UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MCP No. 165., Occupational Safety and Health Administration Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402	No. 21-7000
United Food and Commercial Workers International Union, AFL/CIO-CLC; American Federation of Labor-Congress of Industrial Organizations, Petitioners, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4094
Massachusetts Building Trades Council, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4084
Local 32BJ, Service Employees International Union, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4095

American Federation of Teachers Pennsylvania, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4099
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4089
National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4087

Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213 Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4103
Union of American Physicians and Dentists, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents,	No. 21-4085
North America's Building Trades Unions, Petitioner, v. Occupational Safety & Health Administration, U.S. Department of Labor, Respondents.	No. 21-4152

REPLY TO OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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TABLE OF CONTENTS

INTRODUCTION.....1

I. OSHA May Regulate, Relying on a Reasonable Body of Scientific Thought.....3

II. The ETS Is Not a Vaccine Mandate.....6

III. OSHA's ETS Imposes Only Modest Costs on Employers.....9

IV. OSHA Has Ample Authority to Regulate the Occupational Risks Posed by Exposure to the Coronavirus.....11

V. Congress Intended OSHA to Set Uniform, Minimum Federal Occupational Health Standards.....13

VI. Complaints About the ETS's Application to Particular Employer Groups Are Premature.....14

CONCLUSION.....17

CERTIFICATE OF COMPLIANCE.....22

CERTIFICATE OF SERVICE.....23

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Iron and Steel Inst. v. OSHA,
939 F.2d 975 (D.C. Cir. 1991).....9

Am. Textile Mfrs. Inst. v. Donovan,
452 U.S. 490 (1981).....4, 5, 9

American Dental Ass'n v. Martin,
984 F.2d 823 (7th Cir. 1993) 4

ASARCO, Inc. v. OSHA,
746 F.2d 483 (9th Cir. 1984) 5

BST Holdings, LLC v. OSHA,
No. 21-60845, 2021 WL 5279381 (5th Cir. Nov. 12, 2021).....3, 6, 15

Color Pigments Mfrs. Ass'n v. OSHA,
16 F.3d 1157 (11th Cir. 1994) 5

In re: Establishment Inspection of Manganas Painting Co.,
104 F.3d 801 (6th Cir. 1997) 15, 16

Indus. Union Dep't v. Am. Petroleum Inst.,
448 U.S. 607 (1980).....4

Industrial Union Department, AFL-CIO v. Hodgson,
499 F.2d 467 (D.C. Cir.1974).....5

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,
463 U.S. 29 (1983).....5

N.A. Bldg. Trades Unions v. OSHA,
878 F.3d 271 (D.C. Cir. 2017).....4

Nat'l Grain & Feed Ass'n v. OSHA,
866 F.2d 717 (5th Cir. 1988) 7

Ohio Mfr's Ass'n v. City of Akron,
801 F.2d 824 (6th Cir. 1986) 10, 13

Pub. Citizen Health Research Grp. v. Tyson,
796 F.2d 1479 (D.C. Cir. 1986).....5

Pub. Citizen v. U.S. Dep't of Labor,
557 F.3d 165 (3d Cir. 2009) 4

Sturm, Roger & Co. v. Chao,
300 F.3d 867 (D.C. Cir. 2002).....16

Texas v. United States,
523 U.S. 296 (1998).....15

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994).....15, 16

USW v. Marshall,
647 F.2d 1189 (D.C. Cir. 1980).....9, 10

Weyerhaeuser Co. v. Costle,
590 F.2d 1011 (D.C. Cir.1978).....5

Wilson Air Ctr. v. FAA,
372 F.3d 807 (6th Cir. 2004) 5

Statutes

29 U.S.C. § 655.....2, 3, 4, 18

29 U.S.C. § 659.....17

29 U.S.C. § 660.....16

29 U.S.C. § 671a 12

Pub. Law 102-522 (1992) 12

Other Authorities

29 C.F.R. § 1910.1001 8

29 C.F.R. § 1910.1025 14

29 C.F.R. § 1910.1052 8

72 Fed. Reg. 64341 (Nov. 15, 2007) 8

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86 Fed. Reg. 61402 (Nov. 5, 2021) ..... *passim*

