No. 21-13866

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, STATE OF ALABAMA, STATE OF GEORGIA, GEORGIA HIGHWAY CONTRACTORS ASSOCIATION, GEORGIA MOTOR TRUCKING ASSOCIATION, ROBINSON PAVING CO., SCOTCH PLYWOOD COMPANY, INC., THE KING'S ACADEMY, and CAMBRIDGE CHRISTIAN SCHOOL,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION and U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition for Review

RESPONDENTS' OPPOSITION TO STAY MOTION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for respondents certify that in addition to those noted in petitioners' Certificate of Interested Persons, the following have an interest in the outcome of this appeal:

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TABLE OF CONTENTS

Page

INTRODUCTION

Faced with an extraordinary pandemic and a serious threat to employees, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard to address the grave danger posed by COVID-19 in the workplace. That Standard gives employers the option of requiring vaccination or offering their employees the choice to mask and test. The Standard reflects OSHA's expert judgment that these measures are necessary to mitigate COVID-19 transmission, and the grievous harms the virus inflicts, throughout America's workplaces.

Petitioners seek emergency relief, but their motion fails to explain how the speculative harms they allege would be imminent. No reason exists to rule on petitioners' stay motion immediately, before the Judicial Panel on Multidistrict Litigation even assigns a court to hear the many pending challenges, *see* 28 U.S.C. § 2112(a).

Even if this Court adjudicates the motion, petitioners are not entitled to a stay. Petitioners are not likely to succeed on the merits. Their arguments are foreclosed by precedent, inconsistent with the statutory text, and contrary to the considerable evidence that OSHA analyzed and discussed when issuing the Standard. Petitioners also have not established any injuries that outweigh the harm of delaying a Standard that will save thousands of lives and prevent hundreds of thousands of hospitalizations.

STATEMENT

A. Legal Background

The Occupational Safety and Health Act of 1970 (OSH Act) seeks "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The Act vests the Secretary of Labor, acting through OSHA, with "broad authority" to establish "standards" for health and safety in the workplace. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 611 (1980) (plurality op.); *see* 29 U.S.C. §§ 654(a)(2), (b), 655.

OSHA can establish through notice-and-comment rulemaking permanent standards that are "reasonably necessary or appropriate" to address a "significant risk" of harm in the workplace. *Industrial Union*, 448 U.S. at 642-643 (plurality op.); *see* 29 U.S.C. §§ 652(8), 655(b). If OSHA "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and (B) that a standard "is necessary to protect employees from such danger," OSHA can issue emergency temporary standards that take "immediate effect" and also serve as "proposed rule[s]" for notice-and-comment rulemaking. 29 U.S.C. § 655(c). Such temporary standards are "effective until superseded" by such a permanent standard, and OSHA "shall promulgate" a standard within "six months." *Id.* § 655(c)(2)-(3).

B. Factual Background

The novel COVID-19 virus is "highly transmissible" and deadly. Pmbl.-61409. COVID-19 has already killed more than 750,000 people in this country and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. Significant exposure and transmission, including numerous workplace "clusters" and "outbreaks," are occurring "in workplaces." Pmbl.-61411.

OSHA has monitored the pandemic and previously hoped for "widespread voluntary compliance" with "safety guidelines" to protect against this workplace threat. Pmbl.-61444. In recent months, however, "the risk posed by COVID-19 has changed meaningfully," Pmbl.-61408, and "nonregulatory" options have proved to be vastly "inadequate," Pmbl.-61430. As more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission." Pmbl.-61409; *see* Pmbl.-61411-66. "Unvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

C. COVID-19 Vaccination And Testing Emergency Temporary Standard

On November 4, 2021, OSHA issued an emergency temporary standard to address these "extraordinary and exigent circumstances." Pmbl.-61434. In the Standard, OSHA provided comprehensive analysis showing that COVID-19 presents a "grave danger" to unvaccinated workers, and that the requirements of the Standard were "nec-

essary" to address that grave danger. Pmbl.-61407-61504. The Standard requires employers with 100 or more employees to select one of two workplace policies. Employers may "implement a mandatory vaccination policy." Pmbl.-61436. Or employers may offer employees the choice to have "regular COVID-19 testing" and "wear a face covering." Pmbl.-61520. The Standard staggers compliance deadlines, providing 60 days to implement the testing requirements and 30 days to implement all other requirements. Pmbl.-61549. Employees who exclusively work from home, alone, or outdoors are exempted. Pmbl.-61419.

