Nos. 21-7000 (lead), 21-4028, -4031, -4080, -4088, -4090, -4097
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

On Petitions for Review

OPPOSITION TO MOTIONS TO COMPEL

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY

These 43 consolidated petitions for review involve challenges to an emergency temporary standard issued by the Occupational Safety and Health Administration (OSHA) to protect employees from the grave danger of COVID-19 in the workplace. The rules governing judicial review of agency actions are well established. "The task of the reviewing court is to apply the appropriate . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) (citation omitted). OSHA filed a certified list of the administrative record, which comprises a 150-page preamble explaining the agency's analysis and more than 650 documents, many with attachments, that OSHA considered when issuing the Standard now under review. The record materials total more than 10,000 pages and include scientific analyses of the COVID-19 virus and its morbidity and mortality, detailed studies of workplace clusters and outbreaks, and extensive evidence of the effectiveness of vaccination, masking, and testing to address that workplace danger. OSHA's certification of the record is entitled to a strong presumption of regularity that may be rebutted only by clear evidence to the contrary.

Two groups of petitioners have moved to "complete" the record. Invoking White House statements about the COVID-19 pandemic and the ability of vaccines to prevent transmission and serious disease, petitioners assert that any intent to address the workplace dangers of COVID-19 is "pretextual." Petitioners further assert that

OSHA must have omitted from the administrative record internal agency documents about the challenged Standard, communications between OSHA and the White House about the Standard, and records of communications with private parties about the Standard.

This unsupported chain of inferences does not come close to rebutting the presumption of regularity that attaches to the agency's certified record. Petitioners largely seek deliberative materials that are not part of the administrative record. Agencies regularly discuss possible actions, plans, priorities, and preferences, both internally and with others in the government. Such deliberations, however, are not properly considered part of the administrative record, and treating them as such would chill open and candid discussions. Petitioners also do not establish that any of the broad and vague categories of records they seek exist or that any such records formed part of OSHA's consideration when issuing the Standard. Petitioners' motions should be denied.

BACKGROUND

A. Legal Background

The Occupational Safety and Health Act of 1970 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. Directly relevant here, 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 shall issue an emergency temporary standard that takes "immediate effect" and also serves as a "proposed rule" for notice-and-comment rulemaking. 29 U.S.C. § 655(c).

B. Factual Background

The COVID-19 virus is "highly transmissible" and deadly. Pmbl.-61409. COVID-19 has already killed more than 790,000 people in this country and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. The virus poses a particularly acute workplace danger. Significant exposure and transmission are occurring "in workplaces" throughout the Nation. 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 vastly "inadequate," Pmbl.-61430, 61444. As more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission." Pmbl.-61409; Pmbl.-61411-66. As a result, "[u]nvaccinated workers

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

On November 5, 2021, OSHA published 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 policies to mitigate the danger of COVID-19 transmission in places of employment. Employers may "implement a mandatory vaccination policy." Pmbl.-61436. Or employers may offer unvaccinated employees the choice to have "regular COVID-19 testing" and "wear a face covering." Pmbl.-61520.

OSHA determined that unvaccinated employees face a "grave danger" from workplace exposure to COVID-19. OSHA explained that the COVID-19 virus "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.-61411-17. OSHA further explained that "employees can be exposed to the virus in almost any work setting" and that, even if sometimes physically distanced, employees routinely "share common areas like hallways, restrooms, lunch rooms[,] and meeting rooms" and are at risk of infection from "contact with coworkers, clients, or members of the public." Pmbl.-61411-12. OSHA analyzed peer-reviewed studies and health-department data and found that workplace exposure and transmission are occurring in "a wide variety of work settings across all industries" ranging from "service industries" like "restaurants" and "retail stores," to "schools" and "offices," to "transportation" and

"delivery services," to "waste management" and "construction," to "agriculture" and "food packaging/processing." Pmbl.-61412-15. "Deaths" were "reported in many" of these outbreaks. Pmbl.-61412.

