Nos. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103, -4108, -4112, -4114, -4115, -4117, -4133, -4149, -4152, -4157
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

REPLY IN SUPPORT OF EMERGENCY MOTION TO DISSOLVE STAY

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I. Petitioners Are Unlikely To Succeed On The Merits

A. OSHA Has Legal Authority To Address The Workplace Spread Of COVID-19

1. The novel COVID-19 virus is both an "agent" that is "physically harmful" and a "new hazard" under Section 655(c)(1). Mot.-10-14; Amic.OSHA.Admin.-4-8. As the State petitioners concede, "the disease-causing virus is an 'agent.'" States.Opp.-5. Other petitioners' attempts (*e.g.*, BST.Opp.-21-23; RNC.Opp.-12-13) to string together definitions of other terms cannot overcome that viruses are known as biological and infectious agents in dictionary definitions, common parlance, and longstanding OSHA regulations. Mot.-10; *accord*, *e.g.*, *Agent*, American Heritage Dictionary[1] ("A force or substance that causes a change . . . an infectious agent"); *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 833 (7th Cir. 2015) ("Infectious agents including viral"); 29 C.F.R. § 1910.120(a)(3)(B) (addressing "biological agent[s] and other disease-causing agent[s]"). Petitioners' effort (*e.g.*, Betten.Opp.-11-12) to rehabilitate the Fifth Circuit's toxicity gloss on the statute fares no better. That gloss would not exclude viruses, and the proximity of the words "toxic" and "physically harmful" does not justify reading entire terms out of the statute. Mot.-13; Amici.OSHA.Admin.Br.-5-6.

The statute independently covers dangers "from new hazards," 29 U.S.C. § 655(c)(1), and "COVID-19 is a 'hazard,'" as the State petitioners admit (State.Opp.-

[1] https://www.ahdictionary.com/word/search.html?q=agent.

5). Mot.-10, 13-14. Some petitioners' contention (Phillips.Opp.-5) that a "recognized" hazard cannot be "new" overlooks that a hazard must already be "recognized" before regulation is possible and disregards that during the summer 2021, the danger changed meaningfully. Mot.-13-14.

2. Equally untenable is petitioners' claim (BST.Opp.-13) that OSHA "must find that the harm is *more* likely to occur [in workplaces] than in other places." That limitation appears nowhere in the statutory text. Petitioners cannot derive this constraint (*e.g.*, RNC.Opp.-6) from scattered provisions with generic references to "workplaces" or "employment" that establish nothing more than the undisputed premise that OSHA can regulate hazards that exist in the workplace. *E.g.*, 29 U.S.C. §§ 651(b) ("working conditions"), 655(d) ("places of employment"). OSHA can address dangers in the workplace, and Congress did not limit OSHA's authority to petitioners' atextual and undefined subset of dangers. Mot.-14, 15-16. OSHA regulations have long addressed hazards that exist both inside and outside the workplace, including rules for sanitation and fire prevention, electrical safety, and exit routes. Mot.-15-16; 29 C.F.R. §§ 1910.33-.37 (exit routes), 1910.302-.305 (electrical safety); *see* Amic.OSHA.Admin.-13-14. Petitioners' contrary limitation offers no

workable way to determine when hazards present a sufficiently greater or different risk in the workplace than elsewhere.[2]

In any event, the significant risk of COVID-19 exposure and transmission in the workplace is not just a "danger" of "being alive"—it *is* a danger "employees face because of their employment" (States.Opp.-5-6). Mot.-15. The nature of workplaces is that employees come together in one place for extended periods and interact, thus risking workplace transmission of a highly contagious virus. Pmbl.-61411-17. Whereas individuals have "more freedom to control" their "environment" and "behavior" outside of work, employees may "have little ability to limit contact" with others when they "report to [a] workplace." Pmbl.-61408, 61411. Workplace dangers have thus long been understood to include the dangers of contracting communicable diseases. Mot.-15.