ARGUMENT

Petitioners ask this Court to stay the Standard issued by OSHA to address the dangers of COVID-19 in the workplace. Petitioners have failed to make the showings necessary to warrant this extraordinary remedy. *See Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[1]

I. Petitioners' Requests For Relief Are Premature

Petitioners ask this Court to grant emergency relief, but their motion devotes only a single paragraph to irreparable harm (Mot. 20), and the asserted "immediate" harm is that "employers need to start planning." That vague reference to "planning" for a Standard that does not fully take effect until January does not justify petitioners'

[1] There is a significant question whether the State petitioners qualify as "persons" under 29 U.S.C. § 655(f), but the Court need not consider that issue because private petitioners also joined the motion.

request that this Court take up their stay motion now. The Court should instead allow this matter to proceed under the process that Congress established.

That process contemplates that litigation concerning the Standard will soon be consolidated in one court of appeals. Petitions are pending in eleven circuits. The Judicial Panel on Multidistrict Litigation will "random[ly] designate" one circuit from among those where petitioners were filed within ten days of the Standard's issuance. 28 U.S.C. § 2112(a)(1), (3). All other courts "shall transfer . . . proceedings to th[at] court." *Id.* § 2112(a)(5). That process will likely occur on or about November 16.

The court chosen to adjudicate these matters will have sufficient time to rule on any preliminary motions. To conserve judicial resources and avoid trenching upon the authority of another court that may receive the case, this Court should decline to act in this current posture.

II. Petitioners Are Unlikely To Succeed On The Merits

A. OSHA Reasonably Concluded That The Standard Is Necessary To Address A Grave Danger

Congress entrusted OSHA with issuing emergency temporary standards if the agency determines that a standard is necessary to address a grave danger. 29 U.S.C. § 655(c). OSHA thoroughly explained its determinations, and substantial evidence supports these findings.

1. OSHA properly "determine[d]" that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically

harmful or from new hazards." 29 U.S.C. § 655(c). The COVID-19 virus is both a physically harmful agent and a new hazard. Pmbl.-61408. It readily fits the definition of an "agent," which is "a chemically, physically, or biologically active principle." https://www.merriam-webster.com/dictionary/agent; *see also* https://www.merriam-webster.com/dictionary/virus (defining "virus" as an "infectious agent[]"). OSHA regulations have previously explained as much. *See* 29 C.F.R. § 1910.1020(c)(13) (defining "toxic substances or harmful physical agents" to include "biological agent[s] (bacteria, virus, fungus, etc.)"); *id.* § 1910.1030 (bloodborne-pathogens rule issued pursuant to authority to regulate "toxic materials or harmful physical agents"). The COVID-19 virus also constitutes a "new hazard." It is "a source of danger," https://www.merriam-webster.com/dictionary/hazard (defining "hazard"), and was unknown in the United States until early 2020. Pmbl.-61408.

OSHA also reasonably concluded that the COVID-19 virus presents a "grave danger," which encompasses threats "of incurable, permanent, or fatal consequences to workers." *Florida Peach Growers Ass'n v. DOL*, 489 F.2d 120, 132 (5th Cir. 1974). COVID-19 has killed hundreds of thousands of people in the United States and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. OSHA described myriad studies showing workplace "clusters" and "outbreaks" and other significant "evidence of workplace transmission" and "exposure." Pmbl.-61411-17. With the risk of exposure cutting across workplaces, the country continues to see daily hospitalization and death of unvaccinated workers. Pmbl.-61411-17, 61435.