American Staffing Association,
https://d2m21dzi54s7kp.cloudfront.net/wp-content/uploads/2020/05/ASA_Workforce_Monitor_Job_Seeking_Perspectives-2022.pdf 11

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https://thefeed.blog/2021/08/03/our-next-step-in-the-fight-against-the-pandemic/ 10

EPA
https://www.epa.gov/lead/lead-laws-and-regulations 14

General Motors
https://www.gm.com/coronavirus/employee-response 10

Department of Housing and Urban Development
https://www.hud.gov/program_offices/healthy_homes 14

Michigan
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https://www.cdc.gov/niosh/topics/hierarchy/default.html 7

INTRODUCTION

The Occupational Safety & Health Administration ("OSHA") estimated its Vaccine and Testing Emergency Temporary Standard ("ETS") would prevent 6,500 deaths and more than 250,000 COVID-related hospitalizations in the six months the standard was to be in effect. Pmbl-61408. As the Union Petitioners[1] detailed in their Statement in Support of Motion to Dissolve Stay (ECF No. 257) ("Union Petitioners' Statement"), these numbers were certainly an underestimate, as the rate of infections has since continued to increase, including in states in this Circuit. *See, id.* at 19-20. When OSHA issued the ETS in early November, there had been 750,000 COVID-19 deaths in the U.S. As of December 9, the number of deaths had climbed to 790,000. Two states within this Circuit illustrate the gravity of the problem workers face: In Michigan this past week, one of the states with the most COVID-19 hospitalizations, there have been 92 new outbreaks in workplace settings such as long-term care, K-12 education, corrections, and health

[1]The Unions that have petitioned for review and join this Reply are listed in Appendix A and are referred to collectively as "the Union Petitioners." The petitioners opposing the ETS are referred to collectively as "the Opponents." References to the preamble supporting the ETS will are to "Pmbl-."

care, and 679 ongoing outbreaks in those settings.[2] Tennessee reported 230 active COVID-19 outbreaks on December 1, 129 of which were in work settings.[3] And while many had hoped the pandemic was nearing its end, in the last week, Omicron, an entirely new and highly transmissible variant, has begun to spread rapidly throughout the U.S.

The Fifth Circuit imposed the stay precipitously, with limited briefing and minimal review of the record or citation to OSHA's detailed analysis of the data. It focused on the potential harm claimed by businesses that must comply with the ETS but ignored the irreparable and incalculable harm delay would impose on the nation's working people, whose continued workplace exposure to the coronavirus threatens them with debilitating illness and death. And, as demonstrated in OSHA's Motion to Dissolve the Stay (ECF No. 69) and the Union Petitioners' Statement, the court erred in concluding that the Opponents were likely to succeed on the merits of their claims.

In their various responses in opposition to the Government's Motion, the Opponents continue to act as if there is little relevant caselaw giving meaning to

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[2] For outbreaks, *see* https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_102057---,00.html (last visited Dec. 9, 2021). For hospitalizations, *see* https://www.nbcnews.com/health/health-news/6-states-account-half-countrys-recent-covid-hospitalizations-rcna7776 (last visited Dec. 9, 2021).

[3] https://www.tn.gov/content/dam/tn/health/documents/cedep/novel-coronavirus/CriticalIndicatorReport.pdf.

the Occupational Safety & Health Act ("OSH Act"), to the Secretary's authority to promulgate standards, or to the role of the courts in evaluating OSHA's rules – and as if there is no emergency that justifies OSHA utilizing Section 6(c) of the Act, a provision that even the Fifth Circuit acknowledged Congress crafted with "precision." *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5279381, *9 (5th Cir. Nov. 12, 2021) ("the precision of [§ 655(c)(1)] makes it a difficult one to meet"). Moreover, both the Fifth Circuit's decision imposing the stay and the Opponents' briefs are filled with overblown rhetoric that distorts the nature of the ETS and the legal issues before the Court.

At base, this case presents a straightforward question: Whether OSHA acted reasonably, based on substantial evidence in the record and consistent with the statutory authority Congress granted it in Section 6(c), in promulgating the ETS. If its likely OSHA did so, this Court must dissolve the stay and allow the ETS to go into effect. In this Reply, the Union Petitioners will briefly address, and attempt to defuse, some of the misconceptions supporting the stay.