3. Petitioners similarly lack support for their claim (*e.g.*, Bentkey.Opp.-13-15; RNC.Opp.-7-8) that vaccination is categorically outside the statute. Congress "authoriz[ed]" OSHA to set "mandatory occupational safety and health standards," 29 U.S.C. § 651(b)(3), enabling the agency to require the "use of one or more practices, means, methods, operations, or processes" calculated to "provide safe or healthful

[2] It makes no difference that other agencies may also issue regulations related to communicable diseases (Bus.Ass'n.Opp.-9). *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002). OSHA's workplace-specific purview routinely overlaps with other agencies. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1204 & n.7 (D.C. Cir. 1980) (discussing OSHA's and EPA's regulation of lead).

employment and places of employment," *id.* § 652(8). The Standard calls for vaccination (and other) policies that neatly fit within that language, and petitioners make no argument to the contrary. The fact that vaccination may occur outside of the workplace and have benefits outside of the workplace does not change that it protects employees in the workplace by mitigating the risk that they transmit a deadly virus to one another and cause serious disease. Workplace health or safety standards may have benefits beyond the workplace. And another OSH Act provision contemplates that "immunization" may be "authorize[d] or require[d]" by "other provision[s] of this chapter"—*i.e.*, the OSH Act—"for the protection of the health or safety of others." 29 U.S.C. § 669(a)(5). Petitioners' contrary reading (*e.g.*, ABC.Opp.7-9) disregards that Section 669(a) refers to "this chapter" and that its direction to the Department of Health and Human Services concerns developing information for OSHA standards. *See* 29 U.S.C. § 669; Amic.OSHA.Admin.-7-9.

4. Unable to ground their interpretation in the statutory language, history, or purpose, petitioners fall back on asserted clear-statement rules and meritless constitutional claims. Invoking assumptions of congressional intent, petitioners suggest (*e.g.*, Bus.Ass'n.Opp.-8; Phillips.Opp.-2-4) that agencies cannot issue regulations with broad application or compliance costs absent a statutory clear statement. Petitioners misunderstand the cases they cite, and their view would threaten to invalidate vast swaths of federal rules. Mot.-20-21. Petitioners' argument also disregards the OSH Act's unambiguous grant of authority to protect employees from grave danger in the

workplace and Congress's "underst[anding]" that OSHA standards "would create substantial costs" in order to "create a safe and healthful working environment." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 519-522 (1981).

Petitioners' reliance (*e.g.*, Phillips.Opp.-3) on *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam), only underscores OSHA's authority to act. There, the Court held that the Centers for Disease Control's authority to prevent interstate transmission of disease did not authorize a moratorium on evictions based on the possible "downstream connection" between evictions and "spread of disease." *Id.* at 2488-2489. If the statutory text were "ambiguous," the Court stated that it should not lightly assume that Congress delegated to the CDC "a breathtaking amount of authority" to issue an eviction moratorium regulating a domestic sphere "markedly different from the direct targeting of disease." *Id.* Here, by contrast, the text is unambiguous, and OSHA required precautions that directly prevent the workplace transmission of COVID-19. Congress specifically authorized OSHA to undertake nationwide regulation that may affect many Americans and can be expensive in the aggregate, *American Textile Mfrs.*, 452 U.S. at 520, but that does not render the OSH Act self-defeating.

The canon of constitutional avoidance similarly cannot be deployed to modify the Act's plain language. There is no doubt that the federal government can regulate conditions of employment and set workplace health and safety standards pursuant to the commerce power. Mot.-18-20. This is not a case with "a tenuous link to

commercial activity" (Bentkey.Opp.-7). The Standard imposes obligations on actors engaged in interstate commerce to conduct their operations in a way that ensures safer workplaces for employees. That is quintessential economic activity. Petitioners also incorrectly assert that the Standard is unconstitutional because it produces only "incidental effects on workplace safety" (Burnett.Opp.-13). Not only is Congress empowered to correct societal ills so long as the requisite effect on interstate commerce exists, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964), but here the Standard directly regulates workplace health and safety by reducing the transmission of a deadly virus between employees at work.