2. OSHA also properly "determine[d]" that the Standard "is necessary to protect employees" from this grave danger. 29 U.S.C. § 655(c)(1). The Standard utilizes "the most effective and efficient workplace control available: vaccination," and it offers, as an alternative, "regular testing" and "use of face coverings." Pmbl.-61429. OSHA recognized that vaccination "reduce[s] the presence and severity of COVID-19 cases in the workplace," and effectively "ensur[es]" that workers are protected from being infected and infecting others. Pmbl.-61520. OSHA properly exercised its discretion to offer an alternative whereby employees can be "regularly tested for COVID-19 and wear a face covering." Pmbl.-61436. The Standard provides employers with this choice because they are better positioned to determine which approach will "secure employee cooperation and protection." *Id.* OSHA thus crafted an approach that protects unvaccinated workers while leaving leeway for employers to determine the most appropriate option for their workplaces.

Taken together, these risk-mitigation methods will protect unvaccinated workers against the most serious health consequences of a COVID-19 infection and "reduce the overall prevalence" of the COVID-19 virus "at workplaces." Pmbl.-61435. Indeed, OSHA estimates that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." Pmbl.-61408. OSHA also properly concluded that its existing regulatory tools do not "provide for the types of workplace controls that are necessary to combat the grave danger addressed by" the Standard. Pmbl.-61441.

B. Petitioners' Legal Objections Lack Merit

1. Petitioners brief assertions (Mot. 3-4) of potential constitutional problems are unfounded.

a. *Federalism and Commerce Clause.* The Standard does not, as petitioners urge (at 3, 4), upset any federal-state "balance" or exceed Congress's power to regulate interstate commerce. Congress has long regulated companies engaged in interstate commerce (e.g., Title VII, federal minimum wage), and the Supreme Court has upheld such regulations as within Congress's commerce power, *see, e.g.*, *United States v. Darby*, 312 U.S. 100, 123-125 (1941). The OSH Act permits OSHA to issue "standards applicable to businesses affecting interstate commerce," 29 U.S.C. §§ 651(b)(3), 652(3), (5), in order "to assure . . . safe and healthful working conditions" for the nation's workers, *id.* § 651(b). The Standard reflects congressional findings that "illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce." *Id.* § 651(a); *see also* Pmbl.-61473-74 (discussing cost of absenteeism to employers).

b. *Agency Power.* Quoting *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), petitioners state (at 3) that "Congress [must] speak clearly when authorizing an agency to exercise powers of vast economic and political significance." That case interpreted ambiguous statutory language based on assumptions about when Congress is likely to delegate to an agency a significant policy decision. This Court need not consider those assumptions here because the statutory text is unambiguous and

limited to addressing grave dangers to employees in the workplace. Like many other areas of regulation, workplace-safety regulations may affect many Americans, but that does not require a congressional clear statement or compel a circumscribed interpretation of a deliberately broad congressional grant.

c. *Nondelegation.* "Only twice in this country's history" has the Supreme Court "found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.). Congress's delegations are valid so long as they provide an "intelligible principle" to which the agency must conform. *Id.* at 2123. Section 655(c)(1) exceeds this threshold. It is limited to regulating those agents and hazards that endanger "employees," 29 U.S.C. § 655(c)(1), and is further limited both by the general rule that OSHA standards may apply only to "employment and places of employment," *id.* § 652(8), and by the "grave danger" and necessity requirements for issuing emergency standards. *See Gundy*, 139 S. Ct. at 2129 (describing "very broad delegations" upheld by the Court including authorities "to regulate in the 'public interest'" and "to issue whatever air quality standards are 'requisite to protect the public health.'"); *see also Industrial Union Dep't*, 448 U.S. at 640 n.45, 646 (plurality op.) (indicating that the neighboring subsection of the OSH Act contains an intelligible principle after interpreting that subsection to mirror Section 655(c)(1)). And as petitioners suggest (at 8), courts have had no trouble in evaluating prior emergency standards under Section 655(c)(1)'s rubric.