OSHA further 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.-61410-11, 61424. OSHA reviewed data about the ongoing and significant number of worker deaths, and estimated that the Standard will save at least 6,500 worker lives and prevent more than 250,000 hospitalizations over a six-month duration. Pmbl.-61408. OSHA further explained that "[e]ven for those who survive," the virus "can cause serious, long-lasting, and potentially permanent health effects." Pmbl.-61424. And OSHA considered "variability in infection rates" and tracked then-recent changes in national case rates. Pmbl.-61431.

OSHA likewise determined that it was "necessary" to adopt the Standard to protect unvaccinated employees from this danger in the workplace. Pmbl.-61429-47. OSHA described extensive evidence showing that vaccines dramatically reduce the risk of contracting and transmitting COVID-19, as well as developing serious disease. Pmbl.-61417-19, 61434, 61520, 61528-29. 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.

C. Procedural History

In the week following issuance of the Standard, many parties filed petitions for review in various courts of appeals. The Judicial Panel on Multidistrict Litigation designated this Court to hear the various challenges. On November 26, 2021, OSHA filed a certified list of the administrative record. *See* Fed. R. App. P. 17(b)(1)(B); *see also* 28 U.S.C. § 2112(a)(3) ("The agency . . . shall file the record in the court of appeals designated [by the Judicial Panel]."). The list spans almost 100 pages and includes descriptions of over 650 documents totaling more than 10,000 pages. Doc. 146. The certified record comprises a 150-page preamble explaining the agency's analysis and documents that OSHA considered when issuing the Standard. These include scientific analyses of the COVID-19 virus and its morbidity and mortality, detailed records of workplace transmission, and extensive evidence of the effectiveness of vaccination, masking, and testing to address that workplace danger. *See id.*

ARGUMENT

Two groups of petitioners seek to add documents to the administrative record—what they term "completing" the administrative record. Petitioners cannot overcome the strong presumption of regularity attached to the certified record produced by OSHA to this Court. Based on White House statements about the pandemic, press accounts of White House meetings, and a White House official's retweet of a reporter's

tweet, petitioners speculate that OSHA must have relied on information beyond the extensive administrative record. Much of what petitioners seek—records of internal agency deliberations—are not part of the administrative record. And petitioners provide no basis to believe that OSHA relied on additional materials not contained in the record. Petitioners' efforts to cast suspicion on OSHA also fail on their own terms. Not only do petitioners misunderstand the statements they cite, but they wrongly assume that recognizing the societal transmission of COVID-19 and the effectiveness of vaccines to address that danger is incompatible with OSHA's analysis of workplace transmission and its determination that vaccines are especially powerful tools for addressing that danger.

1. "The task of the reviewing court is to apply the appropriate . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) (citation omitted). The "record to be filed in the court of appeals . . . shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency." 28 U.S.C. § 2112(b); *accord* Fed. R. App. P. 16(a); *see Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997). Courts have stated that this includes "materials compiled" by the agency "that were either directly or indirectly considered." *In re U.S. Dep't of Def. & U.S. Envtl. Prot. Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June*

29, 2015) (*In re DOD*), No. 15-3751, 2016 WL 5845712, at *1 (6th Cir. Oct. 4, 2016) (per curiam); *see Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

Any "predecisional and deliberative documents are not part of the administrative record." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (quotation marks omitted); *see In re DOD*, 2016 WL 5845712, at *2 (same). Internal deliberations are not ordinarily "pleadings, evidence, [or] proceedings before the agency." 28 U.S.C. § 2112(b); Fed. R. App. P. 16(a). Indeed, the Advisory Committee Notes to Rule 16 explain that "[t]he record in agency cases" is "the same as that in appeals from the district court—the original papers, transcripts and exhibits in the proceeding below," Fed. R. App. 16 advisory committee's notes, which of course do not include deliberative materials, such as draft opinions, bench memoranda, and communications with law clerks. *See generally United States v. Morgan* (*Morgan II*), 313 U.S. 409, 422 (1941) ("Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." (citation omitted)). Records of agency deliberations are also "generally exempted from inclusion in the record in order to protect the quality of agency decisions by ensuring open and candid communications." *In re DOD*, 2016 WL 5845712, at *2; *see Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983); *see also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44 (D.C. Cir. 1986) (en banc) (plurality op.) (explaining that "[j]udicial examination of [internal agency] transcripts would represent an extraordinary intrusion into the realm of the agency").