OSHA's longstanding interpretation of the Act also raises no nondelegation problem. Mot.-21-22. Petitioners' own authority (*e.g.*, Job.Creators.Opp.-12-13), *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), undercuts their position. Based on statutory text and history, the Court concluded that OSHA must find "significant risk of material health impairment" before issuing a permanent standard. *Id.* at 642-653 (plurality op.). The Court explained that this finding—which is akin to, and broader than, Section 655(c)(1)'s grave danger finding, *id.* at 640 n.45—*avoided* any nondelegation issue. *See id.* at 646. The Court has also upheld broader delegations, Mot.-21-22, which petitioners largely neglect.[3]

[3] The due process arguments raised by one petitioner group (DTN.Stay.Mot.-17-20) are incompatible with *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See also* Opp. to Stay Mot. 2-3, Dkt. 64 (Nov. 22, 2021).

B. OSHA Had Ample Basis For Its Determinations

OSHA's grave danger and necessity determinations are supported by substantial evidence. *See* 29 U.S.C. § 655(f). Like the Fifth Circuit, petitioners question OSHA's analysis in numerous respects but do not meaningfully address OSHA's comprehensive, evidence-based determinations. Mot.-22-39.

1. Substantial Evidence Supports OSHA's Grave Danger Determination

OSHA properly determined that employees are exposed to a grave danger from COVID-19 in the workplace. COVID-19 is widespread in America's workplaces, and, as a result, every day workers are being hospitalized and "many are dying." Mot.-10-11, 23-24, 28-30, 33-37; *see* Amic.AMA-4-5; Amic.APHA-5-12.

The "effects of the virus" are not "dissipating" (Bentkey.Opp.-16). *See, e.g.*, Pmbl.-61431. The fact that case numbers in early November were below their all-time high (Bentkey.Opp.-16) or that many people are vaccinated (States.Opp.-9; Phillips.Opp.7; Heritage.Opp.-7-8) does not change the reality that the virus is circulating in workplaces and endangering millions of employees. Mot.-28-30.

Petitioners err by citing (States.Opp.-8-9) one estimate of the COVID-19 mortality rate. OSHA explained that grave danger "is clear" because "the mortality and morbidity risk to employees from COVID-19 is so dire." Pmbl.-61408; *see* Pmbl.-61410; Pmbl.-61424. Even petitioners' statistic—a 0.6% mortality rate—is quite high: 1 in 167. That figure, moreover, disregards the tremendous morbidity risk for

survivors—including lengthy hospitalizations and "serious, long-lasting, and potentially permanent health effects." Pmbl.-61424. Petitioners' comparison (States.Opp.-9) of COVID-19 to "peanut butter," which implicates the health of a "small subset of individuals," underscores the grave danger at issue here. As OSHA thoroughly documented, large numbers of employees throughout covered workplaces face a grave danger from COVID-19, and the present ability to treat this deadly virus pales in comparison to the ability to treat a food allergy.

Petitioners quibble about some of the many studies and datasets cited by OSHA when finding workplace exposure and transmission. RNC.Opp.-15-17; Heritage.Opp.-8-9; Benkey.Opp.-18. Agencies often do "not have perfect empirical or statistical data." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021); Mot.-37-38. Under the substantial evidence standard, the question is whether OSHA had "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). The fact that some peer-reviewed studies were from 2020 or early 2021 (RNC.Opp.-15), or that some sources defined workplaces differently (RNC.Opp.-16), collected data from certain types of workplaces (RNC.Opp.-16-17), or "did not confirm" that every illness tied to a workplace cluster "was contracted in the workplace" (Heritage.Opp.-8-9; RNC.Opp.-16; *see* Pmbl.-61411 (OSHA recognizing as much)) does not alter the consistent conclusion: There is significant exposure and transmission, including "clusters" and "outbreaks," occurring in "a wide range" of "workplaces" throughout the Nation. Pmbl.-61411-15.

