No. 21-3066

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF INDIANA,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Respondent.

On Petition for Review

RESPONDENT'S OPPOSITION TO STAY MOTION

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INTRODUCTION AND SUMMARY

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

Petitioner seeks emergency relief, but its asserted harms are minimal and mostly at least a month away. No reason exists to rule on the stay motion immediately, before the Judicial Panel on Multidistrict Litigation even assigns a court to hear the many pending challenges, *see* 28 U.S.C. § 2112(a).

Even if this Court adjudicates the motion, petitioner is not entitled to a stay. Petitioner is not likely to succeed on the merits because its 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 has petitioner shown that its claimed injuries outweigh the harm of delaying a Standard that will save thousands of lives and

prevent hundreds of thousands of hospitalizations. Petitioner's asserted injuries are speculative and remote and 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 such a permanent standard, and OSHA "shall promulgate" a standard within "six months." *Id.* § 655(c)(2)-(3).

B. Factual Background

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

OSHA has 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 proved vastly "inadequate," Pmbl.-61430. As more employees returned to workplaces, the "rapid rise to predominance of

the Delta variant" meant "increases in infectiousness and transmission." Pmbl.-61409; *see* Pmbl.-61411-66. "Unvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

C. COVID-19 Vaccination and Testing Emergency Temporary Standard

On November 4, 2021, OSHA issued an emergency temporary standard to address these "extraordinary and exigent circumstances." Pmbl.-61434. In the Standard, OSHA provided over 100 pages of thoroughly reasoned analysis showing that COVID-19 presents a "grave danger" to unvaccinated workers and that the requirements of the Standard are "necessary" to address that grave danger. Pmbl.-61407–61504. The Standard requires employers with 100 or more employees to select one of two workplace policies: employers may "implement a mandatory vaccination policy," Pmbl.-61436, or they may offer employees the choice to have "regular COVID-19 testing" and "wear a face covering," Pmbl.-61520. The Standard staggers compliance deadlines, providing 60 days to implement the testing requirements and 30 days to implement all other requirements. Pmbl.-61549. Employees who exclusively work from home, alone, or outdoors are exempted. Pmbl.-61419.

ARGUMENT

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

I. Petitioner's Request For Relief Is Premature

Petitioner asks this Court to grant emergency relief, but it points to no imminent harm. Of the harms that it asserts (Mot. 18-20), the nearest in time is the obligation to notify OSHA whether petitioner intends to adopt an equally effective standard as part of its own state workplace safety plan. But petitioner fails to explain why the submission of that notice would be an irreparable harm. The other harms petitioner purports to identify, including that OSHA might begin a process to revoke final approval of petitioner's state-level plan, are not imminent. Accordingly, there is no need to address petitioner's stay motion now. The Court should allow this matter to proceed

[1] Although styled as a motion for a "stay," an order modifying the pre-litigation status quo is better understood as an injunction. *See Nken*, 556 U.S. at 428-429. But because the standards are substantially the same, that does not affect the analysis.

under the process that Congress set forth 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 are currently pending in eleven circuits. The Judicial Panel on Multidistrict Litigation will "random[ly] … designate" one 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). That process will occur on or about November 16.

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

II. Petitioner Is 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). OSHA thoroughly explained its determinations, and substantial evidence supports these findings.

1. OSHA properly "determine[d]" that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c). The COVID-19 virus is both a physically harmful agent and a new hazard. Pmbl.-61408. It readily fits the definition of an "agent," which is "a chemically, physically, or biologically active principle." https://www.merriam-webster.com/dictionary/agent; *see also* https://www.merriam-webster.com/dictionary/virus (defining "virus" as an "infectious agent[]"). OSHA regulations have previously explained as much. *See, 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 was unknown in the United States until early 2020, Pmbl.-61408.

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

2. OSHA also properly "determine[d]" that the Standard "is necessary to protect employees" from this grave danger. 29 U.S.C. § 655(c)(1). The Standard utilizes "the most effective and efficient workplace control available: vaccination," and it offers, as an alternative, "regular testing" and "use of face coverings." Pmbl.-61429. 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 over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." Pmbl.-61408. OSHA also properly concluded that its existing regulatory tools do not "provide for the types of workplace controls that are necessary to combat the grave danger addressed by" the Standard. Pmbl.-61441.

B. Petitioner's Legal Objections Lack Merit

1. Petitioner wrongly claims (Mot. 2-3, 7-11) that OSHA has authority to address only those grave dangers that pose a "heightened risk in particular

workplaces." Petitioner's arguments have no basis in the statutory text, which generally authorizes OSHA to adopt standards for "safe or healthful … places of employment," 29 U.S.C. § 652(8), and which specifically authorizes emergency temporary standards if "employees are exposed to grave danger from exposure to … agents" "or from new hazards," *id.* § 655(c). The statute does not limit OSHA to addressing hazards that are "[particular to] places of employment" or to that pose a "grave[r] danger" in the workplace than elsewhere.

