**Nos. 21-4027, -4028, -4031, -4033**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

BENTKEY SERVICES, LLC, D/B/A THE DAILY WIRE,

Petitioners,

v.

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

Respondents.

*(caption continued on inside cover)*

On Petition for Review

# RESPONDENTS' OPPOSITION TO STAY MOTIONS

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PHILLIPS MANUFACTURING & TOWER COMPANY; SIXARP, LLC,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; MARTY WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR; DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents.

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COMMONWEALTH OF KENTUCKY; STATE OF IDAHO; STATE OF KANSAS; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF TENNESSEE; STATE OF WEST VIRGINIA

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR; DOUGLAS L. PARKER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, IN HIS OFFICIAL CAPACITY; JAMES FREDERICK, DEPUTY ASSISTANT SECRETARY OF LABOR FOR THE OCCUPATIONAL SAFETY AND HEALTH; MARTIN J. WALSH, SECRETARY OF LABOR, IN HIS OFFICIAL CAPACITY,

Respondents.

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THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY; ASBURY THEOLOGICAL SEMINARY,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH; U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR,

Respondents.

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CERTIFICATE OF COMPLIANCE

## INTRODUCTION AND SUMMARY

Faced with a highly infectious disease 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 they face little prospect of harm before the Standard takes full effect in January 2022. No reason exists to rule on petitioners' stay motions 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). That assignment is expected to occur as early as tomorrow.

Even if this Court adjudicates the motions, petitioners are not entitled to a stay. Petitioners are not likely 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. Nor have petitioners shown that their claimed injuries outweigh the harm of delaying a Standard that will save thousands of lives and prevent hundreds of thousands of hospitalizations. Petitioners' speculative asserted injuries do not outweigh the interest in protecting employees from a dangerous virus while this case proceeds.

## 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 a permanent standard, and OSHA "shall promulgate" such 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 continuously 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 proven to be vastly "inadequate," Pmbl.-61444. 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. As a result, "[u]nvaccinated 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. The Standard requires employers with 100 or more employees to select one of two workplace precautions. 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.

OSHA determined that unvaccinated employees face a "grave danger" from workplace exposure to COVID-19. The COVID-19 virus, OSHA explained, "is both a physically harmful agent and a new hazard." Pmbl.-61408. OSHA described myriad studies showing workplace "clusters" and "outbreaks" and other significant "evidence of workplace transmission" and "exposure." Pmbl.-61411. And OSHA explained that "employees can be exposed to the virus in almost any work setting." *Id.*

OSHA also determined that it was "necessary" to adopt the Standard to protect employees from this danger in the workplace. Pmbl.-61436. OSHA described extensive evidence showing that vaccines prevent contracting and transmitting COVID-19. Pmbl.-61520, 61528-29, 61434. OSHA further explained that masking "largely prevent[s]" infected employees "from spreading [COVID-19] to others," and testing identifies infected employees to be removed from the workplace. Pmbl.-61438-39. OSHA discussed various alternatives and explained that existing OSHA standards, statutory requirements, and non-binding guidance are insufficient to combat the new hazard. Pmbl.-61440-45.

## ARGUMENT

Petitioners ask this Court to stay the Standard promulgated by OSHA to address the dangers of COVID-19 in the workplace. To demonstrate that this extraordinary remedy is warranted, petitioners must at a minimum show that they have a strong likelihood of success on the merits, that they are likely to suffer irreparable harm without the requested order, and that such harms outweigh the harms to the public interest of enjoining this Standard. *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] Petitioners have failed to make these showings.

### I. Petitioners' Requests For Relief Are Premature

Petitioners ask this Court to grant emergency relief. But petitioners claim little prospect of harm until the Standard takes full effect in January, and they do not justify their 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 for judicial review of OSHA standards.

That process contemplates that litigation concerning the Standard will soon be consolidated in one court of appeals. Petitions for review have now been filed in 12 circuits. The Judicial Panel on Multidistrict Litigation will "random[ly] designate" one

[1] Although styled as motions for "stays," petitioners seek orders modifying the pre-litigation status quo that are better characterized as injunctions. *See Nken*, 556 U.S. at 428-429. But because the equitable standards are substantially the same, that does not affect the analysis.

circuit from among those where petitions 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) (emphasis added). That process is expected to occur as early as tomorrow, 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 this case, this Court should decline to act in this emergency posture.

## II. Petitioners Are Unlikely To Succeed On The Merits

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

OSHA is entrusted with issuing emergency temporary standards if the agency determines that such a standard is necessary to protect employees from a grave danger. 29 U.S.C. § 655(c)(1). 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)(1). 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's decades-old regulations have previously explained as much. *See, e.g.*, 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 it 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 includes 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. The virus is "highly transmissible," Pmbl.-61409, and OSHA described several 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 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 the] use of face coverings." Pmbl.-61429. Citing extensive evidence, 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 a regulatory 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 thousands of workers' lives and prevent hundreds of thousands of hospitalizations over the course of 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

Petitioners err in contending that OSHA cannot address viruses at all or cannot address viruses that exist both inside and outside the workplace. Bentkey Mot. 18-20;

Phillips Mot. 14-16, 24-25; Ky. Mot. 18-21; SBTS Mot. 15. These arguments have no basis in the statutory text, which broadly refers to "agents" and "new hazards." 29 U.S.C. § 655(c)(1). This grant of authority is not "unbounded" (Phillips Mot. 43) but rather is limited to those agents or 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 specific "grave danger" and necessity requirements for issuing emergency standards.

