IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOB CREATORS NETWORK, et al.,

Petitioners,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Respondents.

STATE OF MISSOURI, et al.,

Petitioners,

v.

JOSEPH R. BIDEN, et al.,

Respondents.

On Petition for Review

RESPONDENTS' OPPOSITION TO STAY MOTIONS

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY

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

Petitioners seek emergency relief, but they face little prospect of harm before the Standard takes full effect in January 2022. No reason exists to rule on petitioners' stay motions immediately, before the Judicial Panel on Multidistrict Litigation even assigns a court to hear the many pending challenges. *See* 28 U.S.C. § 2112(a). That assignment will likely occur early next week.

Even if this Court adjudicates the motions, petitioners are not entitled to a stay. Petitioners are not likely to succeed on the merits because their arguments are foreclosed by precedent, inconsistent with the statutory text, and contrary to the considerable evidence that OSHA analyzed and discussed when issuing the Standard. Nor have petitioners shown that their claimed injuries outweigh the harm of delaying a Standard that will save thousands of lives and prevent hundreds of thousands of hospitalizations. OSHA's detailed analysis of the Standard's impact shows that a stay would likely cost dozens or even hundreds of lives per day. Petitioners' asserted injuries,

by contrast, are speculative and remote and do not outweigh the interest in protecting employees from a dangerous virus while this case proceeds.

STATEMENT

A. Legal Background

The Occupational Safety and Health Act of 1970 (OSH Act) seeks "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The Act vests the Secretary of Labor, acting through OSHA, with "broad authority" to establish "standards" for health and safety in the workplace. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 611 (1980) (plurality op.); *see* 29 U.S.C. §§ 654(a)(2), (b), 655.

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

B. Factual Background

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

OSHA has continuously monitored the pandemic and previously hoped for "widespread voluntary compliance" with "safety guidelines" to protect against this workplace threat. Pmbl.-61444. In recent months, however, "the risk posed by COVID-19 has changed meaningfully," Pmbl.-61408, and "nonregulatory" options have proved vastly "inadequate," Pmbl.-61430. As more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission." Pmbl.-61409; *see* Pmbl.-61411-66. As a result, "[u]nvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

C. COVID-19 Vaccination And Testing Emergency Temporary Standard

On November 4, 2021, OSHA issued an emergency temporary standard to address these "extraordinary and exigent circumstances." Pmbl.-61434. In the Standard, OSHA provided over 100 pages of thoroughly reasoned analysis showing that COVID-19 presents a "grave danger" to unvaccinated workers and that the

requirements of the Standard are "necessary" to address that grave danger. Pmbl.-61407-504. The Standard requires employers with 100 or more employees to select one of two workplace precautions. Employers may "implement a mandatory vaccination policy." Pmbl.-61436. Or employers may offer employees the choice to have "regular COVID-19 testing" and "wear a face covering." Pmbl.-61520. The Standard staggers compliance deadlines, providing 60 days to implement the testing requirements and 30 days to implement all other requirements. Pmbl.-61549. Employees who exclusively work from home, alone, or outdoors are exempted. Pmbl.-61419.

ARGUMENT

Petitioners ask this Court to stay the Standard issued by OSHA to address the dangers of COVID-19 in the workplace. To demonstrate that this extraordinary remedy is warranted, petitioners must at a minimum show that they have a strong likelihood of success on the merits, that they are likely to suffer irreparable harm without the requested order, and that such harms outweigh the harms to the public interest of staying this Standard. *See Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[1] Petitioners have failed to make these showings.

[1] Although styled as motions for "stays," petitioners seek orders modifying the pre-litigation status quo that are better characterized as injunctions. *See Nken*, 556 U.S. at 428-429. But because the equitable standards are substantially the same, that does not affect the analysis.

I. Petitioners' Requests For Relief Are Premature

A. Petitioners ask this Court to grant emergency relief.[2] Job Creators Mot. 24; Missouri Mot. 23. But petitioners claim little prospect of harm until the Standard takes full effect in January, and they do not justify their request that this Court take up their stay motion now. The Court should instead allow this matter to proceed under the process that Congress established for judicial review of OSHA standards.

