IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*, *Plaintiffs,* v. PATRICK PIZZELLA,[1] Acting Secretary of Labor, *et al.*, *Defendants*.	Civil Action No. 19-CV-166 (TJK)
STATE OF NEW JERSEY, *et al.*, *Plaintiffs,* v. PATRICK PIZZELLA, Acting Secretary of Labor, *et al.*, *Defendants*.	Civil Action No. 19-CV-621 (TJK)

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Patrick Pizzella is automatically substituted as a defendant for R. Alexander Acosta.

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INTRODUCTION

These cases, at their core, hinge on the manner in which the Occupational Safety and Health Administration ("OSHA") weighed competing policy priorities when it decided, in 2019, to rescind portions of the 2016 "Electronic Reporting Rule." *See* Final Rule, Tracking of Workplace Injuries and Illnesses, 84 Fed. Reg. 380 (Jan. 25, 2019) (the "Revised Rule"); *see also* Final Rule, Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29,624 (May 12, 2016), *as revised* at 81 Fed. Reg. 31,854 (May 20, 2016). Two sets of plaintiffs—the Public Health Plaintiffs and the State Plaintiffs—have challenged that Revised Rule. This Court, however, lacks jurisdiction over the Public Health Plaintiffs' claims, and both sets of claims fail on the merits.

At the outset, the Public Health Plaintiffs lack standing. Those plaintiffs allege that they have informational standing based solely on their intention to one day file a Freedom of Information Act ("FOIA") request for data from OSHA Forms 300 and 301. But an organization does not suffer a cognizable informational injury whenever an agency chooses not to collect, or create, records that could eventually be subject to FOIA. Such a result would eviscerate Article III's injury-in-fact requirement and would conflict with the rule that FOIA plaintiffs do not have standing until *after* they have filed a FOIA request.

On the merits, Plaintiffs labor mightily to cast the decision at issue here as anything *other* than an exercise of OSHA's substantial discretion in choosing the information it wants to collect and use for enforcement. Plaintiffs' efforts are unavailing. OSHA's decision, as Plaintiffs concede, is not subject to any "heightened standard" under the Administrative Procedure Act ("APA"). *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). Instead, OSHA need only demonstrate that the Revised Rule was "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

OSHA easily clears this bar. In issuing the Revised Rule, OSHA prioritized worker privacy after evaluating the risks of involuntary disclosure of detailed workplace injury information under FOIA. Plaintiffs argue that OSHA erred in conducting that risk analysis, asserting that the agency did not assess the alleged benefits of involuntary disclosure. That argument fails for two reasons. First, any such "benefits" fall outside OSHA's purview. And second, OSHA nonetheless *did* consider the alleged benefits of disclosure, but still determined that any such benefits were outweighed by the real and concrete risks of disclosure and by the resources that would be drained from the enforcement efforts OSHA wanted to prioritize. To that end, Plaintiffs consistently ignore OSHA's determination that the Revised Rule would better align with the agency's enforcement strategies. That failure is symptomatic of a broader shortcoming in Plaintiffs' analysis. Throughout all four of Plaintiffs' briefs, they have tried to view each aspects of OSHA's reasoning in isolation—segregating the agency's discussion of worker privacy from its consideration of enforcement priorities. That approach ignores the reality of OSHA's reasoning, which rested principally on the *interaction* of competing priorities.

For these and other reasons discussed in Defendants' opening brief and below, the Court should enter summary judgment for Defendants.

ARGUMENT

I. The Public Health Plaintiffs Lack Standing.

A. The Public Health Plaintiffs Cannot Rely on FOIA to Generate an Informational Injury.

The Public Health Plaintiffs concede that their theory of informational standing rests on their attempt to "bootstrap[]" the Electronic Reporting Rule "to FOIA," *Judicial Watch, Inc. v. Office of Dir. of Nat'l Intelligence*, No. 1:17-CV-00508 (TNM), 2018 WL 1440186, at *3 (D.D.C. Mar. 22, 2018). *See* Pub. Health Opp'n to Defs.' Mot. to Dismiss, Opp'n to Defs.' Cross-Mot.