"An agency's designation of the Administrative Record is entitled to a presumption of administrative regularity." *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Federal* R.R. *Admin.*, 10 F.4th 869, 878 (D.C. Cir. 2021) (quotation marks and alteration omitted). Even to justify "further action or inquiry," a petitioner would have to make "a substantial showing" that the record is "incomplete." *Oceana,* 920 F.3d at 865 (quotation marks omitted). And the strong presumption of regularity "can be overcome only by clear evidence to the contrary." *In re DOD*, 2016 WL 5845712, at *1 (quotation marks omitted); *see Bar MK*, 994 F.2d at 740 ("The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary."); *see also United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).[1]

2. Two groups of petitioners seek to challenge OSHA's certification of the administrative record, but they do not present the kind of clear evidence necessary to rebut the presumption of regularity. Petitioners assert that OSHA omitted from the administrative record internal agency documents about the challenged Standard, communications between OSHA and the White House about the Standard, and records of communications with private parties about the Standard. Petitioners fail to support

[1] In exceedingly rare circumstances where there is "a strong showing of bad faith and improper behavior," review of extra-record materials may be appropriate. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Latin Americans for Social & Econ. Dev. v. FHWA*, 756 F.3d 447, 465 (6th Cir. 2014). Here, petitioners disclaim any such request, States Mot. 6, and do not come close to making that showing.

their claim that this hypothetical set of records exists and, if so, that such materials should be included in the administrative record.

Initially, the premise of petitioners' request to "complete" the record is flawed. Much of the material petitioners seek—such as "internal documentation" related to "initiation of the rulemaking" (States Mot. 5) and "communications with the White House" about the OSHA Standard (States Mot. 5-6; *see* Phillips Mot. 1)—is not part of the administrative record because it would be deliberative. *See Oceana,* 920 F.3d at 865 (any "predecisional and deliberative documents are not part of the administrative record" (quotation marks omitted)); *In re DOD*, 2016 WL 5845712, at *2 ("Deliberative process materials are generally exempted from inclusion in the record"). The fact that deliberative materials were generated in an agency's decisionmaking process does not transform those materials into documents that were before the agency in any relevant sense. *See* 28 U.S.C. § 2112(b); Fed. R. App. P. 16(a). It is "not the function of the court to probe the mental processes" of the agency, *Morgan v. United States* (*Morgan I*), 304 U.S. 1, 18 (1938) (per curiam), and to review "deliberative proceedings" as a matter of course would deter "uninhibited and frank discussions" that are necessary to sound decisionmaking, *San Luis Obispo*, 789 F.2d at 45. Accordingly, agencies are not normally obligated to include in the administrative record agency deliberations or recommendations made to the decisionmaker. *See Morgan II*, 313 U.S. at 422 ("Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." (citation omitted)).

Petitioners' motions do not acknowledge this fundamental limitation on what constitutes an administrative record. Nor do petitioners address what would, in any event, be the applicable privileges, such as the deliberative-process privilege, which functions "to prevent injury to the quality of agency decisions" by ensuring that the "frank discussion of legal or policy matters" is not inhibited by the prospect of public disclosure. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-151 (1975) (quotation marks omitted). Agencies regularly discuss possible actions, plans, and priorities—both internally and with the White House. Petitioners' nebulous request to "complete" the administrative record would turn principles of agency review on their head. A sweeping expansion of the administrative record to intrude upon the highest offices in the Executive Branch would also raise additional serious separation-of-powers concerns. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385, 389 (2004) (explaining that judicial demands for White House documents raise "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office," with the result that "coequal branches of the Government are set on a collision course").

