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
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 of an Emergency Temporary Standard
Issued by the Occupational Safety and Health Administration

BRIEF OF AMICI CURIAE FORMER OSHA ADMINISTRATORS CHARLES JEFFRESS, DAVID MICHAELS, AND GERARD SCANNELL IN SUPPORT OF RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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November 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-7000 Case Name: In re: OSHA Rule on COVID-19

Name of counsel: Scott L. Nelson

Pursuant to 6th Cir. R. 26.1, Charles Jeffress
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on November 29, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Scott L. Nelson

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-7000 Case Name: In re: OSHA Rule on COVID-19

Name of counsel: Scott L. Nelson

Pursuant to 6th Cir. R. 26.1, David Michaels
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-7000 Case Name: In re: OSHA Rule on COVID-19

Name of counsel: Scott L. Nelson

Pursuant to 6th Cir. R. 26.1, Gerard Scannell
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

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s/Scott L. Nelson

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INTEREST OF AMICI CURIAE[1]

Amici curiae are three former Assistant Secretaries of Labor for Occupational Safety and Health, who administered the Occupational Safety and Health Administration (OSHA) under Presidents George H.W. Bush, Bill Clinton, and Barack Obama.

Gerard Scannell was OSHA Administrator from 1989 to January 1993. Before becoming OSHA Administrator, he was director of corporate safety, health and fire protection at Johnson & Johnson.

Charles Jeffress was OSHA Administrator from October 1997 to January 2001. Before joining the U.S. Department of Labor, he served in the North Carolina Department of Labor as the director of its OSHA state plan. He has also served in senior positions at the U.S. Chemical Safety and Hazard Investigation Board, at the Legal Services Corporation, and at the American Association for Justice.

David Michaels was OSHA Administrator from December 2009 to January 2016—the longest serving administrator in OSHA's history. He

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[1] Amici have moved for leave to file this brief. No party's counsel authored the brief in whole or in part, and no party or party's counsel, nor anyone other than amici or their counsel, contributed money intended to fund its preparation or submission.

also served as the Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 to 2001. Dr. Michaels is an epidemiologist and a professor at George Washington University School of Public Health in the Departments of Environmental and Occupational Health and Epidemiology.

Amici submit this brief in support of respondents' emergency motion to dissolve the stay entered by the Fifth Circuit because they are concerned that the stay reflects an incorrect, and untenable, view of OSHA's statutory authority to protect workers against workplace exposure to disease-causing agents. Amici believe that their brief may be helpful to the Court in considering respondents' motion.

ARGUMENT

The stay rests on a fundamentally flawed view of OSHA's statutory authority.

This case involves OSHA's issuance of an Emergency Temporary Standard under section 6(c) of the Occupational Safety and Health Act (OSH Act), 29 U.SC. § 655(c), to protect against workplace transmission of the virus that causes COVID-19—a disease that has infected over 48 million Americans and killed more than 776,000, including over 12,000 in the two weeks after the Fifth Circuit panel questioned OSHA's

determination that workplace exposure to COVID-19 represents a grave threat.[2] That panel's decision to grant a stay of the standard rested in large part on its view that OSHA lacks authority under OSH Act to issue standards addressing health threats to workers from workplace transmission of viruses and other infectious agents. That view of OSHA's authority is groundless.

A. The OSH Act authorizes OSHA to issue health and safety standards "to serve the objectives of" the Act. 29 U.S.C. § 655(b)(1). Those objectives include protecting workers from "illnesses arising out of work situations," *id.* § 651(a), and assuring "healthful working conditions" by reducing "health hazards" at "places of employment," *id.* § 651(b)(1). The Act's protections are explicitly aimed at "diseases" connected to work environments, *id.* § 651(b)(6) & (13), and the development of "medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience," *id.* § 651(b)(7).

[2] CDC, *COVID Data Tracker*, https://COVID.cdc.gov/COVID-data-tracker/#datatracker-home (visited Nov. 29, 2021).

