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
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 PETITIONS FOR INITIAL HEARING EN BANC

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INTRODUCTION AND SUMMARY

Petitioners in approximately 20 of the 41 pending petitions for review seek initial hearing en banc of their 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. COVID-19 has killed more than 750,000 people in the United States and caused serious illness and long-lasting health effects for many more. Pmbl.-61424. Significant exposure and transmission, including numerous workplace "clusters" and "outbreaks," are occurring in workplaces throughout the Nation. Pmbl.-61411. Employees "are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

Acting pursuant to its express statutory authority to issue standards that ensure safe and healthful places of employment, OSHA issued an emergency temporary standard that gives employers the option of requiring vaccination or requiring their unvaccinated employees to mask and test. The Standard reflects OSHA's judgment that these measures are necessary to mitigate COVID-19 transmission in the workplace and the grievous harms the virus inflicts on workers. OSHA estimates that the Standard will, at a minimum, "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." Pmbl.-61408.

The various petitioners—some of whom seek initial hearing en banc and some of whom do not—have indicated their intention to present a large number of legal and factual issues to this Court. Some petitioners have urged that OSHA lacks statutory

authority to address a grave danger in the workplace caused by any virus or by a virus that also exists outside the workplace; that the detailed statutory standards provide no intelligible principle and therefore violate the non-delegation doctrine; that establishing conditions for safe or healthful participation in employment exceeds the federal government's authority under the Commerce Clause; and that the Standard violates the Due Process Clause. Some petitioners have also challenged OSHA's determinations that the COVID-19 virus is exposing employees to a grave danger in the workplace and that the Standard is necessary to protect employees from that grave danger. Among other things, these petitioners have posited that given employees' varied ages, prior infections, and differences among workplaces, OSHA could not issue any generally applicable standard. Several petitioners have additionally urged that certain religious employers are not properly subject to OSHA standards, that a longstanding OSHA regulation establishing certain carve-outs for churches and religious organizations is underinclusive, and that certain employers and employees are otherwise entitled to individualized exemptions. And the government expects that several petitioners will argue that the Standard is not sufficiently protective and should have required more to prevent exposure and transmission of COVID-19 in the workplace.

These consolidated cases do not warrant the extraordinary and unusual step of initial hearing en banc. Petitioners do not assert that this matter implicates any inter- or intra-circuit conflict. To the contrary, several petitioners urge that this case is governed by circuit law that they believe is correct and should not be reconsidered. Nor

does this matter present the kind of questions that require initial consideration by the full Court. The questions likely to be presented by petitioners' challenges, although undoubtedly of exceptional importance, concern application of settled principles of statutory interpretation and constitutional law to OSHA's Standard and review of OSHA's determinations for whether they are supported by substantial evidence in the record as a whole. Applications of established legal principles to a new and important rule ordinarily do not warrant en banc consideration; and the exigency at issue in this case affirmatively counsels against the delay that would accompany initial en banc consideration. Because this matter concerns an emergency Standard addressing a grave workplace danger that kills more American workers with each passing day, the importance of the case counsels against, rather than in favor of, initial consideration by all sixteen active members of this Court. En banc consideration of a case is particularly time consuming. This matter involves a large number of legal issues, raised by a diverse set of petitioners (each of whom can raise different claims), and review of a voluminous administrative record, all of which are more efficiently addressed in the first instance by a three-judge panel, not by the full sixteen-member Court. In light of the overwhelming and increasing threat to employees, it is critical that the Court resolve this case as soon as practicable.

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.

OSHA can establish, through notice-and-comment rulemaking, permanent standards that are "reasonably necessary or appropriate" to address a "significant risk" of harm in the workplace. *Industrial Union*, 448 U.S. at 642-643 (plurality op.) (quotation marks omitted); *see* 29 U.S.C. §§ 652(8), 655(b). If OSHA "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (B) that a standard "is necessary to protect employees from such danger," OSHA can issue emergency temporary standards that take "immediate effect" and also serve as "proposed rule[s]" for notice-and-comment rulemaking. *Id.* § 655(c). Such temporary standards are "effective until superseded" by a permanent standard, and OSHA "shall promulgate" such a permanent standard within "six months." *Id.* § 655(c)(2)-(3).

B. Factual Background

1. The novel COVID-19 virus is "highly transmissible" and deadly. Pmbl.-61409. COVID-19 has already killed more than 750,000 people in this country and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. The virus poses a particularly acute workplace danger. Significant exposure and transmission, including numerous workplace "clusters" and "outbreaks," 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; *see* Pmbl.-61411-66. As a result, "[u]nvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

2. 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. Consistent with its longstanding interpretations, 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. 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.[1]

[1] Based on evidence about virus-transmission rates and exposure risks, OSHA exempted employees who work alone, remotely, or exclusively outdoors. Pmbl.-61419.