Petitioners do not seriously dispute that the COVID-19 virus is both an "agent" and a "new hazard" within the ordinary meaning of these terms, *see* Ky. Mot. 19 (stating that "every virus is an 'agent'"), and their textual arguments are unavailing. One petitioner takes aim at a strawman (Bentkey Mot. 19) in arguing that "employees" are not toxic agents or new hazards. Several petitioners (Phillips Mot. 15-16; Ky. Mot. 20) point to a provision about annual reporting that mentions "toxic substances in industrial usage," 29 U.S.C. § 675, but has no bearing on the meaning of "agents" or "new hazards"—the terms at issue here. Other petitioners assert (Phillips Mot. 15) that Section 655(c)(1) excludes "communicable diseases like COVID-19." But a virus (like a carcinogen, for example) is an "agent" that causes disease and constitutes a "hazard." Indeed, the OSH Act expressly suggests that OSHA can require "immunization," including to "protect[] the health and safety and others," 29 U.S.C. § 669(a)(5)—a

provision premised on OSHA's authority to protect employees from transmission of disease.[2]

Petitioners largely resort (Bentkey Mot. 18-19; Phillips Mot. 15-16; Ky. Mot. 19-21) to collecting scattered statutory provisions that use words similar to "workplace" to argue that OSHA can regulate only workplace-specific dangers. *See, e.g.*, 29 U.S.C. § 651(a) ("illnesses arising out of work situations"); *id.* § 653(a) ("employment performed in a workplace"), *id.* § 655(d) ("employment and places of employment"), *id.* § 669(a)(3) ("diminished life expectancy as a result of his work experience"), *id.* § 671a(c)(1)(A) ("infectious agents . . . transported from the workplaces"). No one disputes that OSHA's regulations apply to workplaces. The Standard specifically concerns an employment-related danger for unvaccinated employees—namely, workplace exposure to a dangerous virus.

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. City of Chicago*, 560 U.S. 205, 215 (2010). Even if Congress's primary focus were non-biological dangers (*e.g.*, Phillips Mot. 15) or "risks unique to the workplace" (*e.g.*,

[2] Petitioners' related argument (Phillips Mot. 15) that Section 655(b)(5) constrains OSHA's authority under Section 655(c)(1) overlooks that permanent standards "dealing with toxic materials or harmful physical agents," 29 U.S.C. § 655(b)(5), are "just one species of the genus of [permanent] standards." *Industrial Union*, 448 U.S. at 642 (plurality op.). Moreover, OSHA has for decades understood that "biological agent[s] (bacteria, virus, fungus, etc.)" qualify as "toxic substances or harmful physical agents," 29 C.F.R. § 1910.1020(c)(13), and Section 655(c)(1) independently covers "new hazards."

Phillips Mot. 24-25), 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).

Contrary to petitioners' suggestion, moreover, COVID-19 *is* a particularly acute workplace hazard. *See* Pmbl.-61511 (noting "the unique occupational safety and health dangers presented by COVID–19"). The nature of workplaces is that employees come together in one place and interact, thus risking workplace transmission of a highly contagious virus. Pmbl.-61411-17. While at work, "workers may have little ability to limit contact with," and possible exposure from, "coworkers, clients, members of the public, patients, and others." Pmbl.-61408. It is therefore unsurprising that OSHA identified workplace "clusters" and "outbreaks" of the COVID-19 virus, and presented significant "evidence of workplace transmission." Pmbl.-61411.

As the statutory text confirms, OSHA may promulgate standards for both "employment and *places of employment*." 29 U.S.C. § 652(8) (emphasis added). When drafting the OSH Act, Congress was focused on ensuring that employees can work in a safe and healthy "environment." H.R. Rep. No. 91-1291, at 14 (1970). That

environment includes "the air we breathe at work" where "over 80 million workers spend one-third of their day." *Id.* Petitioners, by contrast, would arbitrarily prohibit OSHA from addressing hazards or agents that are "prevalent throughout everyday life" (Phillips Mot. 25) even where, as here, the hazards or agents spread—and create grave danger—inside the workplace.

The idea that workplace hazards include diseases that exist outside of the workplace is hardly novel. OSHA has required precautions for bloodborne pathogens, which can be contracted outside the workplace,[3] and has long imposed workplace sanitation and fire rules, even though such concerns are not workplace-specific. *E.g.,* Pmbl.-61407-08. As exemplified by famous outbreaks of tuberculosis and smallpox in factories, workplace dangers have long been understood to include the dangers of contracting communicable diseases as a result of being in close proximity to other employees. *See also, e.g.,* Danovaro-Holliday et al., *A Large Rubella Outbreak with Spread from the Workplace to the Community*, 284 JAMA 2733, 2739 (2000) (documenting rubella spread in meatpacking plants).

It makes no difference (Phillips Mot. 17-18) that other agencies may also issue regulations related to viruses and vaccines. The Supreme Court has made clear that "mere possession by another federal agency of unexercised authority to regulate certain

[3] That prior agency actions might have been premised on a "heightened or different" workplace risk (Ky. Mot. 19, 21-22; Phillips Mot. 27) does not mean that OSHA lacks statutory authority to act here.

working conditions is insufficient to displace OSHA's jurisdiction." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002); *see* 29 U.S.C. § 653(b)(1). Indeed, agencies often have "overlapping and concurring regulatory jurisdiction." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quotation marks omitted); *see United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1204 n.7 (D.C. Cir. 1980) (largely affirming OSHA's regulation of lead in the workplace even though EPA "deal[s] with the threat of lead in the general environment"). Here, OSHA's workplace-specific purview routinely intersects with other agencies (including, for example, when regulating carcinogens). Petitioners' contrary view would threaten that commonplace occurrence.

Petitioners' reliance on *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), and *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), is misplaced. *See* Phillips Mot. 12-13; Ky. Mot. 44; SBTS Mot. 16; *see also BST Holdings, L.L.C. v. OSHA*, No. 21-60845, slip op. 17-18 (5th Cir. Nov. 12, 2021). Those cases interpreted ambiguous statutory language based on assumptions about when Congress is likely to delegate to an agency a policy decision "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 issue the Standard here.

### C. OSHA Had Ample Basis For Its Determinations

Petitioners contend that OSHA erred when making its determinations. Yet petitioners disregard OSHA's 150-page analysis as well as the deference owed to these evidence-based determinations. *See* 29 U.S.C. § 655(f) ("The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole").