I. OSHA May Regulate, Relying on a Reasonable Body of Scientific Thought

Opponents claim that they are likely to prevail on the merits by offering competing interpretations of the scientific evidence about the prevalence and significance of infection with the COVID-19 virus or the "natural immunity" created by previous COVID infection. *E.g.*, Republican National Committee's Br.

Opp'n Mot. Dissolve Stay at 14-17 (ECF No. 313) ("RNC Brief"). None of these claims undermines OSHA's conclusion that a pandemic that has caused over 50 million infections to date – many of which originated from workplace exposures – constitutes a grave danger.

The test is whether OSHA has amassed substantial evidence for its ETS. 29 U.S.C. § 655(f). The Supreme Court has made clear that OSHA is not required to support its scientific findings "with anything approaching scientific certainty." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 656 (1980). OSHA acts properly when it relies on a "body of reputable scientific thought." *Id.*

OSHA did just that here. OSHA has pointed to extensive scientific evidence of the grave danger posed by COVID-19. It has relied on the Centers for Disease Control, "the nation's, perhaps the world's leading repository of knowledge about infectious diseases," *American Dental Ass'n v. Martin*, 984 F.2d 823, 831 (7th Cir. 1993), reliance for which "it cannot seriously be faulted," *id.* at 825. Under the substantial evidence test, it is not the role of this Court to "reweigh the evidence and come to [its] own conclusion; rather [the Court] assess[es] the reasonableness of OSHA's conclusion." *N.A. Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 283 (D.C. Cir. 2017) (internal quotations and citation omitted).[4] The fact that

[4] This reply relies heavily on caselaw from the D.C. Circuit reviewing OSHA standards because that court has opined most frequently on OSHA's authority.

Opponents can point to a handful of studies reaching different conclusions or a few scientists who interpret the same evidence OSHA relied upon differently does not mean that OSHA's decision is unreasonable. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) ("*ATMI v. Donovan"*). The D.C. Circuit's observation in reviewing OSHA's ethylene oxide (EtO) standard is instructive:

> [i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from facts and probabilities on the record to a policy conclusion. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 2871, 77 L.Ed.2d 443 (1983). OSHA faces just such a problem in regulating EtO exposure. The scientific evidence in the instant case is incomplete but what evidence we have paints a striking portrait of serious danger to workers exposed to the chemical. When the evidence can be reasonably interpreted as supporting the need for regulation, we must affirm the agency's conclusion, despite the fact that the same evidence is susceptible of another interpretation. Our expertise does not lie in technical matters. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1026 (D.C. Cir.1978) (there are "obvious limitations upon the capacity of courts to deal meaningfully with knowledge of this kind"); *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 474-75 n. 18 (D.C. Cir.1974) ("[w]here existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information").

The Supreme Court, *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 530 n.55, and other circuits have endorsed the framework for review of OSHA standards that the D.C. Circuit applies. *See Pub. Citizen v. U.S. Dep't of Labor*, 557 F.3d 165 (3d Cir. 2009); *ASARCO, Inc. v. OSHA*, 746 F.2d 483 (9th Cir. 1984); *Color Pigments Mfrs. Ass'n v. OSHA*, 16 F.3d 1157 (11th Cir. 1994).

Pub. Citizen Health Research Grp. v. Tyson, 796 F.2d 1479, 1495 (D.C. Cir. 1986). *See also, Wilson Air Ctr. v. FAA*, 372 F.3d 807, 813 (6th Cir. 2004) (noting that under the substantial evidence test an agency's findings should be upheld where its choices were reasonable).

Thus, to demonstrate a likelihood of success on the merits of their challenge to the ETS, Opponents must show that OSHA lacked substantial evidence for its decision. It is not enough to show that there is some scientific support for other conclusions or other policy choices. Nothing in either the Fifth Circuit's decision imposing a stay – which barely cites OSHA's detailed analysis of the evidence before it – or the Opponents' arguments opposing OSHA's motion to dissolve the stay suggests that OSHA misconstrued the body of evidence before it or was unreasonable in concluding that a previously unknown virus causing a global pandemic that has killed more than 790,000 in the U.S. alone in just under two years constitutes a grave danger.

