No. 21-60845

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BST Holdings, LL.C.; RV Trosclair, L.L.C.; Trosclair Airline, L.L.C.; Trosclair Almonaster, L.L.C.; Trosclair and Sons, L.L.C.; Trosclair & Trosclair, Incorporated; Trosclair Carrollton, L.L.C.; Trosclair Claiborne, L.L.C.; Trosclair Donaldsonville, L.L.C.; Trosclair Houma, L.L.C.; Trosclair Judge Perez, L.L.C.; Trosclair Lake Forest, L.L.C.; Trosclair Morrison, L.L.C.; Trosclair Paris, L.L.C.; Trosclair Terry, L.L.C.; Trosclair Williams, L.L.C.; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; Kip Stovall; Answers in Genesis, Incorporated; American Family Association, Incorporated; Burnett Specialists; Choice Staffing, L.L.C.; Staff Force, Incorporated; Leadingedge Personnel, Limited; State of Texas; HT Staffing, Limited, doing business as HT Group; The State of Louisiana; Cox Operating, L.L.C.; Dis-Tran Steel, L.L.C.; Dis-Tran Packaged Substations, L.L.C.; Beta Engineering, L.L.C. Optimal Field Services, L.L.C.; The State of Mississippi; Gulf Coast Restaurant Group, Incorporated; The State of South Carolina; The State of Utah; Word of God Fellowship, Incorporated, doing business as Daystar Television Network,

Petitioners,

v.

Occupational Safety and Health Administration, United States Department of Labor; Martin J. Walsh, Secretary, U.S. Department of Labor; Douglas Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY STAY MOTION

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No. 21-60845

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Under Fifth Circuit Rule 28.2.1, federal respondents, as governmental parties, need not submit a certificate of interested persons

s/Martin Totaro
Martin Totaro

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INTRODUCTION AND SUMMARY

Faced with an extraordinary pandemic and a serious threat to employees, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard to address the grave dangers 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 transmission throughout America's workplaces.

Petitioners seek emergency relief, but most of their asserted harms are at least a month off, and many of their claimed harms relate to a testing requirement that does not become effective until 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), and certainly no reason to consider a permanent injunction, which would be particularly improper.

Even if this Court adjudicates the motions, petitioners are not entitled to a stay or any broader order. 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 staying 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 such a permanent standard, and OSHA "shall promulgate" 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," is 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 were "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.

I. Petitioners' Requests For Relief Are Premature

A. Petitioners ask this Court to grant emergency relief, BST Mot. 6-25; Burnett Mot. 6-24, and to expedite review of these cases on the merits, BST Mot. 26. But petitioners claim little prospect of harm until December 7—"28 days prior" to the Standard's "January 4, 2022" compliance date. BST Mot. 26. Accordingly, there is no need to address petitioners' stay motions now, and the Court should lift its administrative stay and allow this matter to proceed under the process that Congress set forth for judicial review of OSHA standards.

That process contemplates that litigation concerning the Standard will soon be consolidated in one court of appeals. The Judicial Panel on Multidistrict Litigation will "random[ly] designate" one circuit from among those where petitioners 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 on or about November 16—21 days before the December 7 date that petitioners allege is the earliest date that any employee could be required to

[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.

receive a vaccine and 51 days before petitioners' employees would be required to start testing.

The court chosen to adjudicate these matters will have sufficient time to rule on any preliminary motions. Because "considerations of comity" require "courts of coordinate jurisdiction and equal rank" to "avoid the waste of duplication" and "avoid rulings which may trench upon the authority of sister courts," this Court should decline to act in this emergency posture. *West Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728-732 (5th Cir. 1985).