**1.** Petitioners err in suggesting that the Standard cannot be necessary to protect employees from a grave danger because OSHA did not act earlier. *See, e.g.*, Ky. Mot. 32, 35-37; *see also BST Holdings*, slip op. 7 n.11. 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); *see also id.* (to conclude "that because OSHA did not act previously it cannot do so now" would "only compound[]" any "failure to act"). Here, OSHA described the "extraordinary and exigent circumstances" warranting the Standard, including that "workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

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, the COVID-19 virus 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"; and OSHA determined that "the increasing rate of production" will ensure sufficient supply before the "testing compliance date,"

Pmbl.-61452. Far from calling into question OSHA's assessments, the timing reflects OSHA's determination, based on detailed and expert analysis, that this response is needed now to address an ongoing grave danger in the workplace.[4]

**2.** Rather than engage with OSHA's analysis or the extensive evidentiary support, petitioners further assert that because OSHA did not immediately extend the Standard to employers with fewer than 100 employees, OSHA must not believe that the Standard is necessary to avert a grave danger. *See* Ky. Mot. 30; Bentkey Mot. 23; SBTS Mot. 17-18; Phillips Mot. 31-32; *see also BST Holdings*, slip op. 15. This contention misunderstands OSHA's rationale and also fails on its own terms.

Due to the "unique occupational safety and health dangers presented by COVID-19" and the exigent "danger presented by COVID-19," OSHA is "proceeding in a stepwise fashion" by applying the Standard to "companies that OSHA is confident will have sufficient administrative systems in place to comply quickly." Pmbl.-61403. In the meantime, OSHA is obtaining "additional information to determine whether to adjust the scope of the ETS to address smaller employers." *Id.* OSHA's decision, in

[4] The record similarly belies petitioners' passing reference to "entities relying on the absence" of a prior rule. Ky. Mot. 36-37; *see also BST Holdings*, slip op 12. OSHA explained that any "reliance would have been unjustified" where OSHA indicated that its prior determinations were predicated on "information available to the agency at that time" and were "subject to change." 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." Pmbl.-61430. *See Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

other words, does not suggest doubt about the grave danger posed by COVID-19 or the necessity of the Standard. To the contrary, it demonstrates OSHA's need to act urgently.[5]

The government "need not address all aspects of a problem in one fell swoop" even under strict scrutiny. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). Here, based on questions about administrability for smaller employers and OSHA's limited data about those employers, OSHA decided not to cover employers with fewer than 100 employees in this emergency temporary standard. *See* Pmbl.-61403, 61511-13 (analyzing the issue). As OSHA explained, "[t]he employees of larger firms should not have to wait for the protections of this standard while OSHA takes the additional time necessary to assess the feasibility of the standard for smaller employers." Pmbl.-61511; *see also* Pmbl.-61512 (citing evidence that "larger employers are more likely to have many employees gathered in the same location" and have "larger" and "longer" outbreaks). Therefore, while simultaneously seeking comment and undertaking further study on smaller employers, OSHA "act[ed] to protect workers now in adopting a standard that will reach two-thirds of all private-sector workers in the nation." Pmbl.-61511.

OSHA's decision not to extend the Standard to smaller employers does not undermine its considered analysis of the grave danger to employees in the workplace

[5] Contrary to petitioners' contention (Ky. Mot. 32), the Standard's staggered compliance dates allow employers time to familiarize themselves with the Standard's requirements and "undertake the necessary steps." Pmbl.-61549.

and need for this Standard. Laws frequently include exemptions for small employers, and such provisions do not call into question the important interests being served. Title VII, for example, which prohibits certain forms of discrimination in the workplace, originally exempted employers with fewer than 25 employees, *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 & n.2 (2006), and currently does not apply to the millions of employers with fewer than 15 employees, *see* 42 U.S.C. § 2000e(b).[6] But that does not call into question the extraordinary importance of prohibiting discrimination in the workplace. The same is true for the critical workplace health risks motivating the Standard.[7]

**3.** Petitioners also contend that COVID-19 poses insufficient danger and that the Standard's means of addressing that danger are not necessary. These assertions lack merit.

[6] *See also, e.g.*, Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees); Americans With Disabilities Act, 42 U.S.C. § 12111(5)(A) (applicable to employers with 15 or more employees).

[7] Additionally, even if a court were to find that additional explanation for excluding smaller employers was needed, any potential disconnect between the carefully documented workplace safety need and OSHA's present decision not to extend the Standard to all employers would warrant expanding the Standard. It therefore would not serve as a basis to vacate the Standard's much-needed protections for employees of larger employers while the agency considered applying those protections more broadly. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (court may remand "inadequately supported" agency action without vacatur).

a. *Grave Danger*. Petitioners wrongly suggest that because the current, national case numbers are lower now than they have been in the past, there must not be a grave danger. *See* Ky. Mot. 37; Bentkey Mot. 23-24. The decline in national cases since the pandemic's most recent peak says little about the current state of workplace exposure and transmission, and the fact that case numbers have been higher says nothing about whether there is a present, grave danger. OSHA found that "[u]nvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549; *see* Pmbl.-61408 (the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months"); *cf. Asbestos*, 727 F.2d at 424 (assuming that 80 deaths would constitute grave danger). OSHA also explained that "the agency cannot assume based on past experience that nationwide case levels will not increase again." Pmbl.-61549.

Petitioners are on no firmer footing when they cite (Ky. Mot. 28-29) one estimate of the COVID-19 mortality rate. OSHA explained that the grave danger "is clear" because "the mortality and morbidity risk to employees from COVID-19 is so dire." Pmbl.-61408; *see* Pmbl.-61410; Pmbl.-61424. Even the statistic that petitioners cite—a .6% mortality rate—is quite high: 1 in 167. That figure, moreover, disregards the tremendous morbidity risk for survivors—including lengthy hospitalizations and "serious, long-lasting, and potentially permanent health effects." Pmbl.-61424.

Petitioners similarly err when suggesting that COVID-19 does not present a grave danger because only a small "subset" of people—those who are not vaccinated—

face the greatest danger. *See* Ky. Mot. 26-27, 31-32. These petitioners acknowledge "the data establish[ing] that COVID-19 is dangerous to the unvaccinated" (Ky. Mot. 31) and observe that the danger is low to people who are "fully vaccinated" (Ky. Mot. 26-27); *see also BST Holdings*, slip op. 11. Petitioners are quite right in acknowledging that unvaccinated employees are at risk of contracting COVID-19. "Unvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549. But it is equally true that vaccinations dramatically lower that risk, which is precisely why OSHA decided to implement the Standard. Vaccines are now widely available, and large-scale studies have further confirmed the "power of vaccines to safely protect individuals," including from the Delta variant. Pmbl.-61431, 61450. Vaccination serves two related functions—it prevents any virus transmitted in the workplace from causing serious illness, as petitioners recognize, and it also reduces the likelihood of employees bringing the virus into the workplace and transmitting the virus to other employees. *See, e.g.*, Pmbl.-61403, 61418-19, 61435, 61438, 61528-61529.

