No. 21-60845

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST Holdings, L.L.C.; RV Trosclair, L.L.C.; Trosclair Airline, L.L.C.; Trosclair Almonaster, L.L.C.; Trosclair and Sons, L.L.C.; Trosclair & Trosclair, Incorporated; Trosclair Carrollton, L.L.C.; Trosclair Claiborne, L.L.C.; Trosclair Donaldsonville, L.L.C.; Trosclair Houma, L.L.C.; Trosclair Judge Perez, L.L.C.; Trosclair Lake Forest, L.L.C.; Trosclair Morrison, L.L.C.; Trosclair Paris, L.L.C.; Trosclair Terry, L.L.C.; Trosclair Williams, L.L.C.; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; Kip Stovall; Answers in Genesis, Incorporated; American Family Association, Incorporated; Burnett Specialists; Choice Staffing, L.L.C.; Staff Force, Incorporated; Leadingedge Personnel, Limited; State of Texas; HT Staffing, Limited; doing business as HT Group; The State of Louisiana; Cox Operating, L.L.C.; DisTran Steel, L.L.C.; Dis-Tran Packaged Substations, L.L.C.; Beta Engineering, L.L.C. Optimal Field Services, L.L.C.; The State of Mississippi; Gulf Coast Restaurant Group, Incorporated; The State of South Carolina; The State of Utah; Word of God Fellowship, Incorporated, doing busines as Daystar Television Network,

Petitioners,

v.

Occupational Safety and Health Administration, United States Department of Labor; United States Department of Labor; Martin J. Walsh, Secretary, U.S. Department of Labor; Douglas Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

SUPPLEMENTAL OPPOSITION TO EMERGENCY STAY MOTION

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Under Fifth Circuit Rule 28.2.1, federal respondents, as governmental parties, need not submit a certificate of interested persons.

s/Martin Totaro
Martin Totaro

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INTRODUCTION

The government submits this response in accordance with the Court's order to "respond specifically to Texas's November 7, 2021 Motion." That motion fails for many of the same reasons as the prior stay motions pending before this Court.[1] Petitioners seek emergency relief even though most of their asserted harms are at least a month off. The Judicial Panel on Multidistrict Litigation will assign a court to hear the many pending challenges in short order. Petitioners are unlikely to succeed on the merits because 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. And petitioners cannot show that their purported injuries outweigh the harm of staying a Standard that will save thousands of lives and prevent hundreds of thousands of hospitalizations. The motion should be denied.

ARGUMENT

I. Petitioners' Request Is Premature

Petitioners here—five States and several corporations (Mot. 5)—face little prospect of immediate harm. The Standard staggers compliance deadlines, providing 60 days to implement the testing provisions and 30 days to implement all other requirements. Pmbl.-61549. The private petitioners assert harm from deciding how to

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

respond to "workers unwilling to receive a vaccine" (Mot. 19), but no worker could be required to be vaccinated until at least December 7. The State petitioners' asserted economic harm (Mot. 5-6, 19) is more remote because it relies on costs they would purportedly incur if workers lose their jobs rather than comply once the Standard takes effect. There is accordingly no need to adjudicate their stay motion now, before the Judicial Panel on Multidistrict Litigation "random[ly] designate[s]" one of several circuits to hear the many pending cases, likely early next week. *See* 28 U.S.C. § 2112(a)(1), (3); *see also West Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728-732 (5th Cir. 1985) ("[c]onsiderations of comity" require "courts of coordinate jurisdiction and equal rank" to "avoid rulings which may trench upon the authority of sister courts" (quotation marks omitted)).

II. Petitioners Are Unlikely To Succeed On The Merits

A. OSHA Had Authority To Adopt The Standard

1. 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 accordingly 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 standards may take many forms—"requir[ing] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes"—that provide for "safe

or healthful employment and places of employment." 29 U.S.C. § 652(8). And particularly relevant here is that OSHA may adopt emergency temporary standards without notice-and-comment rulemaking 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." 29 U.S.C. § 655(c).