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 OSHA estimated that the Standard will save at least 6,500 worker lives and prevent over 250,000 hospitalizations over a six-month duration. Pmbl.-61408. OSHA further explained that "[e]ven for those who survive a SARS-CoV-2 infection, 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 also considered the health and transmission risks for various employees. OSHA analyzed the danger to employees of all ages. *See, e.g.*, Pmbl.-61410, 61424. OSHA cited evidence about the comparative and total rates of death and hospitalization in people ages 18 to 49. *See, e.g.*, Pmbl.-61418; Pmbl.-61410 & n.9 (incorporating 86 Fed. Reg. 32376, 32384-85 (June 21, 2021), which also discussed the incidence of COVID-19 causing strokes, "even in young people"). And OSHA cited evidence that young people can bring the virus into workplaces and transmit it to others even if they do not suffer severe consequences themselves. *See, e.g.*, Pmbl.-61418 (discussing transmission studies, including of populations with mean and median ages between 31 and 44); Pmbl.-61412-14 (discussing outbreaks in schools, restaurants, nightclubs, and other settings with younger and mixed-age populations). With respect to "individuals who were previously infected," OSHA described several studies showing that "[a]

considerable number" do "not appear to have acquired effective immunity to the virus." Pmbl.-61421. OSHA identified "some evidence that infection-acquired immunity has the potential to provide a significant level of protection," Pmbl.-61422 (though less protection than for vaccinated individuals). But OSHA explained that "it is difficult to tell, on an individual level, which individuals" have attained that level of protection. Pmbl.-61421; *see* Pmbl.-61423 (existing "tools cannot determine what degree of protection a particular individual has"). And OSHA described various flaws in these studies, such as generally ignoring "people who had mild COVID-19 infections," which confer far less immunity. Pmbl.-61422-23.

OSHA likewise determined that it was "necessary" to adopt the Standard to protect unvaccinated employees from this danger in the workplace. Pmbl.-61436. OSHA described extensive evidence showing that vaccines dramatically reduce the risk of contracting and transmitting COVID-19, as well as developing serious disease. Pmbl.-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, a number of parties filed petitions for review in various courts of appeals, and several of those petitioners sought stays pending review. Shortly before the various petitions for review were assigned to this Court, the Fifth Circuit granted a stay and enjoined the implementation and enforcement of the Standard. Promptly after the cases were consolidated in this Court, the government moved to dissolve or, in the alternative, to narrow that stay and also requested expedited briefing on both the stay and the merits. Although this Court has not yet addressed whether a stay is warranted, multiple petitioners have filed requests for initial hearing en banc. This Court directed the government to file a consolidated response to these various requests.

ARGUMENT

Petitioners contend that this Court should grant initial hearing en banc to consider various constitutional, statutory, and regulatory questions related to OSHA's emergency temporary standard to address the grave danger of COVID-19 in the workplace. Rehearing en banc itself is an extraordinary procedure, and initial hearing en banc is particularly extraordinary. No sound reason exists to bypass the normal course of appellate proceedings here, especially given the need for expeditious resolution of these consolidated cases.

1. Courts of appeals ordinarily hear cases as panels of three judges. *See* 28 U.S.C. § 46(b); Fed. R. App. P. 35(a); 6 Cir. I.O.P. 35(a); *see also Davenport v. MacLaren*, 975 F.3d

537, 541 (6th Cir. 2020) (Sutton, J., concurring in the denial of rehearing en banc); *Mitts v. Bagley*, 626 F.3d 366, 366 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc). The Federal Rules of Appellate Procedure provide that hearing a case en banc "is not favored." Fed. R. App. P. 35(a). Even "rehearing en banc is an extraordinary procedure." 6 Cir. I.O.P. 35(a). And initial hearing en banc is particularly extraordinary. The "orderly and customary" procedure is not to hear a case en banc before a panel of the Court has heard the case at all. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854 (4th Cir. 2000) (Wilkinson, C.J., concurring in the denial of initial hearing en banc).

2. Petitioners provide no sound reason to bypass the normal course of judicial review. Petitioners do not contend that this matter implicates any inter- or intra-circuit conflict. *See* Fed. R. App. P 35(a)(1). To the contrary, several petitioners urge (*e.g.*, Phillips Pet. 8-11; RNC Pet. 2-3) that this matter is governed by binding precedent that petitioners do not wish this Court to reconsider. The government respectfully disagrees with petitioners' merits arguments for the reasons set out in several filings already before the Court. But petitioners' arguments about cases that they say are "indistinguishable" from this one (Phillips Pet. 10) only further counsels against initial hearing en banc. *See RLR Invs., LLC v. City of Pigeon Forge, Tennessee*, 4 F.4th 380, 390 (6th Cir. 2021) (panels are bound by this Court's and the Supreme Court's decisions); *see also Mitts*, 626 F.3d at 370 (Sutton, J., concurring in the denial of rehearing en banc) ("The judges of a circuit not only share the same title, pay and terms of office, but they

also agree to follow the same judicial oath"); *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243-1244 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc) (warning against a "process" that "would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it").