Section 6 of the OSH Act, 29 U.S.C. § 655, grants OSHA ample authority to carry out the Act's purposes by issuing standards aimed at preventing workplace outbreaks of communicable diseases caused by viruses and other infectious agents. OSHA's authority expressly extends to setting standards addressing "toxic materials *or* harmful physical agents," *id.* § 655(b)(5) (emphasis added), so as to "adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity" resulting from "exposure to the hazard," *id.* Section 6(c) authorizes OSHA to issue emergency temporary standards to protect employees from "grave danger" resulting "from exposure to substances *or* agents determined to be toxic *or* physically harmful," and from "new hazards," *id.* § 655(c)(1) (emphasis added).

These provisions unambiguously grant OSHA authority to protect workers from workplace exposure to a virus that causes severe and often fatal illness. Such a virus falls squarely within the plain meaning of "harmful physical agent" and "agent determined to be … physically harmful." The relevant common meaning of "agent," both when the OSH Act was enacted in 1970 and now, is "something that produces or is

capable of producing a certain effect"—more specifically, "a substance capable of producing a chemical reaction or a physical or biological effect." *Webster's Third New International Dictionary* 40 (3d ed. 1965). That definition plainly covers a virus that causes a disease. Indeed, when Congress enacted the OSH Act, references to disease-causing viruses and microbes as "agents" were commonplace, including in the Nixon Administration's renunciation of biological warfare and in extensive congressional deliberations on related subjects.[3] To the extent such agents produce disease, organ failure, and death, they undoubtedly cause "physical[] harm[]"—that is, "bodily" "damage" or "injury"—within the common meaning of those words. *Id*. 1706, 1034 (defining "physical" and "harm").

The Fifth Circuit panel ascribed a much narrower meaning to the statute because, in its view, the proximity of the statutory term "physically harmful" to the word "toxic" suggested that the statute is

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[3] *See* President's Statement on Chemical and Biological Defense Policies and Programs (Nov. 25, 1969), https://2001-2009.state.gov/r/pa/ho/frus/nixon/e2/83597.htm; *see also* Journal of the Senate 432, 91st Cong., 1st Sess. (Aug. 11, 1969) (recording vote on defense appropriations language concerning "lethal and nonlethal chemical and biological agents").

aimed only at substances with characteristics of "toxicity" and "poisonousness," not at agents that are harmful because they cause infectious disease. Stay Op. 10. That reading wrongly renders the disjunctive phrase "or physically harmful" superfluous, *see Bailey v. United States*, 516 U.S. 137, 146 (1995), in violation of the interpretive principle that "*or* creates alternatives," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012).

Moreover, the Fifth Circuit's view that the enacting Congress would have considered an infectious agent's propensity to cause disease to be a characteristic so distinct from "toxicity" that it never would have included that propensity in a reference to "physical[] harmful[ness]" occurring in the same phrase as "toxic" is belied by the many statutes in which Congress has treated toxicity and infectiousness as related concepts for regulatory purposes. For example, in the Clean Water Act, enacted in 1972, shortly after the OSH Act, Congress defined "toxic pollutant" to mean pollutants "including disease-causing agents" that "cause death, disease" and other harms to organisms exposed to them. 33 U.S.C. § 1362(13). The Fifth Circuit panel's supposition that a Congress that authorized regulation of toxic substances must *not* have intended also to

reach harmful infectious agents—despite its use of language whose plain meaning covers them—is baseless.