Petitioner improperly asks this Court to "rewrite the statute," *Lewis v. Chicago*, 560 U.S. 205, 215 (2010), based on a congressman's floor speech, *see* Mot. 2, and the fact that many OSHA standards address hazards that are particularly acute or unique in the workplace, *see* Mot. 3, 8-9. Even if Congress's and OSHA's primary focuses were workplace-specific dangers, Congress did not limit OSHA's authority to addressing that subset of grave dangers. Statutory provisions "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." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

Petitioner also misunderstands the OSH Act's legislative history and OSHA's prior standards. In crafting the Act, 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).[2] OSHA has required precautions for bloodborne pathogens, which can be contracted outside the workplace, and has long imposed workplace sanitation and fire rules, even though such concerns are not workplace-specific. *E.g.*, Pmbl.-61407-08. And it is unsurprising that OSHA's response to the workplace threat of a once-in-a-century pandemic

[2] Petitioner also misunderstands the speech it cites. *See* Mot. 2. That speech concerned a prior draft of the statute that would have "require[d]" the "impossible task" of "render[ing]" workplaces "perfectly safe," despite the existence of risks "simply [from] the fact that one is living and breathing" for which no "criteria can be established" to ensure "an employee would not be faced with some risk." 116 Cong. Rec. 37,614 (1970).

is different from the mine run of OSHA standards. OSHA establishes standards for both "employment and *places of employment*." 29 U.S.C. § 652(8) (emphasis added). Petitioner, by contrast, would arbitrarily prohibit OSHA from addressing hazards or agents that occur outside the workplace even where, as here, the hazards or agents spread—and create grave danger—inside the workplace.

Additionally, contrary to petitioner's suggestion, COVID-19 *is* a particularly acute workplace hazard. The nature of workplaces is that employees come together to 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" and presented significant "evidence of workplace transmission." Pmbl.-61411. The idea that workplace dangers include dangers that exist outside of the workplace is hardly novel. 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).

Petitioner is equally wrong to contend that a standard must be limited to a particular type of workplace. 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" from the COVID-19 virus. Pmbl.-61412. Nothing in the Act ties OSHA's hands when addressing the most serious and widespread workplace dangers.

2. Petitioner next contends (Mot. 11-13) that OSHA cannot protect unvaccinated employees from the grave danger of COVID-19 transmission in the

workplace because those employees made "their own choices to remain unvaccinated." Petitioner's argument again has no basis in the statutory text, which authorizes standards that are "necessary to protect employees" from "grave danger." 29 U.S.C. § 655(c). This Court has explained, in the context of rules governing workplace transmission of bloodborne pathogens, that even if a reasonable mind could conclude that people "who refuse to be vaccinated" are "assuming the risk," the OSH Act "is constructed on different premises that [courts] are not free to question." *American Dental Ass'n v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993); *see also Atlantic & Gulf Stevedores v OSHRC*, 534 F.2d 541, 544-546, 555-556 (3d Cir. 1976) (requiring employers to enforce hardhat rules despite widespread employee recalcitrance).

3. Petitioner's passing reference (Mot. 17-18) to "the nondelegation doctrine" is similarly misplaced. "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.). Statutory grants of authority are valid so long as they provide an "intelligible principle" to which the agency must conform. *Id.* at 2123. Section 655(c)(1) provides clear standards that easily exceed this threshold. It

permits only measures necessary to protect employees from the grave danger of new hazards or exposure to toxic or physically harmful substances or agents. Courts have had no trouble in evaluating prior emergency standards under Section 655(c)(1)'s rubric. *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'" 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. *See also Industrial Union*, 448 U.S. at 640 n.45, 646 (plurality op.) (indicating that neighboring subsection of the OSH Act contains an intelligible principle after interpreting that subsection to mirror Section 655(c)(1)).

C. OSHA Had Ample Basis For Its Findings

Petitioner's assertions that OSHA erred when making the necessary findings disregard OSHA's 150-page analysis as well as the deference owed to

OSHA's evidence-based determinations. *See* 29 U.S.C. § 655(f) (determinations "conclusive if supported by substantial evidence in the record considered as a whole").

1. Petitioner wrongly asserts (Mot. 13-15) that it is unnecessary to require vaccination or masking and testing for people who were previously infected. 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.

Petitioner's assertion (Mot. 14) that people with previous infections face "reduced" danger of "severe illness and death" also ignores OSHA's explanation of how the Standard addresses grave danger. It not only seeks to prevent infected people from becoming seriously ill, but it also seeks to prevent transmission of COVID-19 in the workplace. *See, e.g.*, Pmbl.-61403, 61418-19, 61435, 61438.

Petitioner errs in relying on an extra-record declaration. 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).[3]

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 properly reviewed available evidence, acknowledged where scientific evidence is not uniform, and explained its analysis. No more is required. *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").

2. Petitioner's passing assertion (Mot. 15-16) that younger employees face no grave danger is similarly misplaced. Initially, as with petitioner's prior infection argument, this argument disregards that even if some individual employees are unlikely to suffer severe health consequences if infected,

[3] Petitioner's declaration is also flawed in many respects. It is inconsistent with the conclusions of the Center for Disease Control and many other experts. *See, e.g.*, Pmbl.-61421-22. The declaration also disregards important aspects of OSHA's analysis, including the selection biases in the existing studies of prior infection and the impossibility of determining functional immunity on an individual basis. *See, e.g.*, Pmbl.-61421-23.