B. This Court's November 6 Order directed the government to "respond to the petitioners' motion for a permanent injunction." Because the pending motions seek preliminary relief, the government understands that order to distinguish petitioners' requested relief from the interim, administrative stay entered by the Court. The government notes that one group of petitioners filed an opening merits brief seeking a permanent injunction but that this Court's November 8 letter confirms that the brief is "premature." It would, of course, be improper to fully adjudicate pending petitions before the multi-circuit lottery occurs or the administrative record is filed. *See* 28 U.S.C. § 2112(a)(3) ("The agency . . . shall file the record in the court of appeals designated [by the Judicial Panel]."); *see also Camp v. Pitts*, 411 U.S. 138, 142-143 (1973) (per curiam) (judicial review is focused on "the administrative record"). The multi-circuit judicial-review provision contemplates—at most—"stay[ing]" the Standard's "effective date"; that stay "may thereafter be modified, revoked, or extended" by the court hearing the

cases. *Id.* § 2112(a)(4). That language, the provision's structure as a whole, and principles of fairness and orderly presentation of arguments, all demonstrate that courts are not to resolve these challenges conclusively during the ten-day period prior to consolidation. Accordingly, the Court should not consider any request for permanent relief at this juncture.

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 makes two determinations. 29 U.S.C. § 655(c). 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). 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; *see also* https://www.merriam-webster.com/dictionary/virus (defining "virus" as an "infectious 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.)"); 29 C.F.R. § 1910.1030 (bloodborne-pathogens issued

rule 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 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 also 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, use of face coverings, and removal of infected employees from the workplace." 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. The Burnett petitioners' sole argument (at 7-16) is 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 measures 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 in evaluating prior emergency standards under Section 655(c)(1)'s 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).

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. This Court recently rejected a nondelegation challenge to a statute that lists certain tobacco products and extends its reach "to any other tobacco products that" the agency "by regulation deems to be subject to [the Act]." *Big Time Vapes v. FDA*, 963 F.3d 436, 438 (5th Cir. 2020) (alterations in original) (quotation marks omitted). The narrower delegation in Section 655(c)(1) likewise provides a meaningful standard constricting OSHA's authority to a defined category of risks. *See also Industrial Union Dep't*, 448 U.S. at 640 n.45, 646 (plurality op.) (indicating that neighboring subsection of the OSH Act contains an intelligible principle after interpreting that subsection to mirror Section 655(c)(1)). And although not properly before the Court, petitioners' argument (in their opening brief, not stay motion) that the Standard's regulation of employment conditions exceeds Congress's commerce

power lacks merit, particularly given the Standard's obvious nexus to interstate commerce. *See, e.g., United States v. Darby*, 312 U.S. 100, 123-125 (1941).

2. The BST petitioners' contentions (at 8-12, 19-21) that OSHA cannot address viruses at all or viruses that exist both inside and outside the workplace are 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). The text does not authorize regulating "any" agent or hazard (BST Mot. 8) but rather is limited to those that endanger "employees," 29 U.S.C. § 655(c), 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' only textual argument is that COVID-19 is a "disease," not an "agent" or "hazard." BST Mot. 19-20. But like a carcinogen, for example, a virus is an "agent" that causes disease and constitutes a "hazard." Indeed, the statute acknowledges that OSHA can require "immunization," including to "protect[] the health and safety and others," 29 U.S.C. § 669(a)(5)—a provision premised on OSHA's authority to protect employees from transmission of disease. Petitioners' atextual reading would exclude even communicable diseases that rarely exist outside of particular workplaces. And petitioners' unexplained contention that the term "new hazards" must be "similar" to a "substance or agent," BST Mot. 19-20, misunderstands that viruses are agents and, in any event, "ignore[s] the disjunctive 'or'" that precedes

the term "new hazards" and would "rob" that term of any independent meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979).

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. Chicago*, 560 U.S. 205, 215 (2010). Even if Congress's primary focuses were non-biological dangers, *see* BST Mot. 19-20, or dangers "more likely to occur" in workplaces, *see* BST Mot. 10, Congress did not limit OSHA's authority to addressing that subset of grave dangers. Statutory prohibitions "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 that occur outside the workplace 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' citations (at 20-21) to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and similar cases only underscore their failure to engage with the

statutory text. Those cases interpreted ambiguous statutory language based on assumptions about when "Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133, 156-161. But this Court need not consider delegation or deference issues 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 may touch on issues about which some people disagree. But that does not automatically compel a circumscribed interpretation of a deliberately broad congressional grant.