That process contemplates that litigation concerning the Standard will soon be consolidated in one court of appeals. Petitions for review have now been filed in 11 circuits. The Judicial Panel on Multidistrict Litigation will "random[ly] designate" one circuit from among those where petitions were filed within ten days of the Standard's issuance. 28 U.S.C. § 2112(a)(1), (3). All other courts "*shall* transfer . . . proceedings to th[at] court." *Id.* § 2112(a)(5) (emphasis added). That process will likely occur in *mere days*, on or about November 16—just one day after petitioners' reply briefs are due.

The court chosen to adjudicate these matters will have sufficient time to rule on any preliminary motions. To avoid needlessly duplicative litigation and conserve judicial resources, the Court should decline to act in this emergency posture.

[2] There is a significant question whether the State petitioners qualify as "persons" under 29 U.S.C. § 655(f), but the Court does not have to decide that issue to dispose of the stay motion because private petitioners also joined the motion.

II. Petitioners Are Unlikely To Succeed On The Merits

A. OSHA Reasonably Concluded That The Standard Is Necessary To Address A Grave Danger

OSHA is entrusted with issuing emergency temporary standards if the agency determines that such a standard is necessary to protect employees from a grave danger. 29 U.S.C. § 655(c)(1). OSHA thoroughly explained its determinations, and substantial evidence supports these findings.

1. OSHA properly "determine[d]" that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). Petitioners do not dispute that the COVID-19 virus is both a physically harmful agent and a new hazard. Pmbl.-61408. It readily fits the definition of an "agent," which is "a chemically, physically, or biologically active principle." https://www.merriam-webster.com/dictionary/agent. OSHA regulations have previously explained as much. *See, e.g.*, 29 C.F.R. § 1910.1020(c)(13) (defining "toxic substances or harmful physical agents" to include "biological agent[s] (bacteria, virus, fungus, etc.)"); *id.* § 1910.1030 (bloodborne-pathogens rule issued pursuant to authority to regulate "toxic materials or harmful physical agents"). The COVID-19 virus also constitutes a "new hazard." It is "a source of danger." https://www.merriam-webster.com/dictionary/hazard (defining "hazard"). And it was unknown in the United States until early 2020. Pmbl.-61408.

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

2. OSHA properly "determine[d]" that the Standard "is necessary to protect employees" from this grave danger. 29 U.S.C. § 655(c)(1). The Standard utilizes "the most effective and efficient workplace control available: vaccination," and it offers, as an alternative, "regular testing [and the] use of face coverings." Pmbl.-61429. Citing extensive evidence, OSHA recognized that vaccination "reduce[s] the presence and severity of COVID-19 cases in the workplace," and effectively "ensur[es]" that workers are protected from being infected and infecting others. Pmbl.-61520. OSHA properly exercised its discretion to offer an alternative whereby employees can be "regularly tested for COVID-19 and wear a face covering." Pmbl.-61436. The Standard provides employers with this choice because they are better positioned to determine which approach will "secure employee cooperation and protection." *Id.* OSHA thus crafted

a regulatory approach that protects unvaccinated workers while leaving leeway for employers to determine the most appropriate option for their workplaces.

Taken together, these risk-mitigation methods will protect unvaccinated workers against the most serious health consequences of a COVID-19 infection and "reduce the overall prevalence" of the COVID-19 virus "at workplaces." Pmbl.-61435. Indeed, OSHA estimates that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." Pmbl.-61408. OSHA also properly concluded that its existing regulatory tools do not "provide for the types of workplace controls that are necessary to combat the grave danger addressed by" the Standard. Pmbl.-61441.

B. Petitioners' Legal Objections Lack Merit

1. Petitioners wrongly contend (Job Creators Mot. 14-16; Missouri Mot. 18-19) that OSHA's authority might be an unconstitutional delegation of legislative power. "Only twice in this country's history" (and only in 1935) has the Supreme Court "found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.). Congress's delegations are valid so long as they provide an "intelligible principle" to which the agency must conform. *Id.* at 2123. Section 655(c)(1) provides clear standards that easily exceed this threshold. It permits only standards necessary to protect employees from the grave danger of new hazards or exposure to toxic or physically harmful substances or agents. Courts have had no trouble evaluating prior

emergency standards under that rubric. *See, e.g.*, *Dry Color Mfrs. Ass'n, Inc. v. Department of Labor*, 486 F.2d 98, 107 (3d Cir. 1973) (vacating standard with respect to two of fourteen carcinogens). Petitioners cannot evade this inquiry by conjecturing (Job Creators Mot. 14-15) about future changes to established Supreme Court precedent.