Petitioners' comparison (Ky. Mot. 31-32) of COVID-19 to "peanut butter" underscores the grave danger at issue here. OSHA thoroughly documented that large numbers of employees face a grave danger. And despite the hope for easily accessible and highly effective treatments in the future (*see* Ky. Mot. 28; Bentkey Mot. 25 & n.8),

the present treatment options for COVID-19 pale in comparison to the ability to treat an allergic reaction.[8]

b. *Necessity*. One petitioner errs by urging that because COVID-19 tests are not 100% accurate, the entire Standard cannot be necessary. *See* Benkey Mot. 26-27. Virtually no precaution is perfect. OSHA discussed types of tests, including tests' "sensitivity" and "specificity" and the risk of a "false negative," Pmbl.-61517, 61535, and OSHA acknowledged that weekly testing will not catch every case. Pmbl.-61530 (discussing studies). OSHA thus also required unvaccinated employees to wear face coverings precisely because "testing unvaccinated workers for COVID–19 will not be 100% effective in identifying infected workers before they enter the workplace." Pmbl.-61438. In addition to the risk of becoming infected between tests, "infected persons may still be missed." Pmbl.-61439. And none of that calls into question the well-established effectiveness of vaccines and masks to prevent introduction and transmission of COVID-19 in the workplace.

Citing a sentence in a brief that OSHA filed in May 2020, one petitioner wrongly posits (SBTS Mot. 18) that the agency's enforcement of "[general duty] requirements" and "publication of extensive COVID-19 guidance" would address the present danger.

[8] Although petitioners hope for an "antiviral pill" that would reduce "the risk of hospitalization and death," they correctly acknowledge that such treatments are still being tested and are not available for general use in the United States. Ky. Mot. 28; Bentkey Mot. 25 & n.8. OSHA has made clear that it is monitoring changes in the workplace danger, and OSHA will update the Standard as appropriate. Pmbl.-61403.

SBTS Mot. 18. As discussed, circumstances have changed since May 2020—which was only months into the pandemic. *See* Pmbl.-61430 (describing OSHA's May 2020 thinking). The virus has grown more virulent, vaccination and testing are now readily available, and nonregulatory options are not working adequately to stop workplace transmission of the virus. In the subsequent 18 months, OSHA's enforcement experience showed that the Act's general duty to furnish safe workplaces, 29 U.S.C. § 654(a)(1), is inadequate to address the threat of COVID-19 in the workplace. Pmbl.-64441-44. And while OSHA previously hoped that the "unprecedented" pandemic would inspire "an unusual level of widespread voluntary compliance" with "safety guidelines," publishing guidance has proven vastly "inadequate." Pmbl.-61444-45. Indeed, "COVID fatigue" has resulted in a "decrease" in "voluntary" mitigation measures. *Id.*[9]

Petitioners similarly miss the mark when they note (Ky. Mot. 35; Phillips Mot. 31) that a standard adopted in June for healthcare workers did not require regular testing

[9] Petitioners also err by excerpting a few lines from a response to an emergency mandamus petition. *See* Ky. Mot. 34; *see also BST Holdings*, slip op. 14-15. Responding to a May 2020 demand that OSHA issue a workplace COVID-19 standard within 30 days, 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 explained that it may not be able to craft a "one-size-fits-all response," particularly on a "30-day deadline" and while COVID-19 was having vastly different effects in different industries and "different impacts on different parts of the country." Mand. Opp. 32. None of that bears on the current Standard. Today, far more is understood about the virus and how it spreads. Precautions, such as vaccines and easily accessible testing, now exist that can be used in any workplace.

or vaccination. OSHA issued that standard at a different time with different information. Since June, as a result of the Delta variant, "the risk posed by COVID-19 has changed meaningfully." Pmbl.-61408. There is now a vaccine that is FDA-approved (rather than authorized for emergency use), Pmbl.-61431, and tests are more readily available, Pmbl.-61452. The healthcare standard, moreover, was "carefully tailored to the healthcare workplaces it covers," and imposed "a multi-layered suite of protections" such as personal protection equipment, disinfection, and ventilation rules, not applicable here. Pmbl.-61515. Thus, while the Standard at issue here simply requires "Face coverings," Pmbl.-61553—which include any two-layer, tightly woven fabric, Pmbl.-61551, and "do not have to meet a consensus standard," Pmbl.-61518—the healthcare-specific standard required FDA-approved masks and, in many instances, special respirators that have been fit and tested for each individual user. 29 C.F.R. § 1910.502(b), (f). Here, given the "extraordinary and exigent circumstances," OSHA had to act "quickly" and could not craft such a "multi-layered" and "comprehensive" approach that would be "feasible for all covered work settings." Pmbl.-61434-35, Pmbl.-61437-38. Additionally, on the same day that OSHA issued the Standard here, the Department of Health and Human Services issued an interim final rule that requires most healthcare providers who accept Medicare or Medicaid to require their staff to be vaccinated. 86 Fed. Reg. 61555 (Nov. 5, 2021).

**4.** Petitioners additionally contend that given employees' varied ages, prior infections, and differences between workplaces, OSHA could not issue any generally

applicable standard. These contentions fundamentally misunderstand the Standard and disregard OSHA's considered explanation and supporting evidence.

a. Petitioners err in asserting that it is unnecessary for people who were previously infected with COVID-19 to get vaccinated or mask and test. *See* Ky. Mot. 27, 34; Bentkey Mot. 25-26; Phillips Mot. 28-29; *see also BST Holdings*, slip op. 13. 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.[10]

[10] For these same reasons, petitioners' proposal (Phillips Mot. 30-31) to "test[] for natural immunity" would be ineffective. While antibody tests are useful for some diseases, they are currently "considered to be poor indicators" for assessing the risk of

Two groups of petitioners improperly rely on extra-record declarations and articles. *See* Bentkey Mot. 26; Phillips Mot. 28-29. Consistent with the ordinary rule that "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), 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). Judicial review is "confined to consideration of the decision of the agency" and "the evidence on which it was based." *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

In any event, "[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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). OSHA fulfilled its obligation by reviewing available evidence, acknowledging where scientific evidence is not uniform, and explaining its analysis. *See National Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 751-752 (D.C. Cir. 2011); *see also* H.R. Rep. No. 91-1291, at 18 (warning that the Secretary should not be "paralyzed by debate surrounding diverse medical opinions").