Petitioners also fail to present the required "clear evidence" that there are materials that OSHA did not include in the certified list but that OSHA considered when issuing the Standard. Despite the State petitioners' protestations to the contrary (States Mot. 6-9), the preamble contains a section describing the relevant chronology of events leading to the issuance of the Standard. Pmbl.-61429-32. To the extent that petitioners rest on their claim (States Mot. 8) that the Standard "is not pinned to a recent

event," that is also incorrect. OSHA explained that in recent months, as a result of the Delta variant, "the risk posed by COVID-19 has changed meaningfully," Pmbl.-61408; *see* Pmbl.-61431-32 (discussing the impact of Delta during the summer and fall of 2021 and noting the possibility of future variants). OSHA also explained that large-scale studies have further confirmed the "power of vaccines to safely protect individuals," including from the Delta variant, Pmbl.-61431; that "FDA granted approval" (rather than Emergency Use Authorization) to one vaccine on August 23, *id.*; that FDA has "authorized more than 320 tests and collection kits," Pmbl.-61452; and that OSHA determined that "the increasing rate of production" will ensure sufficient supply before the "testing compliance date," *id.*

Petitioners' references to White House statements about COVID-19 and to a White House official's retweet of a reporter's tweet are equally misplaced. The fact that the White House expressed a desire for more Americans to be vaccinated (*see* States Mot. 2-3, 9-11; Phillips Mot. 2-4) does not suggest that there are additional materials that were considered by the agency but not contained in the administrative record. To the contrary, White House statements about the dangers and spread of COVID-19 and the ability of vaccines to address these concerns are fully consistent with OSHA's analysis and supporting materials—which describe the scientific consensus that COVID-19 is highly transmissible, has significant morbidity and mortality, and can be addressed through several means including vaccination. And an official's retweet of a

reporter's tweet says nothing about the existence of federal records or the universe of materials considered by the OSHA decisionmaker.[2]

Petitioners' assumption that "[s]ometimes agencies speak with private parties about their actions" (States Mot. 11) is also insufficient. The fact that "public reports" say White House staff met with interested groups (States Mot. 12) does nothing to rebut the presumption of regularity regarding OSHA's sworn certification that it has already identified all materials relied on by the OSHA decisionmaker. "Petitioners' bald assertions" that certain materials may exist, "are an important part of the administrative record," and "were necessarily relied upon by" OSHA "are not enough." *Transportation Division*, 10 F.4th at 878 (quotation marks omitted).[3]

3. The cases cited by petitioners only underscore that they have failed to meet their burden. In *In re DOD*, 2016 WL 5845712 (cited at States Mot. 5 and Phillips Mot. 5), the petitioners identified specific "materials that were undisputedly considered by the Agencies." *Id.* at *1. This Court nonetheless stressed that the "certification of

[2] Petitioners also cannot determine an official's view merely by that official's decision to share a tweet with others, as it is a common understanding that a "retweet" is not the same as an endorsement. Nor does sharing a 280-character missive on a subject indicate an official's full-fledged, fully developed legal, policy, or scientific analysis. Simply put, a retweet cannot bear the weight that petitioners would put on it.

[3] 28 U.S.C. § 2112(b) does not confer a free-floating authority to "designate" materials for the record. *Cf.* States Mot. 5. Section 2112(b) defines the administrative record and notes that an agency may file "such portions thereof," *id.*, as, among other things, the court may "by order . . . designate," *id.* § 2112(b)(3). That procedural mechanism does not enlarge the definition of an administrative record or authorize courts to do so.