The Supreme Court has consistently "upheld even very broad delegations," including authorities "to regulate in the 'public interest,'" "to set 'fair and equitable' prices," and "to issue whatever air quality standards are 'requisite to protect the public health.'" *Gundy*, 139 S. Ct. at 2129. The narrower delegation in Section 655(c)(1) likewise provides a meaningful standard constricting OSHA's authority to a defined category of risks. Petitioners' own authority (Job Creators Mot. 15-16; Missouri Mot. 19) involving OSHA's permanent standard for benzene proves the point. There, the Supreme Court rejected an expansive interpretation of a neighboring OSH Act provision that would have allowed the agency to require that employers "provide absolutely risk-free workplaces whenever it is technologically feasible to do so." *Industrial Union Dep't*, 448 U.S. at 641 (plurality op.). Because the statutory text and history demonstrated that Congress was not concerned with absolute safety, the Court concluded that OSHA had to make a threshold finding of "significant risk of material health impairment" before issuing a permanent standard. *Id.* at 642-52. This threshold finding—which is akin to Section 655(c)(1)'s grave danger finding, *id.* at 640 n.45—*avoided* any nondelegation issue by requiring quantification of the risk. *See id.* at 646.

Petitioners likewise err in urging (Missouri Mot. 20-21) that the Standard alters the balance of federal and state power. Congress has long regulated companies engaged in interstate commerce in a variety of ways (e.g., Title VII, federal minimum wage), and the Supreme Court has upheld such regulations on employment conditions as within Congress's commerce power, *see, e.g.*, *United States v. Darby*, 312 U.S. 100, 123-125 (1941). The OSH Act permits OSHA to issue "standards applicable to businesses affecting interstate commerce," 29 U.S.C. §§ 651(b)(3), 652(3), (5), in order "to assure . . . safe and healthful working conditions" for the nation's workers, *id.* § 651(b). The Standard reflects congressional findings that "illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *Id.* § 651(a); *see also* Pmbl.-61473-74 (discussing cost of absenteeism to employers). Just as a citywide vaccination requirement was a permissible means to protect Cambridge, Massachusetts citizens from the incidence of smallpox in the city, *Jacobson v. Massachusetts*, 197 U.S. 11, 27-28 (1905), OSHA's Standard is a permissible means to protect employees from the workplace transmission of the dangerous COVID-19 virus whose devastating effects have been felt by individuals and commercial enterprises across the country.

2. Petitioners' contention (Missouri Mot. 14-17) that OSHA cannot address hazards that exist both inside and outside the workplace is equally unsound. Petitioners' arguments have no basis in the statutory text, which broadly refers to "agents" and

"new hazards." 29 U.S.C. § 655(c)(1). The text does not authorize OSHA to "requir[e] workers to eat more broccoli" or to regulate "anything which affects or improves working conditions." Missouri Mot. 16. Rather, the text is limited to agents and hazards that endanger "employees," 29 U.S.C. § 655(c)(1), and is further limited both by the general rule that OSHA standards may apply only to "employment and places of employment," *id.* § 652(8), and by the "grave danger" and necessity requirements for issuing emergency standards.

Petitioners improperly ask this Court to "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). Even if Congress's primary focus were "uniquely . . . work-related risk[s]" (Missouri Mot. 16), Congress did not limit OSHA's authority to addressing that subset of grave dangers. Statutes "often go beyond the principal evil [targeted by Congress]," and "it is ultimately the provisions of our laws" that govern. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Those principles are particularly applicable here, where the provision at issue exists to address new or evolving dangers, and "the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions," Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

Contrary to petitioners' suggestion, moreover, COVID-19 *is* a workplace hazard. Employees gather in one place and interact, thus risking workplace transmission of a highly contagious virus. Pmbl.-61411-17. It is therefore unsurprising that OSHA

identified workplace "clusters" and "outbreaks," and presented significant "evidence of workplace transmission." Pmbl.-61411. While at work, "workers may have little ability to limit contact with," and possible exposure from, "coworkers, clients, members of the public, patients, and others." Pmbl.-61408. As the statutory text confirms, OSHA may promulgate standards for both "employment and *places of employment*." 29 U.S.C. § 652(8) (emphasis added). When drafting the OSH Act, Congress compared regulation of workplace dangers to regulation of the environment, explaining that "[o]ur environment is not solely the air we breathe traveling to and from work" but "is also the air we breathe at work," and that "over 80 million workers spend one-third of their day in that environment." H.R. Rep. No. 91-1291, at 14 (1970). Petitioners, by contrast, would arbitrarily prohibit OSHA from addressing hazards or agents "encountered largely outside the workplace" (Missouri Mot. 16) even where, as here, the hazards or agents spread—and create grave danger—inside the workplace.