The Fifth Circuit's reading is also contradicted by other clear language in the OSH Act and related statutes confirming that the Act applies to workplace exposure to harmful infectious agents and authorizes OSHA standards to include vaccinations as part of the protection afforded workers against such exposure. For example, 29 U.S.C. § 669(a)(5) requires the Secretary of Health and Human Services to assist OSHA by developing information regarding "potentially toxic substances or harmful physical agents," including through medical examinations and tests. That provision goes on to provide that "[n]othing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, *immunization*, or treatment, for those who object thereto on religious grounds, *except* where such is *necessary for the protection of the health or safety of others*." *Id.* (emphasis added) The provision's reference to "immunization," and its creation of a limited religious exception to the statute's authorization of standards involving immunization, would be meaningless if the statute did not contemplate that "harmful physical agents" include infectious disease-causing agents

and that standards addressing such agents may include provisions involving immunization.

The Workers Family Protection Act, enacted in 1992 and codified at 29 U.S.C. § 671a, in the same U.S. Code chapter as the OSH Act, likewise confirms OSHA's authority to issue standards under the OSH Act addressing workplace exposures to infectious-disease agents such as viruses. Based on congressional findings that "hazardous chemicals and substances that can threaten the health and safety of workers are being transported out of industries on workers' clothing and persons," and that these substances "have the potential to pose an additional threat to the health and welfare of workers and their families," section 671a requires the National Institute for Occupational Safety and Health, in cooperation with OSHA, to study "the potential for, the prevalence of, and the issues related to the contamination of workers' homes with hazardous chemicals and substances, *including infectious agents*, transported from the workplaces of such workers." *Id.* § 671a(c)(1)(A). The statute tasks OSHA with ongoing responsibility to consider whether additional standards are needed to address such issues, and, if so, to promulgate such standards "*pursuant to … the Occupational Safety and Health Act of 1970*." *Id.*

§ 671a(d)(2) (emphasis added). The statute reflects express congressional recognition that the harmful agents that OSHA is authorized to address through standards under the OSH Act include "infectious agents"—and that, in issuing such standards, OSHA can consider health threats to family members of workers exposed to infectious agents in the workplace.

B. Given the OSH Act's language and structure, OSHA has long asserted authority to protect workers against infectious agents, including viruses. Most notably, OSHA promulgated the Occupational Exposure to Bloodborne Pathogens standard in 1991 "to eliminate or minimize occupational exposure to Hepatitis B Virus (HBV), Human Immunodeficiency Virus (HIV) and other bloodborne pathogens." 56 Fed. Reg. 64004 (1991), *codified at* 29 C.F.R. § 1910.1030. The standard, among other provisions, requires employers to make the hepatitis B vaccine available to employees at risk of exposure to HBV. 29 C.F.R. § 1010.1030(f). Even earlier, OSHA had provided, in its Hazardous Waste Operations and Emergency Response standard, *id.* § 1910.120, that employers must protect workers engaged in hazardous waste cleanup against "[a]ny biological agent and other disease-causing agent which after release into the environment and upon exposure, ingestion,

inhalation, or assimilation into any person, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death [or] disease." *Id.* § 1910.120(a)(3).

In addition, OSHA's Respiratory Protection standard, 29 C.F.R. § 1910.134(a)(1), requires use of respirators to prevent occupational diseases caused by "harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors" when engineering controls are infeasible. In promulgating the current standard, OSHA emphasized that it "does apply to biological hazards," 63 Fed. Reg. 1152, 1180 (1998), including "bioaerosols" that may lead to "epidemics of infections including colds, viruses, tuberculosis, and Legionnaires Disease," *id.* at 1159. More specifically, OSHA has recognized that occupational exposure to the microbe that causes tuberculosis is a health risk that falls within the scope of the OSH Act, although it concluded in 2003 that because of advances in efforts by hospitals and other workplaces to prevent such exposure a standard under 29 U.S.C. § 655(b) was unnecessary to address the risk. *See* 68 Fed. Reg. 75768 (2003). At the same time, the agency recognized that the statute's "general duty" clause, 29 U.S.C. § 654(a)(1),

which requires employers to provide a workplace "free from recognized hazards," continues to authorize enforcement actions against employers who fail to protect workers against the risk of tuberculosis infection.