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COVID-19 "reinfection." Pmbl.-61423. "At this point in time, . . . there is no agreement on what indicators of infection might be sufficient" to confer functional immunity. *Id.*

b. Petitioners' passing assertions that younger employees face no grave danger are similarly misplaced. *See* Ky. Mot. 27-28; Bentkey Mot. 24-25; *see also BST Holdings*, slip op. 13. Petitioners disregard OSHA's discussion of the danger to employees of all ages. *See, e.g.*, Pmbl.-61410, 61424. OSHA cited evidence that unvaccinated adults under 50 face a much higher risk of death or hospitalization than vaccinated adults of the same age, particularly with the Delta variant. *See, e.g.*, Pmbl.-61418 ("For unvaccinated 18 to 49 year olds, the risk of hospitalization was 15.2 times greater, and the risk of death was 17.2 times greater, than the risks for vaccinated people in the same age range."). And OSHA incorporated its recent analysis for a standard governing healthcare workers, Pmbl.-61410, 61410 n.9, where OSHA discussed the hospitalization rate in "people between the ages of 18 and 49," 86 Fed. Reg. 32376, 32384 (June 21, 2021), and the incidence of COVID-19 causing strokes, "even in young people," *id.* at 32385.

Petitioners' argument also misunderstands how the Standard operates. Even if some individual employees are unlikely to suffer severe health consequences if infected, OSHA adopted the vaccination or masking and testing requirements to prevent employees from bringing COVID-19 into the workplace and transmitting the virus to other employees. *See, e.g.*, Pmbl.-61403, 61418-19, 61435, 61438; *see also, e.g.*, Pmbl.-61418 (discussing transmission studies, including one of populations with mean ages of 31 and 44, and another of two populations with median ages of 38); Pmbl.-61412-14

(discussing outbreaks in schools, colleges, restaurants, nightclubs, fitness centers, and other settings with younger and mixed-age populations).

c. Petitioners similarly disregard OSHA's discussion of dangers in varied worksites and industries. *See* Ky. Mot. 33-34, 38; Bentkey Mot. 27; Phillips Mot. 31; *see also BST Holdings*, slip op. 6. Based on evidence about virus-transmission rates, OSHA exempted employees who work alone, remotely, or exclusively outdoors. Pmbl.-61419. 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. Based on its analysis of the record evidence, OSHA concluded that the Standard was necessary to protect unvaccinated workers in "a wide variety of work settings across all industries." Pmbl.-61412.

OSHA reviewed peer-reviewed studies and data collected by health departments and found that "exposures to SARS–CoV–2 happen regularly in a wide variety of different types of workplaces." Pmbl.-61411. OSHA analyzed "studies and reports" of outbreaks in "a wide range of workplaces" across various industries. Pmbl.-61412; *see* Pmbl.-61412-15. These included "service industries (*e.g.*, restaurants, grocery and other retail stores, fitness centers, hospitality, casinos, salons), corrections, warehousing, childcare, schools, offices, homeless shelters, transportation, mail/shipping/delivery services, cleaning services, emergency services/response, waste management,

construction, agriculture, food packaging/processing, and healthcare." Pmbl.-61412. "Deaths" were "reported in many" of these outbreaks. *Id.* Just to offer one (of many) examples: OSHA reviewed one state health department's reports on "5,247 outbreaks in approximately 40 different types of non-healthcare work settings." *Id.* OSHA also considered changes over time, such as in a State where, "in July 2021, the number of cases associated with workplace clusters began increasing in several different types of work settings." Pmbl.-61413. And OSHA reviewed studies that "analyzed death records" and evaluated "how mortality rates among individuals in various types of workplaces changed during the pandemic." Pmbl.-61415. Although some industries showed higher spikes than others, these studies also suggested significant transmission across workplaces. *See id.*

d. In all events, petitioners' assertions about variation in risk disregard that workplace standards need not operate on an employer-by-employer or employee-by-employee basis. The Act directs OSHA to issue an emergency temporary standard if OSHA "determines" that "employees are exposed to grave danger" and the standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). The Act does not require OSHA to determine that "each" employee is exposed to grave danger, with the standard necessary to protect "each" employee from such danger. *Id.*; *see also id.* § 655(d) (authorizing employer-specific variances). No rule could operate that way. Workplaces may have a mix of employees who had prior COVID-19 infections of varied severity at varied times with varied forms of confirmation. Workplaces ordinarily

have people of varied ages and other risk factors that are also correlated with severe COVID-19 cases. And workplaces can have a nearly infinite number of layouts, ventilation systems, traffic patterns, and typical employee habits. OSHA "cannot," for example, be "required to proceed workplace by workplace," *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 827-828 (7th Cir. 1993), or "be expected to conduct on-the-spot investigations," *Dry Color Mfrs. Ass'n, Inc. v. Department of Labor*, 486 F.2d 98, 102 n.3 (3d Cir. 1973). Such a requirement would be particularly anomalous in the context of emergency standards under Section 655(c), which exists "to provide immediate protection." *Id.*

**5.** Finally, two petitioners' allegation (Phillips Mot. 33-36) that OSHA's analyses are "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 such as a White House official's "retweet" of a reporter's tweet, *see* Phillips Mot. 35. 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." *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;

*see Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185-1186 (10th Cir. 2014). 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). Here, OSHA amply explained its conclusions in an exhaustive analysis. The fact that the President has expressed concern about the ongoing pandemic, described the benefit of vaccines, and described the broader response to this pandemic, *see* Phillips Mot. 33-34, does not in any way undermine the agency's reasonable conclusions.

### D. Petitioners' Additional Arguments Lack Merit

**1.** Petitioners contend that imposing a rule to prevent the transmission of a deadly virus in America's workplaces would be unconstitutional and that the OSH Act should therefore be limited to avoid that result. *See* Phillips Mot. 37-42; Ky. Mot. 38-44. Petitioners' constitutional challenges are meritless and could provide no basis "to rewrite" the OSH Act's ample, unambiguous authority to address grave dangers to employees in the workplace. *Salinas v. United States*, 522 U.S. 52, 59-60 (1997) (quotation marks omitted).