The idea that workplace hazards include diseases that exist outside of the workplace is hardly novel. OSHA has required precautions for bloodborne pathogens, which can be contracted outside the workplace, and has long imposed workplace sanitation and fire rules, even though such concerns are not workplace-specific. *E.g.,* Pmbl.-61407-08. Indeed, as exemplified by famous outbreaks of tuberculosis and smallpox in factories, workplace dangers have long been understood to include the dangers of contracting communicable diseases as a result of being in close proximity to other employees. *See also, e.g.,* Danovaro-Holliday et al., *A Large Rubella Outbreak with*

Spread from the Workplace to the Community, 284 JAMA 2733, 2739 (2000) (documenting rubella spread in meatpacking plants).

Petitioners similarly lack support for their passing suggestion (Missouri Mot. 16-17) that vaccination falls outside the statute. Congress "authoriz[ed] the Secretary of Labor 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 employment and places of employment," *id.* § 652(8). The Standard calls for vaccination (and other) policies that neatly fit within that language. And another OSH Act provision indicates that OSHA may order "immunization," including to "protect[] the health or safety of others." *Id.* § 669(a)(5).

Petitioners' reliance (Job Creators Mot. 12-14; Missouri Mot. 18) on *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), and *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), is misplaced. Those cases interpreted ambiguous statutory language based on assumptions about when Congress is likely to delegate to an agency a policy decision "of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324. This Court need not consider those assumptions here because the statutory text is unambiguous and limited to addressing grave dangers to employees in the workplace. Like many other areas of regulation, workplace-safety regulations may affect many Americans and cost large amounts of money in the aggregate. But nationwide effect and compliance costs, which are common in many forms of regulation, do not require

some sort of congressional clear statement or compel a circumscribed interpretation of a deliberately broad congressional grant. The ample, unambiguous tools Congress gave OSHA to address grave dangers to employees in the workplace authorized OSHA's decision to require vaccination or masking and testing.

C. OSHA Had Ample Basis To Support Its Findings On The Relevant Considerations

Unable to identify any legal error, petitioners also assert that OSHA erred when making the necessary findings or failed to address pertinent considerations. But petitioners disregard OSHA's 150-page analysis as well as the deference owed to OSHA's evidence-based determinations. *See* 29 U.S.C. § 655(f) (determinations "conclusive if supported by substantial evidence").

1. Petitioners wrongly assert (Job Creators Mot. 16-17; Missouri Mot. 13) that the Standard cannot be necessary to protect employees from a grave danger because OSHA did not act earlier. Dangers can evolve, as can the need for a standard to address them. That is what happened here, as OSHA explained at length. OSHA can also obtain "new information" or respond to "new awareness," and, of course, need not address all aspects of a problem in one fell swoop. *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984); *see also id.* (to conclude "that because OSHA did not act previously it cannot do so now" would "only compound[]" any "failure to act"). Here, OSHA described the "extraordinary and exigent circumstances" warranting the

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

OSHA fully detailed the evolving danger and new information that prompted the agency to issue the Standard. When the pandemic began, "scientific information about the disease" and "ways to mitigate it were undeveloped." Pmbl.-61429. OSHA crafted workplace guidance but declined to issue an emergency temporary standard "based on the conditions and information available to the agency at that time," including that "vaccines were not yet available" and that it was unclear if "nonregulatory" options would suffice. Pmbl.-61429-30.