2. Substantial Evidence Supports OSHA's Necessity Determination

OSHA also properly determined that the Standard is necessary to protect employees from the grave danger of COVID-19. Mot.-11-12, 23-24, 30-32, 33-35; *see also* Amic.AMA-5-8; Amic.APHA-12-17. No precaution is 100% effective (BST.Opp.-19-20; Bentkey.Opp.-22-23; *see* Pmbl.-61438-39, 61517, 61535), but the vaccination and masking-and-testing options largely prevent employees from bringing COVID-19 into the workplace, transmitting it to others, and causing serious disease. Mot.-30-31. Petitioners' observation (Betten.Opp.18-21; Bentkey.Opp.-22) that if vaccinated employees get infected, they could transmit the virus, misunderstands that vaccinated employees are substantially less likely to contract COVID-19 "in the first place" and bring it to the workplace. Pmbl.-61418-19. Vaccinated people also likely have "a shorter infectious period," Pmbl.-61419, thus reducing spread even in breakthrough infections. OSHA also explained that the "more comprehensive stud[ies]," which capture pre-symptomatic and asymptomatic infections, suggest "a significantly lower" viral load in vaccinated people, which is tied to reduced transmission. Pmbl.-61418-19.[4]

[4] The prior standard for healthcare workplaces does not suggest otherwise. *Cf.* RNC.Opp.-19-21; BST.Opp.-17. That standard pre-dated FDA approval (rather than Emergency Use Authorization) of a vaccine, Pmbl.-61431, and it was specifically "'tailored'" to "'healthcare workplaces'" (Mot.-31), such as by requiring FDA-approved masks and, in many instances, special respirators fit and tested for each user, 29 C.F.R. § 1910.502(b), (f). Subsequently, another agency required that most healthcare providers must have vaccinated staff. *See* 86 Fed. Reg. 61555 (Nov. 5, 2021).

Petitioners are mistaken when they declare that the vaccination and masking-and-testing options are unnecessary given other alternatives. Neither the availability of free vaccines (States.Opp.-13) nor the possibility of "'self-regulation'" (RNC.Opp.-18) has prevented the surge of workplace-associated COVID-19 infections and deaths. Mot.-23. Nonregulatory options have proven "inadequate," and due to "rising 'COVID fatigue,'" voluntary precautions are becoming less common. Pmbl.-61444-45. While some proportion of employers have embraced the workplace need for vaccines (RNC.Opp.-18), the many employers who are not requiring critical health and safety precautions show that the Standard is necessary. And despite the hope for easily accessible and highly effective treatments in the future (Bentkey.Opp.19-20), or the theoretical possibility that OSHA could devise more elaborate and tailored standards for different settings in the coming years (States.Opp.-14-15), such options are not available now, while workers are presently getting sick and dying. Mot.-31-32.

3. Petitioners' Additional Challenges To OSHA's Determinations Lack Merit

Unable to refute OSHA's evidence-based determinations, petitioners urge that OSHA must not believe its own determinations. Many petitioners repeat (Heritage.Opp.-10-11; BST.Opp.16-17; Tankcraft.Stay.Mot.13) the Fifth Circuit's erroneous suggestion that the Standard cannot be necessary to protect employees from a grave danger because OSHA did not act earlier, and some mistakenly assert (Phillips.Opp.-10-11; Assoc.Builders.Opp.-13-15; RNC.Opp.-19-20) that OSHA

changed its position or failed to explain the evolving situation and response. As OSHA clearly described, it acted now because voluntary measures proved ineffective, the COVID-19 virus grew more virulent, and fully approved vaccines and tests are increasingly available. Mot.-22-26; *see* Pmbl.-61429-32.[5]

Petitioners also repeat the Fifth Circuit's assertion that because OSHA did not immediately extend the Standard to employers with fewer than 100 employees, OSHA must not believe the Standard is necessary to address a grave danger. Betten.Opp.-14; States.Opp.-10-12; RNC.Opp.-21. Given the urgency, OSHA explained that it is "proceeding in a stepwise fashion" by immediately applying the Standard to employers for whom OSHA can be confident the Standard is feasible while simultaneously obtaining information about smaller employers. Mot.-26-28. OSHA's decision to obtain that information does not counter the extensive evidence of a "workplace hazard" for covered employers (RNC.Opp.-21). In any event, much as Title VII's application only to larger businesses does not call into question the extraordinary