C. OSHA Had Ample Basis For Its Findings

Unable to identify any legal error, BST also asserts that OSHA erred when making the necessary findings. But BST disregards 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 err in asserting (BST Mot. 14-15, 17) 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*, 727 F.2d at 423; *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.

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 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, *see* BST Mot. 14, "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.*; and FDA has "authorized more than 320 tests and collection kits" and OSHA determined that "the increasing rate of production" will ensure sufficient supply before the "testing compliance date," Pmbl.-61452. Far from calling into question OSHA's assessments, the timing reflects OSHA's determination, based on detailed and expert analysis, that this response is needed now to address a growing and current grave danger in the workplace.

2. Petitioners' contention (BST Mot. 16-17, 18-19) that OSHA incorrectly applied the Standard to all job sites and employees of all ages 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 all 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. OSHA also analyzed mortality and hospitalization rates for people aged 18-64 rather than the entire population to capture the risk of serious illness and death for most working-age people. Pmbl.-61410. 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.

In any event, petitioners are wrong to suggest that OSHA standards must operate on an employer-by-employer or even employee-by-employee basis. The Act directs OSHA to issue an emergency temporary standard if OSHA "determines" that "employees are exposed to grave danger" and the standard "is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). The Act does not require OSHA to determine that "each" employee is exposed to grave danger, with the standard necessary to protect "each" employee from such danger. *See id.* § 655(d) (authorizing employer-specific variances). No rule could operate that way. Such a requirement would be particularly anomalous in the context of emergency standards 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. OSHA "cannot be expected to conduct on-the-spot investigations of every user to determine if exposure is occurring," and "exposure can be assumed to be occurring at any place" where the grave danger exists. *Id.; see also Am. Dental Ass'n v. Martin*, 984 F.2d 823, 827-828 (7th Cir. 1993) (OSHA not "required to proceed workplace by workplace").

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

Having failed to establish a likelihood of success of the merits, petitioners cannot obtain a stay. *See Nken*, 556 U.S. at 433-434; *id.* at 438 (Kennedy, J., concurring); *Vidal*

v. Gonzales, 491 F.3d 250, 254 (5th Cir. 2007). 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 be substantial. Staying 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 extensive evidence exists 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 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* OSHA, *Health Impacts of the COVID-19 Vaccination and Testing ETS* (2021) (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. *Id.* at 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 would 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, staying 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*, _ F.4th _, 2021 WL 4860328, at *7 (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 December 7 at the earliest, BST Mot. 26, and the Standard has little effect on them until 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 prefer not to pay the minimal costs of complying with the Standard, Burnett Mot. 16-19, but "ordinary compliance costs" are "typically insufficient to constitute irreparable harm." *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). And petitioners' reliance on ordinary administrative expenses is "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 certain and substantial. 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. And if the Standard were truly infeasible for their operations—as some petitioners suggest, Burnett Mot. 18-19—they could seek a "variance." 29 U.S.C. § 655(d).

Petitioners also speculate (BST Mot. 22-23; Burnett Mot. 19-20) that some workers may quit when 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 engage with 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 (comparing 48-50% of survey respondents who planned to quit if vaccination were required with 1-3% of employees who left employers with mandatory policies). Petitioners' speculation that employees may move to smaller companies that are not yet subject to the Standard ignores the barriers to switching jobs and OSHA's express statement that it is seeking 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. Contrary to petitioners' characterization, BST 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.[2]

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 defendant than necessary to provide complete relief to the [petitioners]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). 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 all petitions are consolidated pursuant to the multi-circuit petition statute.

CONCLUSION

Petitioners' motions should be denied.

[2] Petitioners additionally note that the Standard preempts a Texas "executive order" that prohibits certain vaccination requirements. Burnett Mot. 20-21. But employers who choose to require vaccination (rather than offer the masking-and-testing option) suffer no cognizable injury from choosing to follow federal, rather than state, law and certainly not one that warrants "an extraordinary remedy." *Winter*, 555 U.S. at 22.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Martin Totaro
Martin Totaro

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5157 words. 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.

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