**a.** OSHA's decision to issue the Standard does not upset any federal-state balance or exceed Congress's power to regulate interstate commerce. *See* Bentkey Mot. 12-16; SBCS Mot. 16-17; Ky. Mot. 43, 46-57; Phillips Mot. 38-41. Congress has long regulated companies engaged in interstate commerce in a variety of ways (for example,

Title VII and federal minimum wage), and the Supreme Court has upheld such regulations on employment conditions 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 both satisfies those criteria and also reflects congressional findings that "illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *Id.* § 651(a); *see also* Pmbl.-61473-74 (discussing cost of absenteeism to employers).

Petitioners fundamentally misunderstand the Standard's operation in asserting that a worker's choice between vaccination or masking and testing is noneconomic activity. *See* Bentkey Mot. 13-16; Phillips Mot. 38-39; SBTS Mot. 16-17; Ky. Mot. 43; *see also BST Holdings*, slip op. 16 ("A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity."). The Standard regulates the economic operations of employers that are already engaged in interstate commerce. And the Standard does so as a means of stemming the workplace spread of a deadly disease whose effects on interstate commerce are well established. *See Darby*, 312 U.S. at 121; *see also United States v. Comstock*, 560 U.S. 126, 142 (2010); Tr. of Oral Arg. at 29, *United States v. Comstock*, 560 U.S. 126 (2010) (No. 08-1224) (Justice Scalia: "[I]f anything relates to interstate commerce, it's communicable diseases, it seems to me.").

**b.** Petitioners' reliance on the nondelegation doctrine is similarly misplaced. *See* Phillips Mot. 42-43; Ky. Mot. 38-41. "Only twice in this country's history," and only in 1935, 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.); *see also Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) ("unfettered" agency power "could raise a nondelegation problem"). Statutory grants of authority are valid so long as they provide an "intelligible principle" to which the agency must conform. *Gundy*, 139 S. Ct. at 2123. Section 655(c)(1) provides clear guidelines that easily exceed this threshold. It permits only emergency standards necessary to protect employees from the grave danger of new hazards or toxic or physically harmful substances or agents. Courts have had no trouble evaluating prior emergency standards according to those requirements. *See, e.g.*, *Dry Color Mfrs. Ass'n v. Department of Labor*, 486 F.2d 98, 107 (3d Cir. 1973) (vacating standard with respect to two of fourteen carcinogens).

The Supreme Court has consistently "upheld even very broad delegations," including authorities "to regulate in the 'public interest,'" "to set 'fair and equitable' prices," and "to issue whatever air quality standards are 'requisite to protect the public health.'" *Gundy*, 139 S. Ct. at 2129. The narrower delegation in Section 655(c)(1) likewise provides a meaningful standard limited to a defined category of risks. Petitioners' own authority (Phillips Mot. 42; Ky. Mot. 39-40) involving OSHA's

permanent standard for benzene proves the point. There, the Supreme Court rejected an expansive interpretation of a neighboring OSH Act provision that would have allowed the agency to require that employers "provide absolutely risk-free workplaces whenever it is technologically feasible to do so." *Industrial Union Dep't*, 448 U.S. at 641 (plurality op.). Because the statutory text and history demonstrated that Congress was not concerned with absolute safety, the Court concluded that OSHA had to make a threshold finding of "significant risk of material health impairment" before issuing a permanent standard. *Id.* at 642-652. The Court observed that this threshold finding—which is akin to Section 655(c)(1)'s grave danger finding, *id.* at 640 n.45—*avoided* any nondelegation issue by requiring quantification of the risk. *See id.* at 646.

**2.** Petitioners also contend (SBTS Mot. 19-21) that the Standard "burdens [their] exercise of religion" in violation of the Religious Freedom Restoration Act (RFRA) and the First Amendment. Initially, these petitioner-specific arguments could provide no basis to stay the rule for any party other than the two petitioners in this case. But even that more limited relief would not be appropriate because petitioners have not shown on this record that the Standard "substantially burden[s]" their "exercise of religion." 42 U.S.C. § 2000bb-1(a).

The Standard accommodates petitioners' religious objections in multiple ways. While petitioners assert that they object to requiring their employees to become vaccinated, SBTS Mot. Ex. 2 ¶ 21, Ex. 3 ¶ 14, the Standard does not obligate them to do so, *see* Pmbl.-61521 (permitting a testing and masking alternative). *Cf. Tony & Susan*

*Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (statute did not "actually burden[] the claimant's freedom to exercise religious rights," even if the receipt of cash wages would violate the religious convictions of its associates, where the statute offered the option of compensating employees by furnishing room and board). And the Standard recognizes that federal law may in some circumstances require an employer to give an employee a "reasonable accommodation" if the options offered "conflict[] with a [worker's] sincerely held religious belief, practice or observance." Pmbl.-61522. The possibility of such accommodations is another reason that the petitioners have not demonstrated that they will necessarily subject their employees to "choices that violate their conscience and religious beliefs." SBTS Mot. Ex. 3 ¶ 14, Ex. 2 ¶ 21.

Petitioners' remaining objections fare no better. Petitioners acknowledge that they make testing available to employees, SBTS Mot. Ex. 2 ¶ 25, and so do not contend that COVID-19 testing violates their religious beliefs. Nor do they register any religious objection to masking. Instead, they claim (SBTS Mot. 20) that the Standard may require them to "incur the employees' testing costs" or to "burden their employees' religious beliefs" by "pass[ing] the testing costs to their employees." Both contentions are incorrect: The Standard "does not require" petitioners to pay for testing, Pmbl.-61532, and any employee who has a sincerely held religious objection to paying for testing may ask their employer for a "reasonable accommodation" from that requirement, *see* Pmbl.-61522. Petitioners thus provide no basis to conclude that anyone's religious beliefs will be abridged by the Standard's testing regime—and, in the absence of such proof,

petitioners cannot show that their own religious exercise will be substantially burdened, even if their religion prohibits them from requiring their employees to act contrary to their faith.