[5] Petitioners' claims (Betten.Opp.-13; Relig.Petrs.Opp.-20-21) that the government "delayed" the vaccination deadline for federal contractors and employees are similarly unsound. The government aligned the contractor deadline with the OSHA Standard. 86 Fed. Reg. 63418, 63424 (Nov. 16, 2021). And while federal employees achieved 97.2% compliance, the Office of Management and Budget determined that "education and counseling efforts" should continue "as the first step in an enforcement process" before suspending employees. *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 9, 2021), https://go.usa.gov/xe7yP.

importance of combating discrimination in the workplace, OSHA's approach here does not "prove[] that the risk is not actually 'grave'" (States.Opp.-11-12). Mot.-27-28.

Petitioners' view (*e.g.*, BST.Opp.-11-13; RNC.Opp.-14, 20-21) that OSHA's evidence-based analyses are "pretextual" is incorrect and ignores the comprehensive administrative record. Mot.-39. 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); *see* 29 U.S.C. § 655(f) (OSHA's determinations are "conclusive if supported by substantial evidence *in the record* considered as a whole" (emphasis added)). Petitioners' unsubstantiated allegations also make little sense on their own terms. 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 just because those steps are consistent with a broader effort to combat a pandemic that affects individuals inside and outside the workplace. 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 record—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 (States.Opp.-10; BST.Opp.-12) says nothing about OSHA's evidence-based determinations.

Petitioners also contend that given employees' varied ages, prior infections, and differences between workplaces, OSHA could not have evidence about the grave

danger and necessity for every employee and workplace. *E.g.*, Tankcraft.Stay.Mot.-10-13; States.Opp.-11, 13-14; Benkey.Opp.-20-21. But OSHA reviewed evidence showing that younger employees and people with prior infections are often susceptible to serious COVID-19 cases and therefore face grave danger and that even employees who are less likely to have a critical case of COVID-19 can contract and transmit COVID-19 to others in the workplace. Mot.-33-35. OSHA also explained that it is not possible to determine exactly who has what level of risk or protection. Mot.-33-34.[6] OSHA similarly considered extensive evidence about how COVID-19 is transmitted as well as studies and reports of outbreaks in a wide range of workplaces. Mot.-35-37. OSHA acknowledged where evidence was imperfect, *e.g.*, Pmbl.-61411 (discussing reports of workplace clusters), or not uniform, *e.g.*, Pmbl.-61421-23 (immunity from prior infection), and then drew reasonable conclusions based on the available data. Mot.-37-38. In any event, the statute does not require standards to operate on an employer-by-employer or employee-by-employee basis or impose the impossible burden of definitively establishing grave danger and necessity for "each" employee, 29 U.S.C. § 655(c)(1). Mot.-38-39.

[6] Proposed "antibody testing" is not an "obvious alternative[]." Phillips.Opp.-8-9. While antibody tests are useful for some diseases, they are currently "considered to be poor indicators" for assessing the risk of COVID-19 "reinfection." Pmbl.-61423.

C. Petitioners' Remaining Contentions Are Meritless

1. A few petitioners seek to pretermit the inquiry by analogizing to Supreme Court review of lower-court stays or invoking law-of-the-case principles and urging that this Court can dissolve the stay only if it was "demonstrably wrong" (BST.Opp.-3-4) or for other "extraordinary reasons" (Amic.NCLA-1-3; Answers.In.Genesis.Opp.-5-7). If those standards were applicable, they would be satisfied for the reasons just discussed and because of the thousands of lives at stake (Mot.-40-41). But this Court was selected to hear dozens of cases, filed nationwide, pursuant to the multi-circuit lottery statute, which stated, without limitation, that while any court where a case is "instituted" may stay the challenged rule, "[a]ny such stay may thereafter be modified, revoked, or extended" by the court "designated" to hear the case. 28 U.S.C. § 2112(a)(4); *cf. McCue v. City of New York*, 503 F.3d 167, 169-171 (2d Cir. 2007) (applying the traditional four factors in lifting its own stay).