II. The ETS Is Not a Vaccine Mandate

The greatest misnomer in the arguments against the ETS is that it is a vaccine "mandate." *See, e.g.*, *BST Holdings*, at *3. The ETS is *not* a vaccine mandate. Nothing in the ETS requires any employee to be vaccinated, nor requires employees to choose "between their job(s) and their jab(s)." *Id.* at *8. The ETS *does* require – *i.e.,* mandate – employers of a certain size to take steps to safeguard

their employees from exposure to the coronavirus in the workplace: Covered employers must either require their employees to be vaccinated or to be tested weekly and wear masks while at work.

The ETS thus follows the pattern of all OSHA health standards which require – *i.e.*, *mandate* – employers to implement certain measures to limit their employees' exposure to hazards while at work. The ETS does so by employing the traditional and well-recognized industrial hygiene approach of requiring employers to control their employees' exposure to a hazard by taking steps to eliminate or reduce it.[5] In this case, where the potential source of the exposure is infected co-workers, customers, or members of the public who frequent the work site, OSHA has determined that the most effective way of controlling exposures is to minimize the level of contagion in the workplace, either through vaccines or through regular testing and masking. OSHA acknowledges that neither of these techniques is foolproof and that neither will eliminate the risk entirely. Pmbl-61433-34. But the agency is required to minimize a grave danger, even if it is not able to eliminate it altogether. *Nat'l Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 737 (5th Cir. 1988).

[5] This principle is embodied in the "hierarchy of controls," an industrial hygiene model that prioritizes the elimination of a hazardous agent as the first step in controlling exposures. *See, e.g.*, Nat'l Inst. for Occupational Safety and Health, Hierarchy of Controls, https://www.cdc.gov/niosh/topics/hierarchy/default.html (explaining that "[c]ontrolling exposures to occupational hazards is the fundamental method of protecting workers," and showing "elimination" at the top of the "hierarchy") (last visited Dec. 9. 2021).

To the extent the ETS departs from OSHA's traditional approach to hazard control, it is too limited and provides too little protection. For example, in addition to controlling exposure to a hazard, OSHA health standards usually require a layered approach that mandates protective clothing, housekeeping measures and medical examinations. *See e.g.*, 29 C.F.R. § 1910.1001 (asbestos); 29 C.F.R. § 1910.1052 (beryllium). OSHA required this layered approach in its healthcare ETS but not in the vaccine and testing ETS before this Court. S*ee* Occupational Exposure to COVID-19; Emergency Temporary Standard, 86 Fed. Reg. 32376, 32426 (June 21, 2021) ("an effective infection prevention program utilizing a suite of overlapping controls in a layered approach better ensures that no inherent weakness in any one approach results in an infection incident"). And, OSHA has previously opined that the OSH Act requires employers to pay for mandatory tests and exams required by OSHA standards. Employer Payment for Personal Protective Equipment, 72 Fed. Reg. 64341 (Nov. 15, 2007). Here, OSHA permits employers to shift the cost of testing to employees. Each of these limitations of the ETS – which leave too many workers at risk – form the basis for the Union Petitioners' challenges to the ETS and have been lost in the over-heated rhetoric about the rule. While these limitations would support a remand to the agency for further rulemaking, they neither invalidate the ETS nor support a stay.

III. OSHA's ETS Imposes Only Modest Costs on Employers

The modest, per employer compliance costs imposed by the ETS do not constitute irreparable harm nor do they suggest that unless Congress has specifically authorized this ETS, OSHA lacks the authority to issue it. OSHA estimated that the average cost of the ETS is $11,298 per affected entity. Pmbl-61493-94.

These costs are not exceptional for an OSHA standard, and they impose only a limited economic burden on any individual employer. Congress understood that OSHA standards would impose costs and placed "the benefit of worker health above all other considerations save those making attainment of this benefit unachievable." *ATMI v. Donovan*, 452 U.S. at 509. OSHA standards must be economically feasible. *Id.* An OSHA standard is economically feasible "if the costs it imposes do not threaten massive dislocation to, or imperil the existence of, the industry." *Am. Iron and Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991). Even if the costs of an OSHA standard are "initially frightening," OSHA is required to consider those costs in relation to the financial health of the affected industries or their impact on consumer prices. *USW v. Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980). *See also*, *ATMI v. Donovan*, 452 U.S. at 530 n.55.