Summ. J., and Reply Supp. Pls.' Mot. Summ. J. ("Pub. Health Opp'n Br.") at 2, ECF No. 19.[2] But Article III does not permit that result. As the Public Health Plaintiffs acknowledge, to demonstrate that they have suffered an informational injury, they must identify "a statute"—not a regulation—that "*directly* requires the defendant[s] to disclose the information that" the Public Health Plaintiffs have "a right to obtain."[3] Pub. Health Opp'n Br. 2 (emphasis added) (quoting *Envtl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 36 (D.D.C. 2015)). FOIA does no such thing.

First, FOIA does not require the disclosure of "the information" that the Public Health Plaintiffs claim "a right to obtain"—*i.e.*, the data from Forms 300 and 301. *McCarthy*, 139 F. Supp. 3d at 36. To the contrary, FOIA says nothing at all about work-related injury and illnesses, OSHA, or even the Department of Labor, *see* 5 U.S.C. § 552, and the Public Health Plaintiffs do not allege that OSHA has violated FOIA. That fact resolves the standing inquiry in this case. As the D.C. Circuit held in *Friends of Animals v. Jewell*, where, as here, the provision under which a plaintiff brings suit "does not itself mandate the disclosure of any information, [the plaintiff] has

[2] As in Defendants' opening brief, this brief refers to litigation documents via shorthand for the relevant parties, rather than including the applicable case name and number in each citation. Thus, citations to "Pub. Health X" are to *Public Citizen Health Research Group v. Acosta*, No. 19-CV-166 (D.D.C.), and citations to "States' Y" are to *New Jersey v. Acosta*, No. 19-CV-621 (D.D.C.).

[3] The Public Health Plaintiffs note in passing that, in two cases—*People for the Ethical Treatment of Animals v. USDA* ("*PETA*"), 797 F.3d 1087 (D.C. Cir. 2015), and *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986)—the D.C. Circuit found standing "without requiring plaintiffs to demonstrate that they had a statutory right to information[.]" Pub. Health Opp'n Br. 4. But the Public Health Plaintiffs do not, and cannot, suggest that those holdings supplant decades of precedent requiring a statutory right to information as a condition of informational standing. *See, e.g.*, *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (citing *FEC v. Akins*, 524 U.S. 11, 21-22 (1998)). Nor do they contest that, as Defendants noted in their opening brief, both *PETA* and *Action Alliance* "featured the required 'drain' on an organization's resources" that is a hallmark of the typical organizational standing inquiry. Defs.' Mem. Supp. Mot. to Dismiss and Mots. Summ. J., and Opp'n to Pls.' Mot. Summ. J. ("Defs.' Br.") at 18, ECF No. 17-1.

not suffered an informational injury and therefore does not have informational standing." 828 F.3d 989, 990 (D.C. Cir. 2016).

To be sure, as the Public Health Plaintiffs note, the D.C. Circuit has recognized that there may be limited contexts where a plaintiff has standing to seek information under a statute that does not expressly include a disclosure provision. *See Waterkeeper All. v. EPA*, 853 F.3d 527, 533-34 (D.C. Cir. 2017). But in *Waterkeeper Alliance*, the court emphasized the "complex interplay" between the two statutes at issue and ultimately found that the statute without a disclosure provision—the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")—nonetheless included a "reporting mandate [that] does, in fact, trigger a public disclosure requirement." *Id.* The same cannot be said here; the Electronic Reporting Rule has no relationship to any statute that automatically triggers a requirement to disclose 300 and 301 data to the Public Health Plaintiffs.