OSHA explained that it acted now because voluntary safety measures proved ineffective, COVID-19 grew more virulent, and fully approved vaccines and tests are increasingly available. Prior nonregulatory options have proven "inadequate," and due to "rising 'COVID fatigue,'" voluntary precautions are becoming even less common. Pmbl.-61444. Meanwhile, since June 2021, when OSHA adopted a standard for healthcare workers, "the risk posed by COVID-19 has changed meaningfully." Pmbl.-61408. As more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." Pmbl.-61409-12, 61431. At the same time, vaccines are now widely available, Pmbl.-61450; large-scale studies have further confirmed the "power of vaccines to safely protect individuals," including from the Delta variant, Pmbl.-61431; "the FDA granted approval" (rather than Emergency Use Authorization)

to one vaccine (Pfizer) on August 23, *id.*; FDA has "authorized more than 320 tests and collection kits," Pmbl.-61452; and OSHA determined that "the increasing rate of production" will ensure sufficient supply before the "testing compliance date," *id.*

This is not an unexplained departure from previous policies, as petitioners intimate (Missouri Mot. 16). It reflects OSHA's fact-intensive analysis of an evolving danger and the need for a standard to address it. OSHA candidly acknowledged that when confronting different workplace health hazards, it has sometimes used a "voluntary approach." Pmbl.-61436. Based on new facts—including the predominance of the Delta variant—OSHA responded with a new Standard. And, consistent with its prior preference for ensuring flexibility, OSHA declined to issue "a strict vaccination mandate with no alternative" and gave employers flexibility to offer a masking-and-testing option. *Id.*

Petitioners also cite (Job Creators Mot. 17) a May 2020 response to an emergency mandamus petition, in which OSHA described its ongoing analysis of the threat of COVID-19 in the workplace and its view that a standard was not necessary at that time given voluntary precautions and a statutory duty to protect employees. *See* Pmbl.-61430 (describing OSHA's thinking at the time). OSHA stressed the many "uncertainties" and reserved the ability to change its approach "when critical new . . . information is learned." Mand. Opp. 29-30. With little information available in May 2020, OSHA was concerned about acting on "incomplete or ultimately inaccurate information" and unintentionally issuing a standard that proved "counterproductive." Mand. Opp. 30.

At that very early stage of COVID-19's emergence, little was understood about the virus and how it spreads, testing was sometimes difficult to find, and no vaccines were available. OSHA's decision at that time does not undermine its current decision to address the existing hazard with effective tools that did not exist then but are widely available now.

2. Petitioners' contention (Job Creators Mot. 17-18) that OSHA incorrectly implemented a "one-size-fits-all" approach misunderstands the Standard and disregards OSHA's considered explanation and supporting evidence. Based on evidence about virus-transmission rates, OSHA exempted employees who work alone, remotely, or exclusively outdoors. Pmbl.-61419. OSHA included other workers, explaining that "employees can be exposed to the virus in almost any work setting" and that even if sometimes physically distanced, employees routinely "share common areas like hallways, restrooms, lunch rooms, and meeting rooms" and are at risk of infection from "contact with coworkers, clients, or members of the public." Pmbl.-61411-12. Based on its analysis of the record evidence, OSHA concluded that the Standard was necessary to protect all unvaccinated workers in "a wide variety of work settings across all industries" from the COVID-19 virus. Pmbl.-61412. These determinations also arise in the context of an emergency standard under Section 655(c), which exists "to provide immediate protection" and "necessarily requires rather sweeping regulation." *Dry Color*, 486 F.2d at 102 n.3.

To the extent petitioners suggest (Job Creators Mot. 18) that OSHA must conduct a cost-benefit analysis before issuing an emergency standard, they are incorrect. The very case on which they rely noted that OSHA need not conduct any "formal cost-benefit analysis" before issuing an emergency standard. *Asbestos*, 727 F.2d at 424 n.18; *see id.* (reasoning that it is "unlikely" that "the agency would have time to conduct such an analysis" to respond to emergencies). In any event, OSHA's detailed cost analysis shows that compliance costs, Pmbl.-61475-95, are reasonable in relation to the substantial benefits of the Standard, *see* OSHA, *Health Impacts of the COVID-19 Vaccination and Testing ETS* (2021) (Health Impacts); *see also* Pmbl.-61408 (estimating that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" over a six-month duration).

3. The record belies petitioners' assertions that OSHA failed to consider various aspects of the problem in issuing the Standard. Petitioners express disagreement (Missouri Mot. 7-8) with OSHA's conclusion that people who were previously infected face a grave danger. *See* Pmbl.-61421-24. OSHA described several studies showing that "[a] considerable number of individuals who were previously infected with SARS-CoV-2 do not appear to have acquired effective immunity to the virus." Pmbl.-61421. OSHA also discussed "some evidence that infection-acquired immunity has the potential to provide a significant level of protection," Pmbl.-61422 (noting less protection than for those who are vaccinated), but explained that "it is difficult to tell, on an individual level, which individuals" have attained that level of protection, Pmbl.-61421; *see* Pmbl.-61423