Finally, OSHA's standard on Access to Employee Exposure and Medical Records, 29 C.F.R. § 1910.1020, grants both OSHA and affected employees a right of access to any records regarding employee exposure to harmful physical agents subject to regulation under the OSHA Act. The standard specifically defines "[t]oxic substance or harmful physical agent" to include "any biological agent (bacteria, virus, fungus, etc.)" that poses a health hazard. *Id*. § 1910.1020(c)(12).

C. The implication of the Fifth Circuit's view that the statute does not authorize protection of workers against health impacts of disease-causing infectious agents such as viruses is that OSHA's longstanding construction of the OSH Act—and, thus, the standards described above, the COVID-19 Emergency Temporary Standard, and the earlier COVID-19 Healthcare Emergency Temporary Standard, 29 C.F.R. § 1910.502(m)—are invalid. Even if the panel were correct in concluding that the proximity of "toxic" and "physically harmful" created some ambiguity in the statute's clear language covering agents such as

viruses that cause physically harmful diseases (which, as explained above, it was not), the panel could not properly reject the agency's contrary view without considering whether it represented a "permissible construction of the statute." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 520 (6th Cir. 2019) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)); *see also City of Arlington, Tex. v. FCC*, 589 U.S. 290 (2013) (requiring deference to an agency's determination of the scope of its regulatory authority). Yet the Fifth Circuit panel never considered whether the longstanding, consistent construction of the statute by the agency responsible for administering it was entitled to *Chevron* deference. Had the panel done so, the agency's reading would have easily passed muster under *Chevron* as the view best grounded in the statute's language and its expressly manifested purpose of fostering healthful workplaces and protecting workers against exposure to illness and disease in their working environments. *See* 29 U.S.C. § 651. OSHA's "natural" reading falls "well within the bounds of reasonable interpretation," and is "entitled to deference under *Chevron*." *Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 454 (1999).

The Fifth Circuit panel's suggestion that the statute applies only to harmful substances and agents that occur uniquely in workplaces (Stay Op. 9) is equally untenable. Although the statute authorizes OSHA to issue standards for *workplace* health and safety, nothing in the statutory language suggests that OSHA cannot regulate to prevent workplace exposures to physically harmful agents if those agents are also present elsewhere. Toxic substances and physically harmful agents are rarely confined to workplaces, and OSHA, throughout its history, has acted to protect workers against workplace exposures to hazards that they may also encounter outside the worksite.

For example, OSHA's bloodborne pathogens standard, 29 C.F.R. § 1010.1030, provides workplace protections against infectious agents that can be encountered anywhere. Moreover, that standard's requirement that employers provide workers with the HVB vaccine protects workers once they leave the workplace just as much as it does in the workplace—as will the COVID-19 vaccinations that the Standard at issue here encourages. Other examples of workplace protections against hazards existing elsewhere abound. OSHA requires employers to protect workers against the recognized hazard of heat exposure on the job, *see*

https://www.osha.gov/heat-exposure/standards, although workers are also exposed to heat at home and elsewhere in their communities. And OSHA regulates lead in workplaces, *see* 29 C.F.R. § 1910.1025, while many other agencies regulate it in other settings, including the home, *see*, *e.g.*, https://www.epa.gov/lead/lead-laws-and-regulations. Similarly, OSHA protects workers against airborne exposure to hexavalent chromium within workplaces, *id.* § 1910.1026, while EPA regulates air emissions of the same hazardous substance, from the same facilities, 40 C.F.R. § 63.342.

The Fifth Circuit's non-textual view of the statute would gut these and many other longstanding OSHA standards aimed at fostering safe and healthy workplaces and would threaten virtually the entire body of the agency's work over its 50-year history. This Court should not permit a stay resting on such a flawed foundation to stand.

CONCLUSION

This Court should vacate the stay of OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard.

Respectfully submitted,

/s/ Allison M. Zieve

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November 30, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 2,596 words.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on November 30, 2021.

/s/ Allison M. Zieve
Allison M. Zieve