OSHA examined the costs of the ETS and found the standard to be feasible. Pmbl-61403. Although the aggregate costs of the standard appear large, the per

employer cost of compliance is modest compared with the type of capital costs often required to install engineering controls to meet OSHA standards.[6] In fact, many large companies have adopted COVID-19 workplace restrictions far more extensive than those required by OSHA.[7] Moreover, OSHA's analysis does not take into account the economic downturn caused by the pandemic and its negative impact on affected businesses. So, while some businesses will incur modest costs as a result of the ETS, all covered businesses will benefit by being able to operate with less fear of COVID-19 outbreaks. OSHA recognized that some businesses feared they would lose staff if they implemented a vaccine policy, but other data OSHA evaluated indicated employers who adopt a vaccine policy "will be met

[6] Some OSHA standards require significant investments in equipment by a limited number of firms. The D.C. Circuit has concluded that OSHA can require an industry to rebuild its production facilities, if it can afford to do so. *USW v. Marshall*, 647 F.2d at 1281 (OSHA estimated the cost to four primary smelting companies of complying with its lead standard to be between $32-47 million). Other standards, such as OSHA's Hazard Communication Standard, affect a broader range of employers, but require limited investment by each affected employer. *See Ohio Mfr's Ass'n v. City of Akron*, 801 F.2d at 827 (describing the requirements of the hazard communication standard).

[7] For example, Tyson Foods requires its employees to be vaccinated. https://thefeed.blog/2021/08/03/our-next-step-in-the-fight-against-the-pandemic/ (last visited Dec. 9, 2021). General Motors has developed a layered approach to protecting its workers. https://www.gm.com/coronavirus/employee-response (last visited Dec. 9, 2021). OSHA found that more than 45% of surveyed employers had already required their employees to be vaccinated. Pmbl-61448.

with an influx of staff." Pmbl-61474.[8] What is more, if OSHA's predictions prove too optimistic, any employer can raise infeasibility as a defense to any citation OSHA may issue for violating the ETS. Here, the Opponents have made no credible claim that the cost of either COVID vaccines or weekly COVID testing threatens the economic viability of any industry.

IV. OSHA Has Ample Authority to Regulate the Occupational Risks Posed by Exposure to the Coronavirus

Opponents argue that COVID 19 is not an occupational risk that OSHA may regulate because exposure to the virus is not confined to workplaces. That is a *non sequitur*. *See* Opp'n Br. of Alabama et al., as *Amici Curiae*, Dissolving Stay at 5-7 (ECF No. 311) ("State AGs Brief").

Employment increases the risk of contracting COVID-19 significantly. As OSHA discussed in detail, employees have little control over their work environment. Pmbl- 61411-17. Many workplaces require employees to work in close quarters with others, with limited ventilation. Employees do not control who they are in contact with at work. Employees cannot limit customer contact. They

[8] In fact, a recent survey conducted by Harris Poll and released by the American Staffing Association revealed that 61% of those surveyed would prefer to work for an employer who mandates vaccines, while 14% of job seekers designated the absence of a mandate as an "important job factor." https://d2m21dzi54s7kp.cloudfront.net/wp-content/uploads/2020/05/ASA_Workforce_Monitor_Job_Seeking_Perspectives-2022.pdf

cannot limit how closely they must stand next to co-workers. They must share lunchrooms, bathrooms, and breakrooms with other co-workers. In other words, at home, an individual can control who they come into close contact with. At work, most cannot. This increases the risk of contracting COVID-19. The multitude of COVID-19 workplace outbreaks OSHA cited in the ETS confirm the increased, occupational risk COVID poses.

As we detailed in our initial pleading, Congress clearly authorized OSHA to regulate the increased risk of exposure to infectious diseases employees encounter in the workplace, and Congress has repeatedly confirmed its understanding that infectious diseases are among the workplace hazards OSHA is intended to address. Union Petitioners' Statement at 10-11. Yet another example of Congress' understanding of the scope of the statute's health concerns is found in the Workers' Family Protection Act, an amendment to the OSH Act. In the Act, Congress, finding that "hazardous chemicals and substances that can threaten the health and safety of workers are being transported" out of the workplace and into their homes, directed HHS to study the take-home effects of these workplace hazards, defined as including "infectious agents." Pub. Law 102-522 *codified at* 29 U.S.C. § 671a(b)(1)(A) and (c)(1)(A), cited in Florida, et al.'s Motion to Stay at 5 (ECF No. 161).