As the government explained in its prior response, OSHA properly found that the Standard is necessary to address a grave danger. *See* BST Stay Opp. Unlike the Burnett and BST petitioners, these petitioners do not dispute that the Standard was "necessary" to address a serious danger, but declare in a single footnote (at 12 n.6) that employees are not exposed to "grave danger" from the COVID-19 virus. 29 U.S.C. § 655(c)(1). "Arguments subordinated in a footnote" are "waived." *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016). Regardless, petitioners' assertion (at 12 n.6) that no grave danger exists given the "availability of vaccines," "natural immunity," and "declining number of cases" disregards OSHA's 150-page analysis, which comprehensively addressed these issues. *See, e.g.*, Pmbl.-61421, 61431, 61444. COVID-19 is deadly and, for survivors, can cause "serious, long-lasting, and potentially permanent health effects." Pmbl.-61424. And prior efforts to address that threat have proven "inadequate"—indeed, due to "rising 'COVID fatigue,'" voluntary precautions are becoming even less common. Pmbl.-

61441-44. "Unvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

2. Petitioners' contention (at 7-11) that COVID-19 is not a "substance[] or agent[] determined to be toxic or physically harmful" or a "new hazard[]," 29 U.S.C. § 655(c)(1), cannot be reconciled with the statute's text or history. OSHA explained that the COVID-19 virus is an agent that is physically harmful and a new hazard. Pmbl.-61408. COVID-19 readily fits the definition of an "agent," which is "a chemically, physically, or biologically active principle." https://www.merriam-webster.com/dictionary/agent; *see* https://www.merriam-webster.com/dictionary/virus (defining "virus" as an "infectious agent[]"). And COVID-19 is "physically harmful," having killed hundreds of thousands of Americans and hospitalized many more. 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 it was unknown in the United States until early 2020. Pmbl.-61408.

Petitioners' insistence (at 7-8) that the COVID-19 virus is not "toxic" is thus irrelevant, as the statute covers dangers from agents that are "toxic *or* physically harmful *or* from new hazards." 29 U.S.C. § 655(c)(1) (emphases added). Petitioners' attempt to limit those terms "to things that can be poisonous or cause physical harm in a similar manner" (Mot. 7-8) ignores "the disjunctive 'or'" separating the terms and makes "physically harmful" redundant surplusage, thereby "rob[bing]" those terms of any independent meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979). And

petitioners' assertion (at 8) that "COVID-19 does not fit within the traditional understanding" of the statutory terms is both unsubstantiated and belied by the statute 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 transmission of disease.

Contrary to petitioners' contention, this plain reading of the statutory text does not authorize general "regulat[ion] [of] communicable diseases" and is not "unbounded." Mot. 7. It is limited to 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. COVID-19 is a workplace danger. *See* BST Stay Opp. 12-13. Employees gather in one place and interact, thus risking workplace transmission of a highly contagious virus. Pmbl.-61411-17. Petitioners, by contrast, would arbitrarily prohibit OSHA from addressing some undescribed set of biological hazards, or biological hazards, that are not "endemic to a particular workplace" (Mot. 7-9) even where, as here, the hazards or agents spread—and create grave danger—inside the workplace.

Petitioners' contrary arguments largely resort to snippets of legislative history. But petitioners cannot properly 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. City of Chicago*, 560 U.S. 205, 215 (2010). Even if Congress's primary

focuses were "poisons" or "items" related to "industrial processes" (Mot. 7-8), Congress chose statutory language that is not so limited. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (statutes "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Moreover, the OSH Act's legislative history demonstrates that Congress was not limiting the Act to poisons or industrial processes. Congress compared 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 breath[e] at work," and that "over 80 million workers spend one-third of their day in that environment." H.R. Rep. No. 91-1291, at 14 (1970).

The sole case on which petitioners rely, *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), says nothing about the applicability of the statute to a deadly virus. That case concerned 29 U.S.C. § 655(b)(5), which states that "in promulgating standards dealing with toxic materials or harmful physical agents under th[at] subsection," OSHA must ensure "that no employee will suffer material impairment of health or functional capacity." The court declined to read that subsection as applicable to the risks of machines that "may suddenly move and cut or crush" workers, reasoning that § 655(b)(5) applied only to "health" and not to "safety" standards. *International Union,* 938 F.2d at 1312-1313. The court's discussion of legislative history concerned different provisions that use different

terms than those used here. *Id.* at 1315; *see id.* at 1314 (contrasting the provision before that court to the one governing emergency temporary standards). None of that discussion sheds any light on whether a dangerous virus is "physically harmful," let alone on the separate question whether such a virus can constitute a "new hazard[]." 29 U.S.C. § 655(c). COVID-19 satisfies both of those prerequisites because it is "physically harmful" and is also a "new hazard[]" under the plain text of Section 655(c).