2. Petitioners wrongly urge (Mot. 4-7) that OSHA's authority is limited to addressing only those dangers that are particularly acute in the workplace. This position has no basis in the statutory text, which authorizes OSHA to adopt standards for "safe or healthful … *places of employment*," 29 U.S.C. § 652(8) (emphasis added), and which authorizes emergency temporary standards if "employees are exposed to grave danger from exposure to … agents" "or from new hazards," *id.* § 655(c).

Petitioners' only textual argument is that other sections of the statute sometimes use the words "agent" and "hazard" to "refer to dangers presented by a job." Mot. 5. Petitioners misunderstand even those examples and would, in any event, read words like "hazard" so narrowly as to render other parts of the section they rely on surplusage. *See, e.g.,* 29 U.S.C. § 670(d)(4)(B) (referring to "changes in working conditions … which introduce new hazards in the workplace"). Petitioners alternative argument (at 7 n.4) that a "virus" cannot be an agent is waived because it was raised "only briefly and in a footnote," *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1283 (11th Cir. 2009), and is also meritless. It ignores plain meaning of the word "agent," as well as the adjoining term "new hazards." 29 U.S.C. § 655(c). That argument is also belied by the OSH Act itself, which expressly suggests that OSHA can require "immunization," including to "protect[] the health or safety of others," 29 U.S.C. § 669(a)(5)—a provision premised on OSHA's authority to protect employees from things like viruses. OSHA

has also long defined "[t]oxic substance or harmful physical agent" to include any "biological agent (bacteria, virus, fungus, etc.)." 29 C.F.R. § 1910.1020(c)(13).[2]

Petitioners improperly ask this Court to "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. Chicago*, 560 U.S. 205, 215 (2010). Even if Congress's primary focus were dangers unique to the workplace, Congress did not limit OSHA's authority to addressing that subset of grave dangers. Statutes "often go beyond the principal evil [targeted by Congress]," and "it is ultimately the provisions of our laws" that govern. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Those principles are particularly applicable here, where the provision at issue exists to address new or evolving dangers, and "the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

Additionally, contrary to petitioners' suggestion, COVID-19 is a particularly acute workplace hazard. OSHA properly determined that employees gather in one place and interact, thus risking workplace transmission of a highly contagious virus that spreads—and creates grave danger—*inside the workplace*. Pmbl.-61411-17. While at work, "workers may have little ability to limit contact with," and possible exposure from,

[2] Petitioners note (at 6) a decision addressing whether the term "workplace" includes housing for seasonal workers. *See Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325 (11th Cir. 1983). That has nothing to do with issues here.

"coworkers, clients, members of the public, patients, and others." Pmbl.-61408; *see* H.R. Rep. No. 91-1291, at 14 (1970) (comparing regulation of workplace dangers to regulation of the environment, explaining that "[o]ur environment is not solely the air we breathe traveling to and from work" but "is also the air we breathe at work," and that "over 80 million workers spend one-third of their day in that environment"). Petitioners' argument (at 6) that the OSH Act only allows OSHA to respond to "dangers arising at work because of one's work" would arbitrarily prohibit OSHA from addressing hazards or agents that occur outside the workplace even where, as here, the hazards or agents spread—and create grave danger—inside the workplace.

OSHA's authority to regulate viruses transmitted through workplace exposure that harm workers at their places of employment is well-established. In 1991, Congress ordered OSHA to issue a bloodborne pathogens standard under its OSH Act authority even though bloodborne illnesses can be contracted outside the workplace as well as within the workplace. And OSHA has long imposed workplace sanitation and fire rules, even though such concerns are not workplace-specific. *E.g.,* Pmbl.-61407-08; *Farmworker Justice Fund v. Brock*, 811 F.2d 613 (D.C. Cir. 1987) (ordering OSHA to issue sanitation standard for farm workers), *vacated as moot* 817 F.2d 890 (D.C. Cir. 1987).