Judge McFadden recently relied on identical reasoning to distinguish *Waterkeeper Alliance*, contrasting the intertwined statutory scheme the plaintiff invoked in that case with a plaintiff's effort to rely on FOIA to generate informational standing. *See Judicial Watch*, 2018 WL 1440186, at *3. Like the provision at issue in *Judicial Watch* (an Intelligence Community Directive), the Electronic Reporting Rule "and FOIA are entirely different regimes, govern different conduct, and there is no express or implied interrelation between the two." *Id.*; *see also* 2018 WL 1440186, at *4 (explaining that "*Friends of Animals* . . . is far more analogous to the present case" than *Waterkeeper Alliance*).[4]

[4] The Public Health Plaintiffs attempt to distinguish *Judicial Watch* by suggesting that the court rested its holding on a finding that the plaintiff "could not show either that the ICD [Intelligence Community Directive] required creation of the document" that the plaintiff sought "or that, once created, the document would be subject to release under FOIA." Pub. Health Opp'n Br. 4-5

Accordingly, to hold that the Public Health Plaintiffs can rely on FOIA to generate informational standing would "expand the boundaries of informational standing to encompass every case alleging a governmental failure to implement or enforce any statutory provision simply because government action creates information." *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 97-98 (D.D.C. 2000). The Public Health Plaintiffs' only defense to this charge is that, in this particular case, they are "not asking OSHA to *create* information." Pub. Health Opp'n Br. 6. But they provide no reason why their theory of standing hinges on whether an agency is collecting, as opposed to creating, information. To the contrary, as the Public Health Plaintiffs note elsewhere, courts generally assume a plaintiff will prevail on the merits when assessing standing. *See id.* at 4. And a plaintiff that prevails in a challenge to an agency's decision not to *collect* information is in the same position as a plaintiff that prevails in arguing that an agency failed to *create* information; in both cases, the court would assume that the sought-after information will be in the agency's possession and therefore be subject to FOIA. If organizations have informational standing whenever a court finds that the information it seeks would likely be obtainable, one day, via a FOIA request, then the narrow constraints on informational standing have disappeared.

The second reason that FOIA cannot support informational standing here is that the statute does not "*directly* require[] the defendant[s] to disclose" the data from Forms 300 and 301 to the Public Health Plaintiffs. *McCarthy*, 139 F. Supp. 3d at 36 (emphasis added). Rather, disclosure can only take place after there has been a FOIA request for the sought-after information—something that has yet to occur here. As the cases cited by the Public Health Plaintiffs confirm,

(citation omitted). But the court foreclosed that reading. In fact, the court expressly "put[] aside the . . . arguments that" the Public Health Plaintiffs invoke on its way to holding that "bootstrapping [the ICD] to FOIA does not establish the deprivation of a statutorily-required disclosure." *Judicial Watch*, 2018 WL 1440186, at *3.

when a plaintiff seeks records under a statute like FOIA, the plaintiff generally does not have standing until *after* it has filed a specific request. For instance, in *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989), the court held than an organization had standing under the Federal Advisory Committee Act ("FACA") where the plaintiff had "specifically requested, and been refused," the information it sought. In reaching that conclusion, the Court analogized FACA to FOIA, explaining that FOIA plaintiffs must show that "they sought and were denied specific agency records" to establish standing. *Id.* The D.C. Circuit recently elaborated on this point, explaining that a FOIA "requester has suffered a particularized injury" only when "he has requested and been denied information Congress gave him a right to receive." *Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017); *see also id.* (holding that the plaintiff lacked standing because he had not filed a FOIA request "before bringing suit").

