authority to ensure safety simply because they were first in time. As an alternative, the Executive should promote a cooperative and coordinated agency approach that ensures consistent and equitable protection of workers.

201. See e.g., Jim Rossi & Jody Freeman, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Laurie J. Beyranevand & Emily M. Broad Leib, *Making the Case for a National Food Strategy in the United States*, 72 FOOD & DRUG L.J. 225 (2017); Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 1971 (2019) (arguing that Congress "authorizes agencies to influence the application of other agencies' resources and discretion, a phenomenon referred to . . . as 'interagency control'").

Such an approach respects the fact that the exemption was created initially to explicitly acknowledge and account for existing standards already created by certain industries. The executive order should reflect a policy judgment that respects this initial purpose and discourages agencies other than OSHA from developing disparate and distinct workplace standards. At the very least, the executive order should require agencies to consult with OSHA and cooperatively develop standards that ensure the standards are at least as protective as those OSHA would have created. In addition, agencies that are not OSHA should develop an enforcement scheme that either delegates that authority back to OSHA (like how some states have the state OSHA agency in charge of enforcement of the WPS²⁰²) or ensures cooperative enforcement with violations reported back to OSHA for data collection.

Specifically, the President could direct federal agencies that are considering promulgating occupational health and safety standards to ensure their standards provide at least as much protection as regulations issued by OSHA would in the same manner the states are required to do so.²⁰³ If the relevant federal law that an agency is operating under prevents this, the agency should work collaboratively with OSHA to develop standards, but should defer to OSHA's broad authority under the OSH Act to develop standards that ensure worker safety. Additionally, if another federal agency wants to promulgate a standard and assume responsibility for implementation and enforcement, it should be required to submit a plan to OSHA detailing how it intends to address that standard in the same manner the states are required to.²⁰⁴

To ensure consistency, OSHA should develop policies and guidance regarding how implementation, enforcement, and data collection should occur. Other federal agencies administering programs related to worker protection should be required to submit this information to OSHA so that the agency can maintain a full repository of occupational health and safety data and information. This would enable OSHA to serve as the repository for information to comprehensively and holistically analyze workplace safety data to suggest comprehensive and coordinated approaches in collaboration with other federal agencies. If the federal government is committed to racial equity, environmental justice,

202. See, e.g., *Worker Protection Standard*, OREGON.GOV, <https://osha.oregon.gov/Pages/topics/worker-protection-standard.aspx> [<https://perma.cc/H28X-7MNP>]. While the WPS is enforced by the states, not all state OSHA agencies enforce it. In some states, the WPS is enforced by the agency of agriculture or another state agency. See, e.g., *Pesticides*, TEX. DEP'T OF AGRIC., <https://texasagriculture.gov/Regulatory-Programs/Pesticides> [<https://perma.cc/Q5ND-D63H>].

203. 29 U.S.C. § 651(b)(11).

204. *Id.*

and regulatory efficiency, these efforts could achieve those goals and would not substantially disrupt the existing scheme, but would require EPA and other agencies engaged in workplace protection to be more accountable to OSHA and be guided by their mandate to protect workers.

The current regulatory scheme fails to achieve consistency for workers in the United States. Because of the preemptive provision, OSHA cannot meet its mission to “to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance” because it is prevented from doing so when another agency is first in time.²⁰⁵ While this legislative compromise recognizes that other agencies may have expertise in particular occupations that might lead to more specialized workplace health and safety standards, it fundamentally leads to piecemeal and uncoordinated regulation that creates gaps, inequities, and confusion. Requiring agencies to coordinate with OSHA when setting standards and adhere to the OSH Act’s legislative mandate can help to resolve these issues while enabling OSHA to ensure appropriate data collection and enforcement. However, OSHA needs appropriate support and funding to carry out what would constitute an expanded role for the agency.

Moreover, ensuring that OSHA is primarily responsible for occupational health and safety standards provides greater protection if challenged in court, given the recent emphasis on the need for a clear statement from Congress when an agency invokes broad authority to develop regulations, particularly in an area where the agency lacks specific expertise and where the regulations at issue may have substantial impacts on the national economy.²⁰⁶ While OSHA faces its own challenges given the breadth of its mandate from Congress, reasonable regulations that employ some degree of cost-benefit analysis should be able to survive scrutiny.

CONCLUSION

For far too long, farmworkers and their advocates have protested, lobbied, and campaigned for workplace safety standards that protect them from extremely hazardous working conditions that include exposure to dangerous pesticides. Our country has deemed farmworkers essential, recognizing their tremendous value in a self-serving manner, but has failed to respect their health, safety, worth, and dignity by

205. *About OSHA*, OSHA, <https://www.osha.gov/aboutosha> [<https://perma.cc/27HN-FQ4U>].

206. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (“A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”).

delaying development and implementation of workplace standards that ensure safety measures are consistently enforced. While Congress could remove the outdated exemption within the OSH Act, the executive branch has the power to swiftly take matters into its own hands and keep jurisdiction over worker safety where it should be—in the hands of OSHA, the agency that was created with the sole purpose of protecting one of our nation’s most valuable assets: workers.