3. Petitioners (at 7) contend in passing that the Standard is invalid because it was published in the Federal Register over the signature of James Frederick, who was no longer Acting Assistant Secretary of Labor at the time of the publication. But that is immaterial: An agency action is valid if adopted by an official with proper authority,

even if that official no longer possesses the requisite authority when the publication of the action in the Federal Register has been completed. *See NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 128-129 & n.8 (3d Cir. 2017); *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 459 (D.C. Cir. 1967). Moreover, because "OSHA's Deputy Assistant Secretary . . . is . . . redelegated authority to act on all matters within the Assistant Secretary's delegation," OSHA Instruction ADM 4-0.3(IX)(A), Mr. Frederick's authority to sign the Standard did not depend on whether he held the "Acting" title when he signed it. In any event, the Secretary has now ratified the prior action (*see* https://go.usa.gov/xeBND).

4. Petitioners' scattered assertions (Mot. 8-18) that OSHA erred when making the necessary findings disregard OSHA's 150-page analysis as well as the deference owed to OSHA's evidence-based determinations. *See* 29 U.S.C. § 655(f).

a. Petitioners wrongly contend (at 8) that OSHA's existing tools "are already protecting workers from COVID-19." OSHA explained that those tools do not "provide for the types of workplace controls that are necessary to combat the grave danger addressed by" the Standard. Pmbl.-61441. And petitioners' reference to the OSH Act's General Duty Clause ignores OSHA's explanation for why that "is not an adequate enforcement tool to protect employees covered by this standard from the grave danger posed by COVID-19." Pmbl.-61444. By contrast, the Standard establishes clear, mandatory, enforceable protections carefully targeted to the specific dangers presented by the COVID-19 virus.

b. Petitioners allusion (at 9-10) to people who were previously infected having some level of "natural immunity" disregards OSHA's detailed discussion of the issue. OSHA described several studies showing that "[a] considerable number of individuals who were previously infected with SARS-CoV-2 do not appear to have acquired effective immunity to the virus." Pmbl.-61421. OSHA noted that some studies that indicate some level of future protection based on prior infection had no "established thresholds to determine full protection from reinfection or even a standardized methodology to determine infection severity or immune response." Pmbl.-61422. And OSHA pointed to studies showing that "vaccination greatly improves the immune response of those who were previously infected." *Id.* OSHA's considered decision to examine all the evidence and arrive at a different, reasonable conclusion than petitioners affords no basis to vacate the Standard.

Petitioners err in relying (at 9) on an extra-record declaration. The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). And OSHA's determinations are "conclusive if supported by substantial evidence *in the record* considered as a whole." 29 U.S.C. § 655(f) (emphasis added). Here, OSHA reviewed available evidence, candidly acknowledged where scientific evidence is not uniform, and explained its analysis.

c. Petitioners wrongly suggest (at 10) that the choice by the Mine Safety and Health Administration not to issue an emergency standard addressing miners is relevant

here. The fact that a different agency with a different statutory mandate and enforcement tools decided not to issue an emergency standard sheds no light on OSHA's authority to issue a Standard necessary to protect covered workers against grave danger.

d. Petitioners further err (at 10-11) in asserting that the Standard cannot be necessary to protect employees from a grave danger because OSHA did not act earlier. Dangers can evolve, as can the need for a standard to address them. That is what happened here, as OSHA explained at length. OSHA can also obtain "new information" or respond to "new awareness," *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984), and "need not address all aspects of a problem in one fell swoop," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Earlier in the pandemic, "scientific information about the disease" and "ways to mitigate it were undeveloped." Pmbl.-61429. OSHA crafted workplace guidance but declined to issue an emergency standard "based on the conditions and information available to the agency at that time," including that "vaccines were not yet available" and that it was unclear if "nonregulatory" options would suffice. Pmbl.-61429-30.