Of course, if a FOIA plaintiff has suffered a particularized injury only *after* filing a request for specific records, then surely the Public Health Plaintiffs—who are not even bringing suit under FOIA—have not a suffered a cognizable injury by virtue of their hope to *one day* file a FOIA request targeting the 300 and 301 data. *See also Friends of Animals*, 828 F.3d at 992 (finding no standing where "[t]he disclosure requirement [the plaintiff] points to as the source of its informational injury does not impose any obligations on the Secretary until a later time in the . . . process"). That same reasoning distinguishes the only district court case the Public Health Plaintiffs cite on this issue that remains good law. In *Citizens for Responsibility & Ethics in Washington v. Executive Office of the President* ("*CREW*"), 587 F. Supp. 2d 48, 60-61 (D.D.C. 2008), the court found standing when, "on the record before this court, [the plaintiffs] each allege that they have FOIA requests for e-mails currently pending with the" relevant agencies. *See also Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 93 (D.D.C. 2013) (explaining that *CREW*

"clarified that, where FOIA requesters challenge an alleged ongoing policy or practice and can demonstrate that they have *pending FOIA requests that are likely to implicate that policy or practice*, future injury is satisfied" (emphasis added)).

In sum, both the D.C. Circuit's informational standing precedents and the court's FOIA precedents confirm that the Public Health Plaintiffs cannot transform FOIA into a silver bullet for demonstrating informational injury.

B. The Public Health Plaintiffs Have Not Established the Drain on Their Resources that Would Be Necessary for Organizational Standing.

Because the Public Health Plaintiffs have not suffered an informational injury, they do not have organizational standing. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019) (holding that a plaintiff "cannot ground organizational injury on a non-existent interest"). In any event, the Public Health Plaintiffs cannot satisfy the typical test for organizational injury because, even if the Revised Rule harms their interests in the abstract, they have not shown the required "drain on the organization's resources." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)).

At summary judgment, the Public Health Plaintiffs must "'set forth' by affidavit or other evidence 'specific facts'" that establish the resources they have had to spend in response to the Revised Rule. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). They have not done so. In fact, the only place in their Opposition and Reply brief that hints at (but does not directly discuss) resource expenditure is a sentence that notably does not cite to any declaration. *See* Opp'n & Reply Br. 8 (alleging that "finding employees and unions to request such data and report it to plaintiffs is much more burdensome than receiving a complete dataset from OSHA"). The declarations themselves, however, are devoid of any specific allegations about the steps the

organizations have taken, or will take, in the wake of the Revised Rule, and they include no information about resources. *See* Carome Decl. ¶¶ 3, 11, ECF No. 16-1; Benjamin Decl. ¶¶ 4, 6, ECF No. 16-2; Harrison Decl. ¶¶ 2, 7, 9, ECF No. 16-3.[5] Accordingly, the Public Health Plaintiffs have not established organizational standing, and their case must be dismissed.

II. The Revised Rule Easily Clears the APA's Deferential Standard for Arbitrary-and-Capricious Review.

This case hinges on whether OSHA reasonably weighed the costs and benefits of two competing approaches to collecting information about work-related injuries and illnesses. In any challenge to such a decision under the APA, the Court's review is "narrow," and its task is only to determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (quoting *State Farm*, 463 U.S. at 43). But deference is particularly warranted here because "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency[.]" *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 304 (D.C. Cir. 2003) (citation omitted). Because OSHA carefully applied its expertise in determining that it should rescind the Electronic Reporting Rules' requirements for data from Forms 300 and 301, the agency is entitled to summary judgment.

A. OSHA Reasonably Assessed the Costs and Benefits of the Revised Rule.

1. OSHA's Conclusion that Disclosing Data from Forms 300 and 301 Would Threaten Worker Privacy Was Not Arbitrary or Capricious.

When OSHA issued the Revised Rule, it stated clearly that the agency "no longer views [the] protections" for worker privacy identified in the Electronic Reporting Rule "as sufficient."

[5] The Public Health Plaintiffs do not dispute that Dr. Harrison's declaration, which is meant to support the standing of the Council of State and Territorial Epidemiologists ("CSTE"), "does not establish that he has the requisite firsthand knowledge to testify about how the Revised Rule allegedly inflicts a concrete and particularized injury on CSTE." Defs.' Br. 19 n.9.