Petitioners' attempts (Mot. 9-10) to explain away the agency's past regulation of viruses are unavailing. Petitioners, for example, acknowledge (at 10) that OSHA has 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). Regardless of where it is in the Code of Federal Regulations, *see* Mot. 10, that provision—which was promulgated less than ten years after enactment of the OSH Act (45 Fed. Reg. 35212 (May 23, 1980))—shows that OSHA has always considered viruses to be physically harmful within the meaning of the Act

It makes no difference that other agencies may also issue regulations related to viruses. Agencies often have "overlapping and concurring regulatory jurisdiction." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (citation and quotation marks omitted). Here, OSHA's workplace-specific purview routinely overlaps with other agencies (including, for example, when regulating carcinogens). Petitioners' contrary view would threaten that commonplace occurrence.

3. Petitioners also lack support for their claim (at 11-12) that vaccination falls outside the statute. Congress "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards," 29 U.S.C. § 651(b)(3), enabling the agency to require the "use of one or more practices, means, methods, operations, or processes" calculated to "provide safe or healthful employment and places of employment," *id.* § 652(8). The Standard calls for vaccination (and other) policies that neatly fit within that language. And another OSH Act provision indicates that OSHA may order "immunization," including to "protect[] the health or safety of others." *Id.* § 669(a)(5).

Petitioners do not even mention this statutory language. Instead, they incorrectly contend (at 11) that Section 655(b)(7), which governs permanent standards, provides an exclusive list of actions OSHA may take in its standards. But that provision does not limit the agency's arsenal of tools; it lists topics to be addressed in OSHA's standards as "necessary" or "appropriate." *See* 29 U.S.C. § 655(b)(7) (permanent standards "shall prescribe the use of labels or other appropriate forms of warning *as are necessary* to insure that employees are apprised of all hazards" (emphasis added)); *id.* ("*[w]here appropriate*, such standard shall also prescribe suitable protective equipment and control or technological procedures" (emphasis added)); *id.* ("*where appropriate*, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available" (emphasis added)). The text nowhere suggests that OSHA is restricted to regulating only these topics. And courts have upheld OSHA standards that take forms other than those listed in Section 655(b)(7). *See, e.g.*, *Public*

Citizen Health Research Group v. U.S. Dep't of Labor, 557 F.3d 165 (3d Cir. 2009) (quantitative exposure limit for hexavalent chromium). Petitioners' interpretation would make no sense in light of those precedents as well as the statute's express indication that OSHA may require "immunization," a topic not covered in Section 655(b)(7).

Petitioners' argument also cannot be reconciled with congressional approval of OSHA's authority to establish vaccine programs through standard-making. In addressing bloodborne pathogens, OSHA sought comment on a proposed standard requiring employers to make hepatitis B vaccination available to employees to prevent infection and death. *See Occupational Exposure to Bloodborne Pathogens*, 54 Fed. Reg. 23,042, 23,134-35 (May 30, 1989). Congress subsequently directed that, if the agency did not promulgate a final standard by a date certain, "the proposed standard on occupational exposure to bloodborne pathogens as published in the Federal Register on May 30, 1989 (54 FR 23042) [would] become effective as if such proposed standard had been promulgated as a final standard by the Secretary of Labor." Pub. L. No. 102-170, tit. I, § 100(b), 105 Stat. 1107, 1113-1114 (1991). And Congress explained that OSHA would be "acting under the Occupational Safety and Health Act of 1970." *Id.* at 1113. This legislative action "illustrates congressional understanding that the statutory delegation of authority to OSHA to issue standards includes authority for vaccine provisions, where appropriate." Pmbl.-61407; *see Branch v. Smith*, 538 U.S. 254, 281 (2003) (opinion

of Scalia, J.) (statutes must be understood "in the context of the corpus juris of which they are a part").