OSHA explained that it acted now because voluntary safety measures proved ineffective, COVID-19 grew more transmissible, and fully approved vaccines and tests are increasingly available. Prior options have proven "inadequate," and due to "rising 'COVID fatigue,'" voluntary precautions are becoming even less common. Pmbl.-61444. Meanwhile, as more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission"

and "potentially more severe health effects." Pmbl.-61409-12, 61431. And "workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

Vaccines are now widely available, Pmbl.-61450; large-scale studies have further confirmed the "power of vaccines to safely protect individuals," including from the Delta variant, Pmbl.-61431; the FDA granted approval rather than Emergency Use Authorization to one vaccine in August, *id.*; and OSHA determined that "the increasing rate of production" of vaccine tests will ensure sufficient supply before the "testing compliance date," Pmbl.-61452. That timing reflects OSHA's determination that this response is needed now to address a growing and current grave danger in the workplace.

e. Petitioners incorrectly contend (at 11-12) that OSHA "overlook[ed]" variation between workplaces. Based on evidence about virus-transmission rates, OSHA expressly exempted employees who work alone, remotely, or exclusively outdoors. Pmbl.-61419, 61516. OSHA included other workers, explaining that "employees can be exposed to the virus in almost any work setting" and that even if sometimes physically distanced, employees routinely "share common areas like hallways, restrooms, lunch rooms, and meeting rooms" and are at risk of infection from "contact with coworkers, clients, or members of the public." Pmbl.-61411-12. OSHA therefore concluded that the Standard was necessary to protect unvaccinated workers in "a wide variety of work settings across all industries" from the COVID-19 virus. Pmbl.-61412. In any event, Section 655(c) exists "to provide immediate protection" and "necessarily requires rather sweeping regulation," and exposure "can be assumed to be occurring at any place"

where the grave danger exists. *Dry Color Mfrs. Ass'n, Inc. v. Department of Labor*, 486 F.2d 98, 102 n.3 (3d Cir. 1973); *see Am. Dental Ass'n v. Martin*, 984 F.2d 823, 827-828 (7th Cir. 1993) (Section 655(c) does not require OSHA "to proceed workplace by workplace").

f. Petitioners similarly err when declaring (at 12) that OSHA ignored "the prospect of mass layoffs and resignations." OSHA discussed workplace impacts and survey data finding that the vast majority of employees who say they will not follow required COVID-19 precautions will end up doing so. *See* Pmbl.-61474-75 (comparing, for example, 48-50% of survey respondents who *said* they would quit if vaccination were required with 1-3% of employees who *actually* left employers with mandatory policies).

g. OSHA also did not fail to justify any "departure" from past "practice." Mot. 13-17. OSHA acknowledged that when confronting different workplace health hazards, it has sometimes used a "voluntary approach." Pmbl.-61436. *Cf.* Mot. 13-14. Based on new facts, OSHA responded with a new Standard. And, consistent with OSHA's prior preference for ensuring flexibility, OSHA declined to issue "a strict vaccination mandate with no alternative" and gave employers flexibility to offer a masking-and-testing option. Pmbl.-61436.

Petitioners similarly misunderstand (Mot. 8, 15) OSHA's decision not to issue an emergency standard in May 2020. OSHA explained that decision at length, both when adopting this Standard and at the time. *See* Pmbl.-614324-25. As OSHA detailed when opposing a mandamus petition, OSHA's decision at an early stage of the pandemic,

when "incomplete or ultimately inaccurate information" could have risked "counter-productive" regulation, Mand. Opp. 30, does not undermine its current decision to address the existing hazard with effective tools that did not exist then but are widely available now. Petitioners' contrary view (at 15-16) would preclude OSHA from acting whenever "the science" is not completely "settled"—or, conversely, incentivize OSHA to act prematurely lest it be "estopped" from acting later. But "[i]t is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities" to an ultimate "conclusion." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

h. Petitioners' unsupported allegation (Mot. 17-18) that the Standard "was based on political pressure and is pretextual" is incorrect and ignores the comprehensive administrative record here. Judicial review should be based on an "agency's contemporaneous explanation in light of the existing administrative record," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019), not on cherry-picked public statements outside that record, *see* Mot. 17-18. And a court may neither "reject an agency's stated reasons for acting" even if "the agency might also have had other unstated reasons," nor "set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Commerce*, 139 S. Ct. at 2573. "It is hardly improper" for officials "to come into office with policy preferences" and to work with agency staff to evaluate the "basis for a

preferred policy." *Id.* at 2574. It "would eviscerate the proper evolution of policymaking were [courts] to disqualify every [official] who has opinions on the correct course of his agency's future actions." *Air Transp. Ass'n of Am., Inc. v. National Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011) (quotation marks omitted). Here, OSHA amply explained its conclusions in an exhaustive analysis, and the fact that the President has expressed significant concern about the ongoing pandemic, including low vaccination rates, and has described the broader response to this pandemic, does not in any way undermine those reasonable conclusions.