Since the beginning of the pandemic, OSHA has claimed the authority to cite employers who fail to protect their employees from the risk of COVID-19 infection at work. While OSHA initially did so by relying on the general duty clause, existing general standards, and non-binding guidance, it has now concluded this early approach was ineffective. Pmbl- 61429-30. The point remains that if OSHA can cite the general duty clause or other existing regulations to prevent outbreaks of COVID-19, it can also issue a specific standard aimed at addressing the same hazard. None of the ETS's opponents complained about OSHA's lack of authority to regulate viruses when the agency did so ineffectively and no employer challenged the healthcare ETS in court. Pmbl – 61431.

V. Congress Intended OSHA to Set Uniform, Minimum Federal Occupational Health Standards

Opponents argue that the ETS is invalid because it impinges on state sovereignty. Contrary to Opponents' claims, Congress intended to preempt state and local laws that conflict with OSHA standards. This Court has recognized that Congress did so "to assure that the states would at least meet the minimum requirements of the federal standards and not attempt to undercut each other." *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 831 (6th Cir. 1986). States and local governments may continue to regulate risks posed to those outside the workplace. *Id.*

Infectious diseases are not the only hazard for which OSHA regulates risks inside the workplace and other federal and state agencies regulate risks that occur outside. For example, OSHA regulates workplace exposure to lead. 29 C.F.R. § 1910.1025. EPA regulates airborne exposure to lead, lead in paint, and lead in drinking water. https://www.epa.gov/lead/lead-laws-and-regulations (last checked Dec. 10, 2021). The Department of Housing and Urban Development regulates lead dust in federally subsidized housing. https://www.hud.gov/program_offices/healthy_homes (last visited Dec. 10, 2021). Many states require reporting of childhood blood lead levels. The fact that other agencies, both federal and state, regulate certain aspects of lead exposure does not limit OSHA's ability to regulate workplace lead exposure. Nor does the fact that other state and federal agencies may regulate COVID-19 risk limit OSHA's authority to regulate the occupational risk posed by COVID-19. Indeed, the current patchwork of conflicting state and local COVID-19 related requirements heightens the need for uniform, minimum federal standards relating to COVID-19 workplace requirements. Pmbl- 61445.

VI. Complaints About the ETS's Application to Particular Employer Groups Are Premature

Various organizations argue the application of the ETS to religious organizations and other non-profits– indeed, the application of the entire Statute, for that matter – would exceed OSHA's jurisdiction and violate their rights under

the Free Exercise Clause and the Religious Freedom Restoration Act, *see, e.g.*, Religious Petitioner's Joint Response in Opposition to Motion to Dissolve Stay at 10-20 (ECF No. 331-1), an argument to which the Fifth Circuit alludes in its decision, *BST Holding,* at *8 n. 21. Pre-enforcement review of the ETS is not the appropriate vehicle for deciding whether the ETS, or any other OSHA standard, can properly be applied to some or all employees of an organization. Whether OSHA's enforcement of the ETS would interfere with an organization's religious mission, internal management or employment decisions, for example, are questions of fact that cannot properly be resolved on pre-enforcement review of an OSHA standard. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations and citations omitted).

These arguments are premature, as the standard is not yet in effect and OSHA has taken no steps to enforce it against any employer, much less against a religious institution. Nor has OSHA taken a position on how, if at all, it intends to apply the standard to any particular employer or group of employers, and unless and until it issues a citation, there is no basis on which to evaluate how the standard applies to a concrete set of facts. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (interpreting the Mine Act to bar pre-enforcement review of

certain claims when they can be raised during enforcement proceedings); *In re: Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 803 (6th Cir. 1997) (interpreting *Thunder Basin* to require challenges to an OSHA inspection to be raised during enforcement proceedings); *Sturm, Roger & Co. v. Chao*, 300 F.3d 867, 872 (D.C. Cir. 2002) (applying *Manganas Painting* to bar pre-enforcement review of OSHA reporting regulations).