the record is entitled to a presumption of regularity," which "can be overcome only by clear evidence to the contrary." *Id.* (quotation marks omitted). And the Court made clear that deliberative materials are not part of the administrative record. *Id.* at *1-2. The Court found that the petitioners had met their "'clear evidence' burden" with respect to a "predominantly factual and technical" document because, under the agency's own guidance, it contained mostly non-deliberative factual information that could be separated and included in the record. *Id.* By contrast, the Court agreed with the agency's exclusion of another document that "contain[ed] deliberative and non-deliberative material" because the "non-deliberative contents" could not be "neatly extricated from the deliberative." *Id.* at *2 n.1; *see also National Courier Ass'n v. Board of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (concerning application of deliberative process privilege to information in memoranda that the agency itself concluded were part of the administrative record).[4]

[4] The court in *National Carrier* suggested that there may be instances where portions of internal staff memoranda "would appear to be" part of the administrative record. 516 F.2d at 1241; *see id.* at 1243 ("It may be that the factual information thus presented in the deleted parts of this memorandum should have been made a part of the record."). But the court went on to state that the deliberative-process privilege would normally shield deliberative materials contained in such memoranda because, "[u]nless he has left no other record of the reasons for his decision, the mental processes of an administrator may not be probed." *Id.* at 1242. As discussed, the D.C. Circuit has subsequently confirmed that "predecisional and deliberative documents are not part of the administrative record to begin with." *Oceana*, 920 F.3d at 865 (quotation marks omitted).

Petitioners' reliance (Phillips Mot. 6-7) on a recent unpublished, district court decision, *Louisiana v. Biden,* No. 21-cv-778, 2021 WL 5370101 (W.D. La. Nov. 17, 2021), is even further afield. That case involved judicial review of an Executive Order concerning new oil and gas leases on public lands and in offshore waters and plaintiffs' understanding of that Executive Order's implementation. *Id.* at *1. Based on its understanding that the plaintiffs' complaint challenged only specific lease decisions and other actions, the relevant agency did not include in the record materials related to other actions. *Id.* at *2. The district court, however, "believe[d]" that a more expansive set of leases and agency actions were "'fairly inferred' from the Complaint" and accordingly concluded that the certified record was incomplete. *Id.* at *3. Because the "primary issue" in that case was "the implementation" of an Executive Order, the district court also ordered the government to include certain White House materials if they were considered by the agencies. *Id.* at *5. None of that calls into question the proper definition of an administrative record or petitioners' failure to rebut the strong presumption of regularity for OSHA's certified record.

4. For the reasons just discussed, petitioners cannot overcome the presumption of regularity that attaches to OSHA's certified record. It is also difficult to see how the sorts of materials that petitioners request could be relevant to this proceeding at all.

As noted, courts review an "agency decision based on the record the agency presents." *Florida Power & Light Co.*, 470 U.S. at 743-744. That record, rather than "some new record made initially in the reviewing court," is the "focal point" for judicial

review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Consistent with that settled principle of agency review, OSHA's determinations are "conclusive if supported by substantial evidence in the record considered as a whole," 29 U.S.C. § 655(f).

When the challenged action is supported by a contemporaneous explanation, it "must . . . stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 143. When the record supplied by the agency is inadequate to support the agency's explanation, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.*, 470 U.S. at 744. But it is "not the function of the court to probe the mental processes" of the agency. *Morgan I*, 304 U.S. at 18. And, ordinarily, the "subjective motivation of agency decisionmakers is immaterial as a matter of law." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998).

Petitioners do not explain how their speculation about motive could have any bearing on judicial review of the OSHA Standard. The President, along with public health officials, has expressed significant concern about the ongoing pandemic, including low vaccination rates, because COVID-19 is a serious threat to the health of all unvaccinated Americans. That expression of concern reinforces the agency's reasonable conclusions that COVID-19 poses a grave danger to unvaccinated employees who gather with others in workplaces. Petitioners wrongly assume that being concerned about COVID-19 generally and the ability of vaccines to address that danger is incompatible with concluding that COVID-19 poses a grave danger in the

workplace and that vaccines are one of several ways to address that danger. The opposite is true. There is nothing pretextual about an agency whose mission is to protect the health and safety of workers taking critical steps to establish a workplace health standard that requires either vaccination or masking and testing just because those steps are consistent with a broader effort to combat a pandemic that affects individuals inside and outside the workplace.[5] That is evidence that the Standard makes sense and is likely to be effective, not that it is pretext.