The BST petitioners' claim that this Court cannot revisit the stay unless it is "demonstrably wrong" equates this situation to a motion asking the Supreme Court to vacate a stay entered by another court that is still hearing the case. BST.Opp.-3-4; *see Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1302-1304 (1976) (Rehnquist, J., in chambers). Here, the cases in which a stay was entered are pending in this Court pursuant to the multi-circuit system. 28 U.S.C. § 2112(a)(4).

For similar reasons, "law of the case" principles (Amic.NCLA-1-3; Answers.In.Genesis.Opp.-5-7) do not limit this Court's consideration of whether a stay

is warranted. These principles "promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quotation marks omitted). They guide a court's "discretion" but do "not limit [its] power." *Arizona v. California*, 460 U.S. 605, 618 (1983). These principles were "crafted with the course of ordinary litigation in mind," *id.* at 618-619, and not for the multi-circuit lottery system. That system reflects Congress's judgment that before cases are assigned to a single circuit, courts can issue (possibly conflicting) stay rulings on a highly expedited basis (as the Fifth Circuit did here), and the designated court can then determine the appropriate equitable order. Treating the Fifth Circuit's order as law of the case here would also be particularly anomalous because only 8 of the 43 pending petitions were transferred from that court.

2. The stay cannot rest on the theory that the Standard allegedly "violate[s]" the Congressional Review Act (CRA) because it was not submitted "to Congress for review" before its effective date (Phillips.Opp.-14-15). The CRA precludes "judicial review," 5 U.S.C. § 805, and thus courts cannot "void rules on the basis" asserted by petitioners. *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 346 (D.C. Cir. 2018). Regardless, CRA review by Congress was not required in light of OSHA's "good cause find[ing]." 5 U.S.C. § 808(2); *see* Pmbl.-61504.

3. The arguments of certain religious petitioners (Relig.Pets.Opp.-10-20; Answers.In.Genesis.Opp.-7-15) provide no basis for a petitioner-specific stay, much less a nationwide stay of the entire Standard. Petitioners' contention that OSHA "lacks

jurisdiction to regulate religious non-profit institutions" (Relig.Pets.Opp.-10-11) challenges a separate regulation promulgated in 1972 and not cited or discussed in the Standard. *See* 29 C.F.R. § 1975.4(c)(1). The Standard does not implicate the First Amendment's ministerial exception, which insulates "decision[s] to fire" employees who hold certain religious positions, but which, to the government's knowledge, has not been applied to excuse employers from health and safety regulations. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). No religious petitioner has shown that the Standard violates its rights under the Religious Freedom Restoration Act because it is unclear whether any petitioner asserts a sincerely held religious objection to the mask-and-test option, Pmbl.-61521. *Cf. Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-305 (1985). The Standard also recognizes that federal law may in some circumstances require case-specific religious accommodations. Pmbl.-61522. In all events, the various religious objections do not concern the Standard's validity but instead assert only person-specific reasons that particular employers or employees may not need to comply.

II. The Balance Of Equities Also Precludes A Stay

A. The harms to the government and the public of continuing the stay would be enormous. COVID-19 is spreading in workplaces, and workers are being hospitalized and dying. As COVID-19 case numbers continue to rise and a new variant has emerged, the threat to workers is ongoing and overwhelming. OSHA estimated that the Standard will save thousands of lives and prevent hundreds of thousands of

hospitalizations—an average of 77 lives and 3128 hospitalizations per day. Mot.-40-41. That does not reflect many health benefits in the workplace or any health benefits outside of the workplace, such as preventing COVID-19 cases among family and friends who are exposed to an infected worker or the benefits from reducing strains on healthcare systems, slowing the emergence of new variants, and combating the pandemic's ongoing effects on the economy. None of the many responses, some accompanied by expert declarations, meaningfully disputes OSHA's estimates.

B. The Fifth Circuit disregarded *every* benefit of the Standard. Petitioners do not seriously defend that decision, and their speculative compliance costs and similar asserted injuries cannot overcome the extraordinary harms to the public interest that result from a stay.