OSHA adopted the vaccination or masking and testing requirements also 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 populations with median ages of 38); Pmbl.-61412-14, 61537-38 (discussing outbreaks in schools and other settings with younger and mixed-age populations).

Petitioners also 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.

Petitioner's extra-record estimate of aggregate risk also disregards that OSHA standards cannot operate on an employee-by-employee basis, particularly where age is only one of several factors—including ethnicity, genetics, smoking, and various health conditions both known and unknown—that predict risk. *See* 86 Fed. Reg. at 32388-89 (incorporated by reference). 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" or "every" employee is exposed to grave danger, with the standard necessary to protect "each" or "every" employee from such danger. No rule could operate that way. Such a requirement would be particularly anomalous in the context of emergency standards, which exist "to provide immediate protection" and "necessarily requires rather sweeping regulation." *Dry Color*, 486 F.2d at 102 n.3; *cf. American Dental*, 984 F.2d at 827-828 (OSHA not "required to proceed workplace by workplace").[4]

[4] There is also a significant question whether petitioner 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

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

Having failed to establish a likelihood of success on the merits, petitioner cannot obtain a stay. *See Nken*, 556 U.S. at 433-434; *id.* at 438 (Kennedy, J., concurring); *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020). Petitioner also has not shown any injury that outweighs the injuries to the federal government and the public interest and that favors staying a Standard that will save thousands of lives.

A. Most fundamentally, the harms of a stay to the federal 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. As discussed, 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 extensive evidence

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defines the word "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons," 29 U.S.C. § 652(4). This significant "question as to jurisdiction" makes petitioner's 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.

exists 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 a stay 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. *Id.* at 1. These estimates 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 the workplace. OSHA's 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, and result in more hospitalizations, serious health effects, and tremendous expenses. 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. Petitioner fails to establish any irreparable injury, let alone one that could outweigh these harms. Of petitioner's asserted harms (Mot. 18-20),

the nearest in time is the obligation to notify OSHA whether petitioner intends to adopt an equally effective standard. But that requires only sending an internal notice to OSHA.

Petitioner contends (Mot. 18-19) that if it "takes too long" to adopt an equally effective standard, it "risks" "revocation of its state-plan status." That risk 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). And merely utilizing OSHA's administrative decisionmaking process would "not constitute irreparable injury," *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).[5] Any eventual revocation would not alter petitioner's authority to operate its state plan; it means only that OSHA would have concurrent jurisdiction to apply federal standards in the State. 29 C.F.R. § 1952.52(b); *see* 29 U.S.C. § 667(e). 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.

Petitioner's claim that the Standard "impede[s]" a state law that bars government agencies "from issuing or requiring a COVID-19 'immunization

[5] Petitioner also misunderstands (Mot. 19) that "CASPA" grievances are complaints *to OSHA*. 29 C.F.R. § 1954.20(a)-(b).

passport'" (Mot. 19) is similarly misplaced. OSHA standards do not govern "any State or political subdivision of a State." 29 U.S.C. § 652(5). Even if a state standard could not be "at least as effective" as the OSHA Standard, *id.* § 667(c)(2), without requiring an "immunization passport," the fact that petitioner chooses to continue to exercise exclusive jurisdiction over workplaces in its State does not "impede" state law. Indeed, offering petitioner the choice between operating its own exclusive system, sharing responsibility with the federal government, or having the federal government solely regulate workplaces in the State is even less of an "imped[iment]" to state law than the ordinary preemptive operation of federal law. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018) (Supremacy Clause provides a "rule of decision" about how to reconcile conflicting commands). And the possibility of employers following 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.

Petitioner's argument is particularly anomalous because petitioner relies on the assertion of "imped[ing]" state regulation to urge this Court to enjoin the operation of federal regulation. Some interference with a government's

policy 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"). And a court order blocking the Standard would be a far greater affront to sovereign prerogatives than petitioner choosing whether to adopt an equally effective state standard.

Petitioner also errs by asserting (Mot. 20) compliance costs. A State does not "have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982). And parties seeking equitable relief "must show that they themselves are likely to suffer irreparable harm." *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018). Petitioner's unsubstantiated assertions also disregard that "injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm." *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). And petitioner disregards OSHA's detailed economic analysis, Pmbl.-61460-88, estimating a cost to employers of about $35 per covered employee—or $94 per covered unvaccinated employee, Pmbl.-61472, 61493. Additionally,

if the Standard were truly infeasible for their operations, employers could seek a "variance." 29 U.S.C. § 655(d).

C. Finally, if the Court disagrees, any relief should be limited to the petitioner. 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 [petitioner]." *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.[6]

CONCLUSION

Petitioner's motion should be denied.

[6] In accordance with these principles, the government understands the Fifth Circuit's order in *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 6, 2021), as limited to the parties in those consolidated cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,179 words. This opposition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Book Antiqua, a proportionally spaced typeface.

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