4. Petitioners' reliance (at 12-13) on *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), and *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014), is misplaced. Those cases interpreted ambiguous statutory language based on assumptions about when Congress is likely to delegate to an agency a policy decision of "of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324. 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 and cost large amounts of money in the aggregate. But nationwide effect and compliance costs, which are common in many forms of regulation, do not require some sort of congressional clear statement or compel a circumscribed interpretation of a deliberately broad congressional grant. The ample, unambiguous tools Congress gave OSHA to address grave dangers to employees in the workplace authorized OSHA's decision to require vaccination or masking and testing.[2]

[2] Petitioners waived (at 14 n.7) their meritless claim that the Standard's regulation of employment conditions exceeds Congress's commerce power by raising that argument only in a conclusory footnote. *See Arbuckle Mountain Ranch*, 810 F.3d at 339 n.4; *see also* BST Stay Opp. 10-11.

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

Petitioners' passing assertions that OSHA failed to address pertinent considerations are belied by OSHA's 150-page analysis as well as the deference owed to OSHA's evidence-based determinations. *See* 29 U.S.C. § 655(f) (determinations "conclusive if supported by substantial evidence").

1. Petitioners err in asserting (at 9, 14-16) that OSHA "reverse[d]" any "prior policy" or failed to explain the evolving danger and new information that prompted OSHA to issue the Standard. When the pandemic began, "scientific information about the disease" and "ways to mitigate it were undeveloped." Pmbl.-61429. OSHA crafted workplace guidance but declined to issue an emergency temporary 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 virulent, and fully approved vaccines and tests are increasingly available. Prior nonregulatory options have proven "inadequate," and due to "rising 'COVID fatigue,'" voluntary precautions are becoming even less common. Pmbl.-61444. Meanwhile, since June 2021, when OSHA adopted a standard for healthcare workers, "the risk posed by COVID-19 has changed meaningfully." Pmbl.-61408. 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. At the same time, 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 (Pfizer) on August 23, *id.*; FDA has "authorized more than 320 tests and collection kits," Pmbl.-61452; and OSHA determined that "the increasing rate of production" will ensure sufficient supply before the "testing compliance date," *id.*

This is not a "sharp reversal of previous policies." Mot. 14. It reflects OSHA's fact-intensive analysis of an evolving danger and the need for a standard to address it. OSHA candidly acknowledged that when confronting different workplace health hazards, it has sometimes used a "voluntary approach." Pmbl.-61436. Based on new facts—including the predominance of the Delta variant—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. *Id.*

Contrary to petitioners' contentions (at 9, 15), OSHA never "disclaimed" the "authority" to establish standards necessary to address a grave danger to employees of viruses in the workplace. Petitioners cite (at 9) a May 2020 response to an emergency mandamus petition, in which OSHA described its ongoing analysis of the threat of

COVID-19 in the workplace and its view that a standard was not necessary at that time given voluntary precautions and a statutory duty to protect employees. *See* Pmbl.-61430 (describing OSHA's thinking at the time). OSHA stressed the many "uncertainties" and reserved the ability to change its approach "when critical new . . . information is learned." Mand. Opp. 29-30. With little information available in May 2020, OSHA was concerned about acting on "incomplete or ultimately inaccurate information" and unintentionally issuing a standard that proved "counterproductive." Mand. Opp. 30. At that very early stage of COVID-19's emergence, little was understood about the virus and how it spreads, testing was sometimes difficult to find, and no vaccines were available. OSHA's decision at that time does not undermine its current decision to address the existing hazard with effective tools that did not exist then but are widely available now.

OSHA's filing separately responded to the mandamus petitioners' request for "a sweeping infectious disease [emergency temporary] standard beyond COVID-19," accompanied by no information about "a specific workplace-related grave danger" to be addressed. Mand. Opp. 33. OSHA explained that the requester had provided no strong evidence supporting a finding of "grave danger" for a generic and "undefined category of 'infectious diseases.'" *Id.* Only with respect to that generic category did OSHA state that "[t]he OSH Act does not authorize OSHA to issue sweeping health standards" without notice and comment "to address *entire classes* of known and unknown infectious diseases on an emergency basis." Mand. Opp. 33-34 (emphasis added).