"It is hardly improper" for officials "to come into office with policy preferences" or to work with agency staff to evaluate the "basis for a preferred policy." *Department of Commerce*, 139 S. Ct. at 2574; *see Jagers*, 758 F.3d at 1185-1186 (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). 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)

[5] Nor does it matter that the President previously stated that, pursuant to the Administration's policy "to protect the health and safety of workers from COVID-19," he "directed" OSHA to "consider whether any emergency temporary standards on COVID-19" would be necessary. *Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32,376, 32,413 (June 21, 2021); *see* States Mot. 9. Of course a President can instruct OSHA to *consider* whether further steps should be taken to protect the health and safety of workers. Such an instruction does not undermine the comprehensive administrative record OSHA compiled in this case justifying the Standard. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019); *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185-1186 (10th Cir. 2014).

(quotation marks omitted). That is why judicial review is based on an "agency's contemporaneous explanation in light of the existing administrative record," *Commerce*, 139 S. Ct. at 2573, not on cherry-picked public statements by others, such as a White House official's "retweet" of a reporter's tweet, *see* States Mot. 3, 10; Phillips Mot. 2, 4, 6. Here, OSHA explained its conclusions in an exhaustive analysis that provides this Court with a basis to review the Standard.

Department of Commerce, 139 S. Ct. 2551, on which petitioners chiefly rely, only underscores petitioners' failure to tie their unsupported allegations to the actual case before this Court. The Supreme Court there stressed that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Id.* at 2573 (quotation marks omitted). That decision further emphasized that courts "may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons" and "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." *Id.*

That decision involved circumstances markedly different from the circumstances here. There, the Secretary of Commerce, "prodded by DOJ, filed a supplemental memo that added new, pertinent information to the administrative record." *Department of Commerce*, 139 S. Ct. at 2574. That effectively "disclosed" that the existing record was incomplete, a conclusion that "[t]he Government did not challenge." *Id.* The parties

stipulated to the addition of "12,000 pages" to the administrative record, and the district court also ordered "extra-record discovery." *Id.* But the Court explained that even the extraordinary facts of that case "reflect[ed] the sometimes involved nature of Executive Branch decisionmaking" and that "no particular step in the process [stood] out as inappropriate or defective." *Id.* at 2574-2575. Instead, the Court vacated the agency decision based on "a significant *mismatch* between the decision the Secretary made and the rationale he provided." *Id.* at 2575 (emphasis added). In particular, "unlike a typical case in which an agency may have both stated and unstated reasons for a decision," the "sole stated reason" did not match the administrative record. *Id.*

Here, by contrast, the record explains each of the agency's key conclusions. Petitioners fail to explain how their allegation of pretext could alter those conclusions. The Standard's 150-page preamble explains in painstaking detail why OSHA decided to act to address the grave danger of COVID-19 in the workplace. OSHA identified several studies showing workplace "clusters" and "outbreaks" and other significant "evidence of workplace transmission" and "exposure." Pmbl.-61411-17. OSHA explained that "employees can be exposed to the virus in almost any work setting." Pmbl.-61411. And OSHA determined that the Standard was "necessary" to protect employees from this workplace danger because of the effectiveness of vaccines as well as masking and testing. Pmbl.-61528-29, 61434, 61436, 61438-39, 61520, 61528-29. OSHA further discussed various alternatives and explained that existing OSHA standards, statutory requirements, and non-binding guidance are insufficient to combat

the new and ongoing workplace hazard. Pmbl.-61440-45.

CONCLUSION

Petitioners' requests to compel production should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 4,933 words. This response 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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