1. Petitioners' focus on compliance costs is highly speculative and disregards the significant benefits to employers from fewer COVID-19 outbreaks in the workplace. Mot.-43-44. OSHA's detailed cost analysis shows the modest costs to implement measures necessary to mitigate the workplace spread of COVID-19. Pmbl.-61475-78, 61493. Petitioners' disagreements with these cost estimates fail on their own terms. Employers need not overhaul their current human resources infrastructure (RNC.Opp.-22) because the Standard relies on "straightforward recordkeeping systems that are already widely used by large employers as part of their usual and customary business practices." Pmbl.-61456. And even putting aside that employers are not required to pay for testing, Pmbl.-61532, secondhand "report[s]" about testing costs

(Bus.Ass'ns.West.Decl.-6) are unfounded, and OSHA identified many free or subsidized options, Pmbl.-61451.

The threat to human life and health also vastly outweighs petitioners' guesswork about the number of workers who may quit rather than get vaccinated or tested. OSHA cited empirical data showing that while many employees may suggest they would not comply, most change their minds. Mot.-43. According to one survey, for example, 96% of employers with vaccination policies saw at most a slight increase in turnover compared to a normal year. Pmbl.-61474-75. OSHA's analysis has proven true in practice. Petitioners' predictions of worker attrition (Bus.Ass'ns.Opp.-15-19) and resulting supply-chain interruptions (NPA.Opp.-17-18) have not occurred in workplaces that imposed COVID-19-related protections. *See Florida v. HHS*, _ F.4th _, 2021 WL 5768796, at *16 (11th Cir. Dec. 6, 2021) (rejecting as "speculative" declarations that "resignations would occur" as a result of vaccination requirement). "[N]umerous private companies have undertaken vaccine mandates," with workers complying. *Determination of the Acting OMB Director*, 86 Fed. Reg. 63418, 63422 (Nov. 16, 2021). Thus, 99.7% of United Airlines' workforce complied with vaccination requirements, and the rate of vaccination at Tyson Foods now exceeds 96%. *Id.*; *see also* p. 11 n.5, *supra* (reporting 97.2% compliance with the federal government's employee vaccine requirement). And these statistics are for employers that require vaccination, whereas the Standard permits employers to offer masking and testing instead. Pmbl.-61475.

Petitioners' rebuttal evidence chiefly consists of declarations by employers stating their *beliefs* that employees will depart (*e.g.*, AIG.Torres.Decl.-4) or by a few employees stating that they would rather lose their jobs than comply (*e.g.*, Job.Creators.Mitchell.Decl.-¶6). OSHA provided reasons to discount such statements, as data show that "the number of employees" who ultimately refuse to comply has been "much lower than the number who claimed they might." Pmbl.-61475; *see* Amic.SBM-15. Regardless, petitioners' flimsy declarations provide no basis to reject OSHA's judgment that "potentially increased employee turnover" is not anticipated to be "substantial enough to negate normal profit and revenue." Pmbl.-61474-75.

Petitioners' theory (States.Opp.-21; RNC.Opp.-22) that unrecoverable costs always justify a stay would make extraordinary relief in agency cases the norm rather than the exception. Mot.-44. And any sanctions against employers that fail to comply with the Standard (Bentkey.Opp.-25) are neither imminent nor irreparable, because they are reviewable in court. Here, moreover, the statute has built-in protections against irreparable harm because employers can seek a "variance" where appropriate, 29 U.S.C. § 655(d), and can assert a defense of infeasibility, *see Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 952 (6th Cir. 1990).[7]

[7] Even if the Court were to conclude that some petitioners demonstrated irreparable harm, that would only warrant interim relief for those petitioners. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

2. The personal preference of some employees not to be vaccinated or not to mask and test cannot override the substantial benefits of the Standard. These practices are commonplace, and the Standard provides flexibility by permitting employers to choose the compliance option suited for their workplaces and allowing for appropriate individual accommodations where federal law requires. Pmbl.-61459, 61475 n.43, 61522.