Petitioners' claim (SBTS Mot. 20) that the Standard substantially burdens their religious exercise by "tak[ing] faculty out of classrooms . . . to provide testing on a weekly basis" plainly lacks merit. As OSHA concluded in promulgating the Standard, "[s]ince point-of-care testing that uses an antigen test allows for results within minutes, OSHA does not expect that scheduling tests or providing results to employers will be an impediment." Pmbl.-61531. Petitioners provide no evidence for why their employees will not be able to take that minor step once every seven days. And they cite no authority for the position that such a negligible burden is "substantial" within the meaning of RFRA.[11]

**3.** Petitioners urge (Phillips Mot. 32-33) that OSHA violated the Congressional Review Act by not first submitting the Standard to Congress. But "[n]o determination,

[11] Petitioners also assert (SBTS Mot. 7) that the Standard is invalid because OSHA "lacks jurisdiction to regulate religious institutions." In support of that argument, they allege various constitutional defects with 29 C.F.R. § 1975.4(c)(1), which provides that religious institutions "are considered employers under the [OSH] Act where they employ one or more persons in secular activities." But that decades-old regulation does not affect the Standard's validity because the Standard did not rely on, cite, or even discuss the regulation. If OSHA filed an enforcement action against petitioners, they would have a full opportunity to litigate whether Congress intended religious institutions like theirs to be subject to workplace-safety laws. Unless OSHA does so, petitioners may not use a purported defect in a decades-old OSHA interpretation to seek to invalidate a separate, unrelated Standard.

finding, action, or omission under [that Act] shall be subject to judicial review." 5 U.S.C. § 805. That "judicial-review prohibition" applies here and "denies courts the power to void rules on the basis" asserted by petitioners. *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 346 (D.C. Cir. 2018).

Regardless, that requirement does not apply where, as here, the agency explains why its action becomes effective immediately. Here, OSHA found "good cause to make [the Standard] effective upon publication because notice and public procedure . . . [would have been] both impracticable and contrary to the public interest, given the expedited timeline on which this standard was developed and the grave danger threatening workers' lives and health." Pmbl.-61504; *see* 5 U.S.C. § 808(2). OSHA's decision to follow the requirements of the statute—which expressly provided that an emergency standard "take[s] immediate effect upon publication in the Federal Register," 29 U.S.C. § 655(c)(1)—does not violate the Congressional Review Act.[12]

[12] There is also a significant question whether the State petitioners can properly invoke this Court's jurisdiction under 29 U.S.C. § 655(f). That provision authorizes "[a]ny person" to challenge an OSHA standard, *id.*, and the statute defines the word "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons," *id.* § 652(4). This significant "question as to jurisdiction" makes these petitioners' likelihood of success on the merits "more *unlikely*." *Munaf v. Geren*, 553 U.S. 674, 690 (2008). The Court does not have to decide that issue to dispose of the stay motion, however. Once the many petitions are consolidated in one circuit pursuant to the multi-circuit petition statute, the jurisdictional question may become academic.

## III. The Balance Of Equities Also Precludes The Extraordinary Relief Petitioners Seek

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); *Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021). Petitioners also have not shown any injury that outweighs the injuries to the government and the public interest and that warrants staying 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 likely be significant. Delaying this Standard would endanger many thousands of people. 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 there is extensive evidence of "workplace transmission." Pmbl.-61411. With the reopening of workplaces and the emergence of the highly transmissible Delta variant, the threat to workers is ongoing and overwhelming. *See* Pmbl.-61411-15. Workers "are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

The Standard responds to these "extraordinary and exigent circumstances," Pmbl.-61434, and the stay that petitioners seek would likely cause significant harm. 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; *see* OSHA, *Health Impacts of*

*the COVID-19 Vaccination and Testing ETS* (2021) (Health Impacts). Accounting for workers aged 18-74, those estimates rise to 13,847 lives saved and 563,102 hospitalizations prevented—an average of roughly 77 lives and 3,128 hospitalizations per day. Health Impacts 1.

The Fifth Circuit recently ordered that the Standard "remains stayed pending adequate judicial review of the petitioners' underlying motions for a permanent injunction," and further ordered that "OSHA take no steps to implement or enforce the Mandate until further court order." *BST Holdings*, slip op. 21. These directives may reduce the Standard's ultimate effectiveness. But thousands of people will be saved, and hundreds of thousands will avoid hospitalization, if the Standard takes effect as planned.[13]

The estimates in the Standard, moreover, do not include the long-lasting and serious health effects avoided. And these figures understate the impact of a stay because they estimate only the protection provided by vaccination to workers who become vaccinated—not the protection to unvaccinated workers when "vaccinated workers are less likely to spread the virus" or when other workers mask and test. *Id.* at 2; Pmbl.-61438-39. A stay could also cause significant harm outside of the workplace. OSHA's

[13] Petitioners claim that state, local, and private entities could voluntarily institute mitigation measures to protect unvaccinated workers even if the Standard were stayed. *See* Bentkey Mot. 28-29; Phillips Mot. 47; Ky. Mot. 54-55. But there is no guarantee that those actors will take effective steps in a timely fashion, and OSHA took swift action precisely because current measures proved inadequate to protect unvaccinated employees against the ongoing grave danger. Pmbl.-61430, 61432.

estimates do not account for "avoided COVID-19 cases among family and friends that would occur due to exposure to an infected worker," diminished "transmission from employees to clients or other visitors," prevented breakthrough infections in vaccinated workers, and reduced infections in vaccinated employees "caused by non-workplace exposures." Health Impacts 2. And none of that includes the benefits from reducing strains on healthcare systems, slowing the emergence of new variants, and combatting the pandemic's ongoing effects on the economy. *Id.*

Simply put, delaying the Standard would likely cost many lives per day, in addition to large numbers of hospitalizations, other serious health effects, and tremendous costs. That is a confluence of harms of the highest order. *See, e.g.*, *Does 1-6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021); *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020).

**B.** Petitioners fail to establish any impending irreparable injury that could outweigh these harms. Petitioners claim little prospect of significant injury until the Standard takes full effect early next year. And petitioners must further establish that any harm to them could overcome the extraordinary harms to the government and the public interest detailed above. They cannot meet that burden.