The record similarly belies petitioners' assertion (at 15-16) that OSHA "failed to consider the[ir] 'reliance interests.'" Petitioners do not even state how they relied on OSHA's prior decisions to monitor an evolving situation or what petitioners would have done differently. OSHA also explained that any "reliance would have been unjustified" where OSHA indicated that its prior determinations were predicated "on the conditions and information available to the agency at that time" and were "subject to change as additional information indicated the need" for an emergency standard. Pmbl.-61430. Thus, "at an early phase of the pandemic, when vaccines were not yet available and when it was not yet known how extensive [COVID-19's] impact would be on illness and death," OSHA decided to "hold off on regulation in order to see if its nonregulatory enforcement tools could be used to provide adequate protection against the virus." *Id.* The Standard charted a different course because, as described above, "the risk posed by COVID-19 . . . changed meaningfully," Pmbl.-61408, and "nonregulatory" options proved "inadequate," Pmbl.-61430. OSHA further noted that even if there were such (unreasonable) reliance interests, they "cannot outweigh the countervailing urgent need to protect" unvaccinated workers "from the grave danger posed by COVID-19." *Id.* OSHA therefore satisfied any obligation to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

2. Petitioners' brief allusion (at 16-17) to people who were previously infected disregards OSHA's detailed discussion of the issue. *See* Pmbl.-61421-24. 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 also discussed "some evidence that infection-acquired immunity has the potential to provide a significant level of protection," Pmbl.-61422 (noting less protection than for those who are vaccinated), but explained that "it is difficult to tell, on an individual level, which individuals" have attained that level of protection, Pmbl.-61421; *see* Pmbl.-61423 (existing "tools cannot determine what degree of protection [that] particular individual has"). OSHA further explained that these studies suffered from "selection bias" by generally ignoring "people who had mild COVID-19 infections," which are known to confer far less immunity. Pmbl.-61422-23. And these studies had no "established thresholds to determine full protection from reinfection or even a standardized methodology to determine infection severity or immune response." Pmbl.-61422.

Petitioners' suggestion (at 16-17) that OSHA failed to address how vaccination "will affect" or "will work in" people with prior infection is incorrect. Beyond discussing comparative levels of immunity and grave danger, OSHA also specifically discussed expert views and evidence about how people with prior infection would benefit from a vaccine. In one cited study, for example, where nearly a quarter of previously infected people "did not produce antibodies," the authors suggested that

even those who "did produce antibodies . . . would benefit from a vaccination." Pmbl.-61421. And OSHA described two different studies showing that when "previously-infected individuals were vaccinated, their immune response (as measured by neutralization) increased by more than an order of magnitude." Pmbl.-61421-22. These studies showed that "vaccination greatly improves the immune response of those who were previously infected." Pmbl.-61422. 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.

3. Petitioners wrongly contend (Mot. 17-18) that "OSHA's policy is internally inconsistent" because vaccinated people need not test and mask but, if they contract COVID-19, have similar "viral loads" and thus "may be just as likely to transmit the virus" as unvaccinated people. Petitioners ignore that vaccinated individuals are *substantially* less likely to contract COVID-19 (including the Delta variant) in the first place. Pmbl.-61418-19. That is why vaccinated employees are in the aggregate significantly less likely both to bring the virus into the workplace and then transmit it. *See id.* Petitioners are also wrong about transmission risk. OSHA explained that vaccinated people likely have "a shorter infectious period" than unvaccinated people who contract COVID-19, Pmbl.-61419, thus making clear that vaccinations help reduce spread even in the case of a breakthrough infection. OSHA also discussed mixed evidence about viral loads and suggested that the "more comprehensive studies," which capture pre-symptomatic and asymptomatic infections, suggest "a significantly lower"

viral load. Pmbl.-61419. "It 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). Far from being "internally inconsistent" (Mot. 17), OSHA reviewed available evidence, candidly acknowledged where scientific evidence is not uniform, and explained its analysis. *See* H.R. Rep. No. 91-1291, at 18 (warning that the Secretary should not be "paralyzed by debate surrounding diverse medical opinions").