(existing "tools cannot determine what degree of protection [that] particular individual has"). OSHA further explained that these studies suffered from "selection bias" by generally ignoring "people who had mild COVID-19 infections," which are known to confer far less immunity. Pmbl.-61422-23. And these studies had no "established thresholds to determine full protection from reinfection or even a standardized methodology to determine infection severity or immune response." Pmbl.-61422. Petitioners' assertion (Missouri Mot. 7-8) that people with previous infections face little danger also ignores that the Standard not only seeks to prevent serious illness but also seeks to prevent transmission in the workplace. *See, e.g.*, Pmbl.-61418-19; *see also* Pmbl.-61403 (noting that unvaccinated workers are more likely to both "contract and transmit COVID-19 in the workplace").

Petitioners err in relying on an extra-record declaration.[3] It is well established that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). And OSHA's determinations are "conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. § 655(f). Here, OSHA reviewed available evidence, candidly acknowledged where scientific evidence is not uniform, and explained its analysis. *See* H.R. Rep. No. 91-1291, at 18 (warning that

[3] Petitioner's declaration is also flawed in many respects. Notably, it disregards important aspects of OSHA's analysis, including the selection biases in the existing studies of prior infection and the impossibility of determining functional immunity on an individual basis. *See* Pmbl.-61421-23 (discussing these limitations).

the Secretary should not be "paralyzed by debate surrounding diverse medical opinions"). That OSHA arrived at a different, reasonable conclusion than petitioners or their declarant affords no basis to vacate the Standard.

Petitioners similarly disregard (Missouri Mot. 9-10) the explanation and evidence supporting OSHA's determination that "potentially increased employee turnover" is not anticipated to be "substantial enough to negate normal profit and revenue." Pmbl.-61474-75. According to one survey, 96% of employers who implemented vaccination policies saw at most a slight increase in turnover compared to a normal year. *Id.* OSHA also identified several examples of employers whose recruiting efforts were bolstered by instituting such policies. *Id.* And OSHA provided reasons to doubt the survey percentages that petitioners cite (Missouri Mot. 9), as data suggests that "the number of employees who actually leave an employer" has been "much lower than the number who claimed they might." Pmbl.-61475 (comparing 48-50% of survey respondents who *said* they would quit if vaccination were required with 1-3% of employees who *actually* left employers with mandatory policies). Particularly when considered alongside other benefits of the Standard—including fewer COVID-19 illnesses and reduced absenteeism at work—this evidence adequately justifies OSHA's conclusion that the Standard's "net effect . . . on employee turnover will be relatively small." Pmbl.-61475.

Petitioners further contend (Missouri Mot. 10-12) that OSHA cannot protect unvaccinated employees from the grave danger of COVID-19 transmission in the workplace because those employees made "their own decision to forego vaccination."

Petitioners assume that any employee can easily choose to get vaccinated, but many employees will not do so for health or religious reasons. Pmbl.-61519. In any event, petitioners' argument has no footing in the statutory text, which authorizes standards that are "necessary to protect employees" from "grave danger." 29 U.S.C. § 655(c). Other courts have explained, in the context of rules governing workplace transmission of bloodborne pathogens, that even if as a policy matter, Congress could have chosen not to authorize OSHA to protect people "who refuse to be vaccinated" because those people are "assuming the risk and should be left to bear the consequences," the OSH Act "is constructed on different premises that [courts] are not free to question." *American Dental Assoc. v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993).

Also without merit is petitioners' claim (Missouri Mot. 12) that the Standard should be set aside because its enforcement might in some cases impinge on a religious employer's constitutional right to select and choose when to discipline "ministerial employees." As an initial matter, these employer-specific arguments do not provide a basis to stay the rule for any party other than the private petitioners in this case who raise religious claims. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). But even that more limited relief would not be appropriate because petitioners' claims are not likely to succeed.

Nothing in the Standard implicates the First Amendment's ministerial exception, which the Supreme Court has applied only to "decision[s] to fire" certain religious

employees, and which no court has held excuses employers from health and safety regulations. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012); *see Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049, 2069 (2020). The Standard does not require any employer to fire or discipline any employee, and it affirmatively allows employees to request and receive a religious exemption from their employers. *See* Pmbl.-61522. Because the Standard does not permit OSHA to second-guess those religious-exemption decisions, it does not create any risk of impermissible "interference by secular authorities" in religious affairs. Missouri Mot. 12 (quoting *Morrisey-Berru*, 140 S. Ct. at 2061). And OSHA's repeated discussion of religion-based exemption requests shows that the agency did not fail to consider this "critical aspect of the problem" (Missouri Mot. 13). *See* Pmbl.-61447-48, 61472-73, 61512, 61514-15, 61519, 61521, 61524, 61532, 61540, 61553.