Petitioners' efforts to constitutionalize their preferences about proper workplace precautions do not change the analysis. Even if petitioners' constitutional challenges were not plainly deficient, *see* pp. 4-6, *supra*, they offer no support for their assertion that the allocation of legislative power at issue here is an infringement on "personal liberty" (NPA.Opp.-18) comparable to the deprivation of individual rights. Mot.-45. Petitioners' bare allegations do not warrant blocking the Standard while this case proceeds.

3. The balance of equities and public interest are unaltered by state laws preempted by the Standard. Mot.-49-50. The federal government "does not invade areas of state sovereignty simply because it exercises its authority in a way that preempts conflicting state laws." *Florida*, 2021 WL 5768796, at *15 (quotation marks omitted). To "conclude otherwise would mean that a state would suffer irreparable injury from all . . . federal laws with preemptive effect." *Id.* The federal government also has a sovereign interest in enforcing its regulatory choices, not to mention protecting employees from an acute workplace danger. Thus, the harm from a stay does not

depend solely on abstract notions of sovereignty, but on the real world impact of the Standard.[8]

III. If This Court Disagrees, The Stay Should Still Be Modified

A. If the Court were inclined to leave the stay in place, the stay should be modified so that the masking-and-testing requirement can remain in effect during the pendency of this litigation. Mot.-46-48. Most of the petitioners do not even respond to this request.

Like the Fifth Circuit, while petitioners object to every aspect of the Standard, many of their arguments focus on requiring vaccination. Petitioners often refer to the multi-faceted Standard as a "Vaccine Mandate." *E.g.*, Job.Creators.Opp.-18; Phillips.Opp.-1; Bentkey.Opp.-1. Petitioners urge that OSHA's statutory authority does not include requiring vaccination. Bentkey.Opp.-13-15; RNC.Opp.-7-8. Petitioners focus many of their constitutional and "major-questions" arguments on the power to require vaccination. *E.g.*, Bus.Ass'ns.Opp.-10-11; DTN.Stay.Mot.-17-20. And petitioners' claimed injuries—including the risk of employee attrition—draws heavily on opposition to "vaccination" (*e.g.,* Job.Creators.Opp.-7) or conceptions of whether the federal government can create "vaccine policies" (States.Opp.-20).

[8] Any claimed injury to States should also be discounted given the significant question whether the State petitioners can invoke this Court's jurisdiction. Mot.-50 n.17. Those petitioners rely (States.Opp.-19-20) on precedent interpreting a different statute that, unlike this one, defines "person" to include a "public . . . organization." *See Maryland Dep't of Human Res. v. HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (a State "could be considered" a "public . . . organization").

At this "interim" stage, the Court must exercise its "discretion and judgment" to "mold" any "decree to meet the exigencies of the particular case." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (quotation marks omitted). If this Court does not dissolve the stay in its entirety, then in light of petitioners' focus on vaccines, the extraordinary and ongoing threat to employee safety in the workplace, and the proven ability of masking and testing to mitigate that threat, the Court should lift the portion of the order that enjoins the masking-and-testing requirement.[9]

B. If nothing else, any stay should be limited to the affirmative requirements imposed on employers, thereby leaving the Standard in effect to the extent that it gives employers the option to adopt COVID-19 policies regardless of contrary state law. Mot.-48-50. "The equities relied on" by the Fifth Circuit "do not balance the same way" in this "context." *Trump*, 137 S. Ct. at 2088. The State petitioners—the only petitioners who could plausibly claim to be "injured" by such preemption—have not seriously opposed this request, and any claimed injury caused by preemption cannot justify this aspect of a stay.

[9] The masking-and-testing requirement is not "indistinguishable" from "[a] vaccine mandate." Bus.Ass'ns.Opp.-21. Among other things, it does not raise the vaccine-specific issues and equities on which many petitioners have focused. Additionally, under the Standard, an employer may choose to require vaccination and forgo the masking-and-testing alternative. For those workplaces, the masking-and-testing alternative makes an obvious practical difference and eliminates any asserted injury from requiring vaccines.

CONCLUSION

This Court should dissolve the Fifth Circuit's stay as soon as possible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply complies with the Court's December 3, 2021 order because it contains 5,149 words. This reply also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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