Petitioners state that complying with an unconstitutional regulation amounts to irreparable harm. *See* Phillips Mot. 46; Ky. Mot. 50; SBTS Mot. 21. But the Standard does not come close to impairing or threatening any constitutional rights. *See* pp. 30-35, *supra*. In addition, the Standard does not require all employees to receive a vaccine.

Employers must permit a vaccine option but may also offer a testing-and-masking option. And regardless of which compliance option petitioners choose, employees may seek appropriate, individual accommodations. Pmbl.-61459, 61475 n.43. The Standard's built-in flexibility confirms that petitioners cannot show concrete and certain irreparable harm that counterbalances the government's and public's interest in protecting employees against the workplace spread of COVID-19.

Petitioners would prefer (Bentkey Mot. 28; Phillips Mot. 44-46; Ky. Mot. 51-52; SBTS Mot. 22) not to pay the costs of complying with the Standard, but "ordinary compliance costs" are "typically insufficient" to justify a stay. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *see American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (similar). To the extent petitioners suggest (Phillips Mot. 45-46; Ky. Mot. 51-52) that a stay is warranted *any* time *any* compliance costs may not be recoverable from the government, such a categorical rule would be "inconsistent with [the] characterization of [equitable] relief as an extraordinary remedy." *Winter*, 555 U.S. at 22.

Nor do petitioners demonstrate that any expenditures would be so certain and substantial as to warrant the extraordinary relief they seek. Based on a detailed economic analysis making several conservative assumptions, Pmbl.-61460-88, OSHA estimated a cost to employers of about $35 per covered employee—or $94 per covered unvaccinated employee, Pmbl.-61472, 61493. The unsubstantiated claim in one declaration that a company "ha[s] been advised" otherwise (Phillips Mot. Ex. B ¶ 11) is

insufficient and provides no basis to question OSHA's estimates. Additionally, if the Standard were truly infeasible for their operations, petitioners could seek a "variance." 29 U.S.C. § 655(d).

Petitioners further speculate (Phillips Mot. 44) that employers may lose employees who refuse to comply with the Standard. These fears are poorly substantiated and likely inflated. Petitioners do not ascertain what portion of unvaccinated employees may be entitled to an exemption or accommodation, Pmbl.-61459, 61475 n.43, or engage with the empirical data, cited by OSHA, showing that "the number of employees" who ultimately refuse to comply with these kinds of required COVID-19 precautions has been "much lower than the number who claimed they might." Pmbl.-61475.[14] Petitioners also disregard the likely benefits to employers. Workplace COVID-19 outbreaks can force shutdowns and cause significant losses. *See, e.g.*, Pmbl.-61446. Even one-off cases can be costly and disruptive, and "reduced absenteeism due to fewer COVID-19 illnesses and quarantines" means savings for employers. Pmbl.-61474.

The State petitioners separately rely on what they call "intru[sions] on their sovereign authority." Ky. Mot. 48-50. Although these states may prefer that their residents not be subject to any rule requiring COVID-19 precautions in the workplace,

[14] For example, petitioners submitted an estimate that omits the possibility of exemptions or accommodations and disregards the data identified by OSHA addressing actual employee compliance rates with required COVID-19 precautions. *See* Phillips Mot. Ex. A.

an independent obligation falling on a State's residents is generally not an injury to that State's sovereign prerogatives. *See Florida v. Mellon*, 273 U.S. 12, 16-17 (1927). Petitioners' unexplained "intrus[ion]" on their "authority to enact or enforce" policies is insufficient. *See* Ky. Mot. 49. Myriad federal laws regulate private parties and address subjects that are, or might be, also addressed by state law. The Supremacy Clause provides a "rule of decision" about how to reconcile any conflicting commands. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). The fact that employees or employers are obligated to follow federal, rather than state, law is not the kind of concrete and significant injury that warrants "an extraordinary remedy." *Winter*, 555 U.S. at 22; *cf. Murphy*, 138 S. Ct. at 1481 ("[E]very form of preemption is based on a federal law that regulates the conduct of private actors.").

Petitioners' argument is particularly anomalous because they rely on an asserted "intru[sion]" on state regulation to urge this Court to enjoin the operation of federal regulation. Some intrusion on a sovereign's choices is on both sides of the balance. The Supremacy Clause establishes which interest takes precedence. *Cf. United States v. California*, 921 F.3d 865, 893 (9th Cir. 2019) (describing the manifest interest in "preventing a violation of the Supremacy Clause"), *cert. denied*, 141 S. Ct. 124 (2020). And a court order blocking the Standard would be a far greater affront to sovereign prerogatives. Such an order would also threaten thousands of deaths and hundreds of thousands of hospitalizations, as well as other serious health effects and economic

injury. Those interests, and the government's interests in regulating workplace safety while this case proceeds, vastly outweigh petitioners' asserted harm.

The State petitioners briefly reference (Ky. Mot. 49, 51-52) that they operate federally-approved "state plans" for the development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," 29 U.S.C. § 667(b). State-plan standards must be "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655." *Id.* § 667(c)(2). Petitioners correctly note (Ky. Mot. 12-13) that if they wish to continue to exercise exclusive jurisdiction over workplace regulation in their states, they must adopt an "equally effective" standard. But offering States the choice between operating their own exclusive system of workplace safety rules, sharing responsibility with the federal government, or having the federal government solely regulate workplaces in the State is even less of an "intrus[ion]" on state law than the ordinary preemptive operation of federal law.[15] The fact that federal law may apply to private employers within a State is hardly an injury that warrants "an extraordinary remedy." *Winter*, 555 U.S. at 22.

[15] And if petitioners declined to adopt an equally effective standard, the risk of OSHA taking action is neither imminent nor certain. *See* 29 C.F.R. § 1902.47(a) (initiating revocation is discretionary); *id.* § 1902.48-49 (requiring notice, comment, and a hearing). Any eventual revocation would not alter petitioner's authority to operate its state plan; it would mean only that OSHA would have concurrent jurisdiction to apply federal standards in the State. *Id.* § 1952.52(b); *see* 29 U.S.C. § 667(e).

**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 [respondents] than necessary to provide complete relief to the [petitioners]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Petitioners have not even attempted to 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 petitions are consolidated pursuant to the multi-circuit petition statute.

## CONCLUSION

Petitioners' motions should be denied.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This response complies with this Court's November 12, 2021 Order (Doc. 21) because it contains 10,895 words. This response 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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