4. Petitioners' unsupported allegation (Missouri Mot. 5-6) that OSHA's explanations are "pretextual" is incorrect and does not bear on review of the comprehensive administrative record here. A court "may not reject an agency's stated reasons for acting" even if "the agency might also have had other unstated reasons," and a court "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." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). "It is hardly improper" for officials "to come into office with policy preferences" and to work with agency staff to evaluate the "basis for a preferred policy." *Id.* at 2574. And 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) (quotation marks omitted). Judicial review should be based on an "agency's contemporaneous explanation in light of the existing administrative record." *Commerce*, 139 S. Ct. at 2573. Here, OSHA amply explained its conclusions, and the fact that the President earlier requested that the agency consider whether to issue a standard (Missouri Mot. 1-2) does not in any way undermine those conclusions.

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

Having failed to establish a likelihood of success on the merits, petitioners cannot obtain a stay. *See Nken*, 556 U.S. at 433-434; *id.* at 438 (Kennedy, J., concurring); *cf. Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013). Petitioners also have not shown any injury that outweighs the injuries to the government and the public interest and that favors staying a Standard that will save thousands of lives.

A. Most fundamentally, the harms of a stay to the government and the public—which merge here, *see Nken*, 556 U.S. at 435—would likely be significant. Delaying this Standard would endanger many thousands of people. As discussed, COVID-19 has already killed over 750,000 people in the United States and caused "serious, long-lasting, and potentially permanent health effects" for many more. Pmbl.-61424. And there is extensive evidence of "workplace transmission." Pmbl.-61411. With the reopening of

workplaces and the emergence of the highly transmissible Delta variant, the threat to workers is ongoing and overwhelming. *See* Pmbl.-61411-15. Workers "are being hospitalized with COVID-19 every day, and many are dying." Pmbl.-61549.

The Standard responds to these "extraordinary and exigent circumstances," Pmbl.-61434, and the stay that petitioners seek would likely cause significant harm. Even limiting its analysis to employees aged 18-64 who elect vaccination, OSHA estimates that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" over a six-month duration. Pmbl.-61408; *see* Health Impacts. Accounting for workers aged 18-74, those estimates rise to 13,847 lives saved and 563,102 hospitalizations prevented—an average of roughly 77 lives and 3,128 hospitalizations per day. Health Impacts 1. These estimates do not include the long-lasting and serious health effects avoided. And these figures understate the impact of a stay because they estimate only the protection provided by vaccination to workers who become vaccinated—not the protection to unvaccinated workers when "vaccinated workers are less likely to spread the virus" or when other workers mask and test. *Id.* at 2; Pmbl.-61438-39.

A stay could also cause significant harm outside of the workplace. OSHA's estimates do not account for "avoided COVID-19 cases among family and friends that would occur due to exposure to an infected worker," diminished "transmission from employees to clients or other visitors," prevented breakthrough infections in vaccinated workers, and reduced infections in vaccinated employees "caused by non-workplace

exposures." Health Impacts 2. And none of that includes the benefits from reducing strains on healthcare systems, slowing the emergence of new variants, and combatting the pandemic's ongoing effects on the economy. *Id.*

Simply put, delaying the Standard would likely cost dozens or even hundreds of lives per day, in addition to large numbers of hospitalizations, other serious health effects, and tremendous costs. That is a confluence of harms of the highest order. *See, e.g.*, *Does 1-6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021); *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020).

B. Petitioners fail to establish any impending irreparable injury, let alone one that could outweigh these harms. Petitioners claim little prospect of injury until the Standard takes full effect early next year. And petitioners must further establish that any harm to them could overcome the extraordinary harms to the government and the public interest detailed above. They cannot meet that burden.

Petitioners would (Job Creators Mot. 19-20) prefer not to pay the minimal costs of complying with the Standard, but "ordinary compliance costs" are "typically insufficient" to justify a stay. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *see American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (similar). A contrary rule would be "inconsistent with [the] characterization of [equitable] relief as an extraordinary remedy." *Winter*, 555 U.S. at 22.