5. Finally, petitioners contend (Mot. 18-19) that the Standard violates the First Amendment's ministerial exception and the Religious Freedom Restoration Act (RFRA). *See Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). These petitioner-specific arguments do not provide a basis to stay the rule for any party other than the religious employers in this case. And regardless, petitioners cite no case holding that the ministerial exception excuses employers from safety and health requirements that impose rules on their employees. *See Hosanna-Tabor*, 565 U.S. at 196.

Nor have the religious-school petitioners shown on this record that the Standard violates their RFRA rights. Those petitioners assert that they have a religious objection (Mot. 19) to requiring their employees to become vaccinated—but the challenged Standard does not oblige any employer to require its employees to be vaccinated. It

permits them to instead give their employees the option to mask and test.[3] Petitioners do not assert that those measures would violate any sincerely held religious belief.

III. The Balance Of Equities Also Precludes The Extraordinary Relief Sought Here

Having failed to establish a likelihood of success on the merits, petitioners cannot obtain a stay. *See Nken*, 556 U.S. at 433-434; *id.* at 438 (Kennedy, J., concurring); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Petitioners also have not shown any injury that outweighs the injuries to the government and the public interest would justify delaying a Standard that will save thousands of lives.

A. Most fundamentally, the harms of a stay to the government and the public—which merge here, *see Nken*, 556 U.S. at 435—would be substantial. COVID-19 has already killed over 750,000 people in the United States and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. And with the reopening of workplaces and the emergence of the highly transmissible Delta variant, the threat to workers is ongoing and overwhelming. Pmbl.-61411-15. Workers "are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549. That is a confluence of harms of the highest order. *See, e.g.*, *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020).

[3] Moreover, to the extent that petitioners' employees have religious objections to complying with the Standard, moreover, they may request and receive a religious exemption from the Standard's requirement. *See* 29 C.F.R. § 1910.501(d), n.1.

Even limiting its analysis to employees aged 18-64 who elect vaccination, OSHA estimates that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" over a six-month duration. Pmbl.-61408. These estimates do not include the long-lasting and serious health effects avoided. And these figures understate the impact of a stay because they do not account for the protection to unvaccinated workers when vaccinated workers are less likely to spread the virus or when other workers mask and test. Pmbl.-61438-39. Nor do they account for the avoided harms outside the workplace, including fewer COVID-19 cases among family and friends that would occur due to exposure to an infected worker, avoided breakthrough infections in vaccinated workers, and reduced strains on healthcare systems.

B. Petitioners fail to establish any impending irreparable injury, let alone one that could outweigh these harms. Their brief discussion (Mot. 20) asserts only a single harm: that "employers need to start planning to implement" the Standard. Even were that harm imminent and irreparable, "ordinary compliance costs" are "typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). And petitioners' reliance on ordinary administrative expenses is "inconsistent with [the] characterization of [equitable] relief as an extraordinary remedy." *Winter*, 555 U.S. at 22.

C. Finally, if the Court disagrees, any relief should be limited to the petitioners. Court orders should be "limited" and "tailored" to redress the parties' "particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1931, 1934 (2018). And equitable relief must "be

no more burdensome to the defendant than necessary to provide complete relief to the [petitioners]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Petitioners nowhere assert that they would suffer any harm if other employers were subject to the Standard. Limiting any relief granted would be especially appropriate now, before all petitions are consolidated pursuant to the multi-circuit petition statute.

CONCLUSION

Petitioners' motion should be denied.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,140 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

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