84 Fed. Reg. at 385; *see also Fox*, 556 U.S. at 515 (explaining that a "reasoned explanation" for an agency change in policy "would ordinarily demand that [the agency] display awareness that it *is* changing position."). As reflected below, that conclusion relied on a handful instance where OSHA made well-explained changes to its prior analysis. But at bottom, the decision to place a higher value on worker privacy, relative to other agency priorities, is not an instance of an agency making "contrary factual findings[.]" Pub. Health Opp'n Br. 9. Rather, it is a textbook example of "the types of [cost-benefit] decisions that are most appropriately entrusted to the expertise of an agency[.]" *Consumer Elecs. Ass'n* , 347 F.3d at 304 (citation omitted).

Plaintiffs' remaining arguments about the value OSHA placed on worker privacy fall into one of two categories: first, that OSHA was not permitted to treat data from Forms 300 and 301 as private at all, and second, that the agency placed too high a premium on privacy. Both criticisms lack merit.

The Public Health Plaintiffs are principally responsible for the first charge—*i.e.*, that OSHA had no business considering worker privacy here. As an initial matter, they continue to claim that, because OSHA has always allowed some data from Forms 300 and 301 to be disclosed to *some* individuals—namely, employees, former employees, and their representatives, *see* 29 C.F.R. §§ 1904.35(b)(2)(iii)-(v)[6]— the 300 and 301 data at issue in this case categorically are not "'private' or 'confidential[.]'" Pub. Health Opp'n Br. 10. Nonsense. Not only does the Public Health Plaintiffs' position fly in the face of common sense, *see* Defs.' Br. 23, it requires ignoring

[6] As the cited regulations make clear, the Public Health Plaintiffs are wrong to suggest that "employees, former employees, and their representatives" can each "obtain and disclose" all of the anonymized "301 information that would be collected under the Electronic Reporting Rule." Pub. Health Opp'n Br. 10. Employees and former employees can obtain a Form 301 that describes *their own* injury or illness, but only employee representatives can obtain data from Form 301 for other employees. *See* 29 C.F.R. § 1904.35(b)(2)(v).

years of OSHA's own statements about privacy. Long before the agency issued the Electronic Reporting Rule, OSHA explained that its "access requirements" for injury and illness data "were intended as a tool for employees and their representatives to affect safety and health conditions at the workplace, *not as a mechanism for broad public disclosure* of injury and illness information." Final Rule, Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 6057 (Jan. 19, 2001) (emphasis added). Accordingly, OSHA's explanation that data from Forms 300 and 301 are released "on a case-by-case basis only to those with a 'need to know,'" 84 Fed. Reg. at 384, is not a "new claim," Pub. Health Opp'n Br. 10. Rather, that explanation represented a return to "the balance OSHA has historically struck[.]" 84 Fed. Reg. at 384.[7]

The Public Health Plaintiffs also incorrectly assert that OSHA has maintained that "its standard for protecting personal privacy" would be "the same as that embodied in FOIA." Pub. Health Opp'n Br. 12 (citation omitted). OSHA did no such thing, and the Public Health Plaintiffs' parenthetical suggesting otherwise mischaracterizes (and notably does not quote from) the cited Federal Register page. *See id.* at 12-13 (citing 84 Fed. Reg. at 386). Rather, as Defendants explained in their opening brief, if OSHA only thought about privacy through the lens of what FOIA would require the agency to disclose, the result would be absurd. *See* Defs.' Br. 24-25. The Public Health Plaintiffs have no response to the observation that their position would require OSHA to "disregard every invasion of privacy that is just 'unwarranted,' rather than 'clearly unwarranted,' because Exemption 6 only applies to the latter." *Id.* at 25 (quoting 5 U.S.C.