4. Petitioners' unsupported allegation (Mot. 18-19) that OSHA's "explanations are pretextual" is incorrect and does not bear on review of the comprehensive administrative record here. A court "may not reject an agency's stated reasons for acting" even if "the agency might also have had other unstated reasons," and a court "may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). "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. And 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). Judicial review should be based on an "agency's contemporaneous

explanation in light of the existing administrative record," *Commerce*, 139 S. Ct. at 2573, not on cherry-picked public statements by others, such as a White House official's "retweet" of a reporter's tweet, *see* Mot. 2, 19.[3] Here, OSHA amply explained its conclusions, 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, *see* Mot. 18-19, does not in any way undermine those conclusions.

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

A. Having failed to establish a likelihood of success of the merits, petitioners cannot obtain a stay. *See Nken v. Holder*, 556 U.S. 418, 433-434 (2009); *id.* at 438 (Kennedy, J., concurring); *Vidal v. Gonzales*, 491 F.3d 250, 254 (5th Cir. 2007). Petitioners also have not shown any injury that outweighs the injuries to the government and the public interest to justify staying a Standard that will save thousands of lives.

[3] Petitioners' carefully worded reference to this retweet disregards that the official never used the term "work-around" at all. Mot. 2, 19. That official merely shared someone else's tweet using that term. Petitioners cannot determine an official's view merely by that official's decision to share a tweet with others, as it is a common understanding that a "retweet" is not the same as an endorsement. Nor does sharing a 280-character missive on a subject indicate an official's full-fledged, fully developed legal analysis. Simply put, a retweet cannot bear the weight that petitioners would put on it.

As the government explained in its prior response, the harms of a stay to the government and the public—which merge here, *see Nken*, 556 U.S. at 435—would be substantial. Staying the Standard would likely cost dozens or even hundreds of lives per day, in addition to large numbers of hospitalizations, other serious health effects, and tremendous economic costs. BST Stay Opp. 17-19; *see* OSHA, *Health Impacts of the COVID-19 Vaccination and Testing ETS* (2021).

Against all that, petitioners urge (Mot. 20) that the public may incur some unidentified compliance costs. But "ordinary compliance costs" are "typically insufficient" to warrant a stay. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). Petitioners also object (Mot. 20) to what they describe as the Standard "requiring citizens to undergo medical procedures," but that objection is misguided. Employers must permit a vaccine option but may also offer a testing-and-masking alternative. Even if an employer chooses mandatory vaccination, employees may seek appropriate, individual accommodations. Pmbl.-61459, 61475 n.43. And the testing-and-masking alternative amounts to no greater a burden than the ordinary incidents of employment, such as commuting, dress codes, or other health requirements. Any costs to the public thus pale in comparison to the Standard's significant benefits.

Petitioners likewise fail to establish any impending irreparable harm to themselves, let alone certain and substantial harm that could outweigh the grievous injuries to the public interest. The private petitioners (Mot. 19) state that they will need to develop "burdensome policies for managing workers unwilling to receive a vaccine,"

but OSHA estimated a cost to employers of about $35 per covered employee—or $94 per covered unvaccinated employee, Pmbl.-61472, 61493. And if the Standard were truly infeasible for their operations, they could seek a "variance." 29 U.S.C. § 655(d). Petitioners also speculate (Mot. 19) that "some employees" will "lose their jobs for failure to comply with the [Standard's] mandates," but survey data suggests 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.

The State petitioners' claim of irreparable harm fares no better. They invoke (Mot. 5-6) a general interest in avoiding preemption of their laws, but that theory of irreparable harm would seemingly justify a stay whenever a federal law or regulation preempts state law. And even if that general interest existed, the State petitioners do not explain why it can only be remedied through the extraordinary relief they request rather than through ordinary litigation.

The State petitioners also allege (Mot. 19) that, if employees decide to quit their jobs en masse in response to the Standard's requirements, "such workers will likely seek unemployment compensation, Medicaid, or other government aid, putting an extra financial burden" on the States. That claim is remote and unsubstantiated. As noted above, the number of employees who actually quit is likely to be much lower than the number who claim they might. The State petitioners' speculation also disregards the economic benefits from the fewer deaths and hospitalization—and the resulting

reduction healthcare costs and other strains on the public fisc—that will result from the Standard taking effect.

B. 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). 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Martin Totaro
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5078 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 Garamond 14-point font, a proportionally spaced typeface.

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