Instead, if OSHA issues a citation against a religious employer – or, indeed, any employer -- for allegedly violating the standard, that employer will have the full opportunity to challenge the citation in a proceeding before the Occupational Safety and Health Review Commission ("OSHRC"), an agency independent from OSHA, during which the employer can air its legal and factual objections, including OSHA's jurisdiction. 29 U.S.C. § 660(c) (citations contested in proceedings before OSHRC).[9]

The same is true with respect to arguments that the ETS necessarily exposes covered organizations to onerous financial penalties. The Statute authorizes OSHA to *propose* penalties for OSH Act violations. The final penalty is

[9] The Religious Organizations completely ignore the fact that the ETS contains an exception from any vaccine requirement for religious objectors. While they argue that requiring employees with religious objections to vaccines to pay for their tests would unduly burden the employees' liberty interests, ECF No. 331, at 18, the ETS leaves it to the employer to decide whether to pass that cost on to the employee. And as explained in the text, the expenses the employer would incur if it paid for the employees' tests are relatively minimal.

determined by the OSHRC. Moreover, while the employer's challenge to the citation is pending, it is under no obligation to pay the proposed fine or abate the alleged hazard. 29 U.S.C. § 659(c). The hypothetical penalties OSHA may recommend and OSHRC may impose thus hardly constitute the kind of imminent irreparable harm that would support the continuation of the stay.

As with many of the arguments lodged against the ETS, the nub of the Opponents' arguments go well beyond the ETS and challenges OSHA's ability to act at all. Thus, the clear implication of the Religious Organization's argument, for example, is that OSHA has no authority to protect *any* employees of *any* religious institution against *any* workplace hazard, be it to protect employees of a religious healthcare organization from COVID-19 or from bloodborne pathogens, or to protect the employees of any religious organization from the risk of exposure to asbestos in their workplaces. Unless this Court is prepared, based on these broad, general arguments, to completely remove entire classifications of employees from the OSH Act's coverage, it must find that questions of how the ETS applies to them are not appropriately raised in this pre-enforcement review proceeding, and thus, that the Opponents are not likely to succeed on the merits of these claims.

CONCLUSION

Faced with an unprecedented pandemic that has killed more than 790,000 people in the United States and infected more than 50 million in less than two

years, OSHA has responded with a limited, minimal standard designed to protect workers who face a grave danger from COVID -19. Once the agency concluded that the initial approach it had taken to address the pandemic had proven ineffective, it issued a standard supported by 150 pages in the Federal Register that analyze hundreds of scientific studies and the economic impact of the ETS and explain OSHA's policy choices.

OSHA has addressed the impact of the pandemic in the country's workplaces by promulgating an ETS it estimates will save 6500 lives and prevent 250,000 COVID infections once the standard goes into effect. Section 6(c) of the OSH Act grants OSHA the authority to issue an ETS to protect workers from a grave danger. If the COVID-19 pandemic does not constitute such an emergency, no occupational health crisis will ever meet the test. If this Court were to accept the sweeping arguments leveled against the ETS, its decision would deny workers desperately needed protections against COVID-19 infection. The breadth of the legal attacks on the ETS, moreover, would eviscerate OSHA's ability to protect workers more generally from a wide variety of other occupational risks unless Congress specifically and expressly authorizes such regulation hazard-by-hazard – a requirement that would cripple the government's ability to protect workers against novel, unexpected and grave hazards like COVID-19. There is no legal

justification for such a sweeping ruling invalidating OSHA's standard setting authority.

Respectfully submitted,

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Dated: December 10, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing REPLY TO OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). The brief was prepared in 14-point Times New Roman font, and with the exception of the portions excluded by F.R.A.P. 32(f) it contains 4,370 words.

/s/ Randy Rabinowitz
Randy Rabinowitz

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, a true and correct copy of the foregoing REPLY TO OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY was electronically filed with the Clerk and served electronically upon all counsel of record registered with the Court's CM/ECF system.

/s/ Randy Rabinowitz
Randy Rabinowitz

APPENDIX A

The Union Petitioners

- American Federation of Labor, Congress of Industrial Organizations ("AFL-CIO");
- United Food and Commercial Workers International Union ("UFCW"); Massachusetts Building Trades Council;
- Local 32BJ, Service Employees International Union;
- American Federation of Teachers Pennsylvania;
- United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO;
- National Association of Broadcast Technicians – The Broadcasting & Cable Television Workers Section of the Communications Workers of America, AFL-CIO;
- Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213;
- Union of American Physicians and Dentists;
- North America's Building Trades Unions.