[7] It seems like the main reason the Public Health Plaintiffs stumble on this point is they assume that, just because "employees, former employees, and their representatives *can* obtain and disclose" certain data from Forms 300 and 301, the risk of that data becoming public is somehow equal to the risk of that data being disclosed under the Electronic Reporting Rule. Pub. Health Opp'n Br. 10 (emphasis added). Such an assumption lacks any support in the record, and in fact, it would undermine Plaintiffs' claim that *OSHA* must collect and disclose the 300 and 301 data in order for the alleged benefits of public dissemination to be realized.

§ 552(b)(6)). To be sure, OSHA has previously noted that FOIA provides a *floor* for the protection of worker privacy, *see, e.g.*, 81 Fed. Reg. at 29,659 ("OSHA again wishes to emphasize that, consistent with FOIA, the Agency does not intend to post personally identifiable information on the Web site."), but it has never taken the position that it is impermissible to care *more* about worker privacy than FOIA requires. As such, the Public Health Plaintiffs' key assumption about privacy—that "FOIA's protections cover all privacy interests OSHA recognizes as legitimate"—is wrong. *See* Pub. Health Opp'n Br. 13.

The final argument the Public Health Plaintiffs raise about whether OSHA was permitted to consider worker privacy concerns the risk of re-identification—*i.e.*, the possibility that even anonymized data from Forms 300 and 301 would allow an injured or sick worker to be identified by combining information like the worker's job title and the details of an injury. The Public Health Plaintiffs claim that OSHA could not consider the risk of re-identification because the *possibility* of re-identification exists in the absence of the Electronic Reporting Rule. *See* Pub. Health Opp'n Br. 10-11. But this argument rests on the same faulty reasoning discussed above, *see supra* at 10 n.7; even if some employees *can* request a subset of the data that would be available under the Electronic Reporting Rule, the risk of re-identification is greater when OSHA is collecting, and may have to disclose, *all* of the 300 and 301 data covered by the Electronic Reporting Rule. Put differently, if "re[-]identification is most likely to occur among coworkers[,]" Pub. Health Opp'n Br. 11, then a key question is under which regime coworkers are *more likely* to encounter data that could be used for re-identification. If OSHA prevails, then coworkers will encounter the data if they request it. But if Plaintiffs prevail, then coworkers will encounter the data if they request it *or* if the data are disclosed publicly in the wake of a court-ordered response to a FOIA request. Accordingly, and in light of the fact that neither set of Plaintiffs disputes that de-identification

software does not address the risk of re-identification,[8] *see* 84 Fed. Reg. at 385, it was reasonable for OSHA to conclude that there is a meaningful risk that the Electronic Reporting Rule would allow workers with sensitive injuries or illnesses to be re-identified. *See* Defs.' Br. 22-23.

The second criticism of OSHA's privacy analysis—which is advanced by both sets of Plaintiffs—is that the agency held worker privacy to too high a standard. As an initial matter, the risk to worker privacy the agency identified is not "mere speculation[.]" Pub. Health Opp'n Br. 13 (citation omitted). To the contrary, as outlined above, the risk that workers who have experienced sensitive injuries or illnesses will be re-identified if the 300 and 301 data are released is real, as is the risk that employers will inadvertently include personal data in the incorrect fields. *See also* Defs.' Br. 22-23, 27-28. In fact, with respect to the latter risk, when OSHA promulgated the Electronic Reporting Rule it acknowledged that the agency had *already* encountered employers that included personal identifying information in the wrong field of Form 300. *See* 81 Fed. Reg. at 29,662.