Nor do petitioners demonstrate that their expenditures would be so certain and substantial as to warrant the extraordinary relief they seek. Based on a detailed

economic analysis making several conservative assumptions, Pmbl.-61460-88, OSHA estimated a cost to employers of about $35 per covered employee—or $94 per covered unvaccinated employee, Pmbl.-61472, 61493. Contrary to petitioners' suggestion (Job Creators Mot. 21), they need not provide a "sterile location" or expend "manpower" to conduct testing. In fact, the Standard does not require employers to "pay for *any* costs associated with testing" and instead allows employers to have their employees "independently schedul[e] tests at point-of-care locations" outside of work hours. Pmbl.-61531-32 (emphasis added). And if the Standard were truly infeasible for their operations, petitioners could seek a "variance." 29 U.S.C. § 655(d).

Petitioners further speculate (Job Creators Mot. 20, 23-24) about lost business and supply-chain disruptions if workers quit when they are required to undergo weekly testing beginning in January 2022. These fears are poorly substantiated and likely inflated. Petitioners do not attempt to ascertain what portion of unvaccinated employees may be entitled to an exemption or accommodation, nor do they seriously engage with empirical data, cited by OSHA, showing that "the number of employees who actually leave an employer" has been "much lower than the number who claimed they might." Pmbl.-61475. Petitioners' conjecture that employees may move to smaller companies that are not yet subject to the Standard does not fully account for the barriers to switching jobs or OSHA's express statement that it seeks information about applying the Standard to smaller companies. Pmbl.-61403. Petitioners also disregard the likely benefits to employers. Workplace COVID-19 outbreaks can force shutdowns and cause

significant losses. *See, e.g.*, Pmbl.-61446. Even one-off cases can be costly and disruptive, and "reduced absenteeism due to fewer COVID-19 illnesses and quarantines" means savings for employers. Pmbl.-61474.

Nor can petitioners establish irreparable injury by asserting harms to employees. As petitioners appear to acknowledge (Job Creators Mot. 21), all employees are not required to receive a vaccine under the Standard. Employers must permit a vaccine option but may also offer a testing-and-masking alternative. And regardless of which compliance option petitioners choose, employees may seek appropriate, individual accommodations. Pmbl.-61459, 61475 n.43. The Standard's built-in flexibility confirms that petitioners cannot show concrete and certain irreparable harm that counterbalances the government's and public's interest in protecting employees against the workplace spread of COVID-19.

The State petitioners (Missouri Mot. 22) separately rely on asserted "intrusions on their sovereignty" to urge the Court to stay the operation of federal law. But "intrusion" on a sovereign's choices is on both sides of the balance. The Supremacy Clause establishes which interest takes precedence. *Cf. United States v. California*, 921 F.3d 865, 893 (9th Cir. 2019) (describing the manifest interest in "preventing a violation of the Supremacy Clause"), *cert. denied*, 141 S. Ct. 124 (2020). And a court order blocking the Standard would be a far greater affront to sovereign prerogatives because a stay would also threaten thousands of deaths and hundreds of thousands of hospitalizations, as well as other serious health effects and economic injury. Those

interests, and the government's interests in regulating workplace safety while this case proceeds, vastly outweigh petitioners' asserted harm.

Petitioners' citation (Missouri Mot. 22) to *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), only underscores why a stay here would be inappropriate. Petitioners have not suffered the unique "form of irreparable injury" that occurs when a sovereign is "enjoined by a court." *Id.* at 1303. That is what they ask this Court to do to the United States. Nor have petitioners demonstrated anything like a "concrete harm" to "law enforcement and public safety interests." *Id.*

C. Finally, if the Court disagrees, any relief should be limited to the petitioners. Court orders should be "limited" and "tailored" to redress the parties' "particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1931, 1934 (2018). And equitable relief must "be no more burdensome to the [respondents] than necessary to provide complete relief to the [petitioners]." *Madsen,* 512 U.S. at 765. Petitioners have not even attempted to assert that they would suffer any harm if other employers were subject to the Standard. Limiting any relief granted would be especially appropriate now, before petitions are consolidated pursuant to the multi-circuit petition statute.

CONCLUSION

Petitioners' motions should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 6,780 words, and the government has separately moved for leave to file its overlength response. This brief 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.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

s/ Brian J. Springer
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