3. Nor do petitioners' arguments about the importance of this matter justify initial hearing en banc. *See* Fed. R. App. 35(a)(2). This matter is certainly important, in that workplace transmission in a once-in-a-century pandemic is devastating employees, and the lives and health of thousands of workers are at stake. Like many other areas of regulation, workplace health and safety regulations also affect many Americans and may cost large amounts of money in the aggregate. *See*, *e.g.*, Phillips Pet. 7-9; Southern Baptist Pet. 7; *see also American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 519-520 (1981) (explaining that Congress recognized as much when passing the Occupational Safety and Health Act). But the questions presented here concern the application of settled principles of statutory interpretation and constitutional law to an agency rule as well as review of whether the agency's determinations were supported by substantial evidence in the record as a whole. *See* 29 U.S.C. § 655(f) ("The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."). Petitioners' extensive discussion of the merits and exhortation that the Standard must be set aside (*e.g.*, Alabama Pet. 5-17) improperly "reduces the 'exceptional importance' test to a self-serving and result-oriented criterion," *Bartlett*, 824

F.2d at 1243 (Edwards, J., concurring in the denial of rehearing en banc), that cannot justify initial hearing en banc. And litigants should not "prejudge" how any members of "the court will adjudicate a case." *Belk*, 211 F.3d at 855 (Wilkinson, J., concurring in the denial of an initial hearing en banc) (stressing that courts should resist any public perception "that certain judges invariably resolve certain cases in certain ways").

The importance of this matter counsels against, not in favor of, initial consideration by all sixteen active members of this Court. Given the grave danger of COVID-19 in the workplace, as well as the increasing number of workers killed and hospitalized each day, the need for a prompt resolution of these consolidated cases is extraordinary. But as judge after judge has observed, hearing a case en banc is an "inefficient process," *Mitts*, 626 F.3d at 370 (Sutton, J., concurring in denial of en banc), that is particularly "unwieldy" and "time-consuming," *Hart v. Massanari*, 266 F.3d 1155, 1172 & n. 29 (9th Cir. 2001) (collecting citations and studies by "[a]n impressive array of judges and academics" that stress the "time consuming" nature of en banc consideration); *see also, e.g.*, *Neuman*, 824 F.2d at 1244 (Edwards, J., concurring in the denial of rehearing en banc) (en banc "substantially delays" the case).

As discussed, significant exposure and transmission of COVID-19, including numerous workplace "clusters" and "outbreaks," are occurring in workplaces throughout the Nation. Pmbl.-61411. Employees "are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549. Case numbers and deaths have also recently been increasing, and another new variant of concern (Omicron) has

recently been identified.[2] OSHA estimates that the Standard will, at a minimum, "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." Pmbl.-61408. Accounting for workers aged 18-74, those estimates rise to 13,847 lives saved and 563,102 hospitalizations prevented—an average of roughly 77 lives and 3128 hospitalizations per day. OSHA, Health Impacts of the COVID-19 Vaccination and Testing ETS 1 (2021). Given the exigent circumstances, the government has requested that the Court expedite briefing on the stay and issue an expedited schedule for briefing on the merits. If this Court determines to leave the Standard stayed pending review, then it is particularly critical that the process proceed expeditiously. And if the Court dissolves the Fifth Circuit's interim stay, then petitioners' pleas for prompt resolution counsel against initial hearing en banc.

The numerous legal issues and voluminous record are also especially ill-suited to initial en banc review. The over three dozen groups of petitioners have already indicated their intentions to raise a large number of legal and factual issues.

[2] The "7-day moving average of daily new cases (88,482) increased 16.1%" in the United States as of November 17 "compared with the previous 7-day moving average (76,223)." CDC, *COVID Data Tracker Weekly Review*, https://go.usa.gov/xeQHc. And the "7-day moving average of new deaths" during that period exceeded 1,000, with hospitalizations exceeding 5,000. *Id.* Workplace outbreaks of COVID-19 continue to occur; for example, Colorado recently reported 724 active outbreaks in a variety of occupational settings, resulting in 6,190 COVID-19 staff cases and 6 staff deaths. Colorado Department of Public Health & Environment, *COVID-19 Outbreak Data*. https://go.usa.gov/xeQH4. That is a significant increase compared to what Colorado reported in early September. *See* Pmbl.-61413. On Friday, November 26, the CDC announced that it is tracking the new Omicron variant. https://go.usa.gov/xem3a.

Adjudicating this case will also involve reviewing OSHA's lengthy and detailed analyses in light of a voluminous administrative record. *See* 29 U.S.C. § 655(f). The Standard's preamble spans 150 pages of the Federal Register, and the certified index to the administrative record includes more than 650 entries of studies, reports, and other supporting materials. Such complex and time-sensitive issues are more efficiently considered by a three-judge panel, and not the full sixteen-member Court. Indeed, even if this Court were later to conclude that further review is necessary, a panel decision following briefing and argument would "refine, narrow, and focus" the issues for the full Court's (or the Supreme Court's) consideration. *Belk*, 211 F.3d at 854 (Wilkinson, C.J., concurring in the denial of initial hearing en banc).

CONCLUSION

For the foregoing reasons, the petitions for initial hearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response contains 3308 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.

s/ Brian J. Springer
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