The thrust of Plaintiffs' argument, however, is that OSHA set "an impossible standard" for privacy—one that so "skewed the cost-benefit analysis" that it rendered the Revised Rule arbitrary and capricious. States' Opp'n Br. 9; *see also* Pub. Health Opp'n Br. 13. The main problem with this argument is that the premise is wrong; the agency did not concoct an "absolutist standard" for protecting worker privacy. *See* States' Opp'n Br. 10. That charge might be plausible if OSHA had considered the issue of worker privacy in a vacuum—if, for instance, the agency had said that it would reject *any* rule that threatened worker privacy, irrespective of all other considerations. Of

[8] As they did in their opening brief, the State Plaintiffs ignore that de-identification software is not an effective solution for the risk of re-identification (as distinct from the risk of inadvertent disclosure of personal identifying information). *Compare* States' Opp'n to Defs.' Mot. Summ. J. and Reply Supp. States' Mot. Summ. J. ("States' Opp'n Br.") at 10, ECF No. 23, *with* Defs.' Br. 27-28.

course, what OSHA actually did was weigh the threat to privacy against the other costs and benefits associated with collecting the 300 and 301 data. From there, OSHA concluded that it could not "justify the risk given its resource allocation concerns and the uncertain incremental benefits to OSHA of collecting the data." 84 Fed. Reg. at 387. That judgment falls squarely within OSHA's authority—indeed, its responsibility—to assess the "proper allocation of resources to achieve agency priorities" and to balance factors "peculiarly within [the agency's] expertise." *Kisser v. Cisneros*, 14 F.3d 615, 620 (D.C. Cir. 1994) (citation omitted).

Moreover, even if OSHA *had* set an especially high standard for worker privacy, Plaintiffs do not cite a single case holding that an agency is prohibited from placing dispositive weight on a particular policy concern. *See* States' Opp'n Br. 9-11; Pub. Health Opp'n Br. 13. To be sure, the Public Health Plaintiffs rely on *Natural Resources Defense Council, Inc. v. EPA* ("*NRDC*"), 859 F.2d 156 (D.C. Cir. 1988), *see* Pub. Health Opp'n Br. 13. But that case simply confirms that an agency cannot dismiss an option "as impracticable" without "discussing any record evidence[.]" *NRDC*, 859 F.2d at 210. Here, as noted above—and as acknowledged by the State Plaintiffs, *see* States' Opp'n Br. 9—OSHA's conclusions about the risks to worker privacy were grounded in its assessment of the record. To second-guess the *weight* OSHA placed on those privacy concerns would impermissibly "substitute [the Court's] judgment for that of the agency[.]" *State Farm*, 463 U.S. at 43, 52; *see also Fox*, 556 U.S. at 515 ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better" than the prior policy.).

2. Plaintiffs Ignore the Benefits of the Revised Rule for OSHA's Enforcement Strategy.

Neither the State Plaintiffs nor the Public Health Plaintiffs grapple with a central component of OSHA's reasoning in issuing the Revised Rule: that the Revised Rule would avoid

diverting "resources from agency priorities such as fully utilizing the 300A data and severe injury reports" that "OSHA already collects electronically[.]" 84 Fed. Reg. at 383; *see also* Defs.' Br. 30-32. The State Plaintiffs do not mention these benefits in their most recent brief, and the Public Health Plaintiffs expressly do not contest them, *see* Pub. Health Opp'n Br. 13. That failure is telling in light of the particular deference an agency receives to "allocate its resources in the optimal way" across a range of priorities. *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

As Defendants noted in their opening brief, the most analogous application of that deference—*i.e.*, in a context where the agency was also deciding how much information to collect—is Judge Moss's decision in *Environmental Integrity Project v. McCarthy*, 139 F. Supp. 3d 25 (D.D.C. 2015). There, as here, the agency opted not to pursue a more aggressive strategy of information collection in light of the risk of "divert[ing] Agency resources" from other priorities. *Id.* at 41. The court upheld that decision, emphasizing that disagreement with the agency's "conclusions or analysis" did not invalidate the decision, so long as the agency's "explanation [was] plain and coherent[.]" *Id.* at 40.

The State Plaintiffs ignore *McCarthy* entirely, and the Public Health Plaintiffs merely note that the agency in that case was entitled to "even greater deference" because the case involved a decision to "withdraw a proposed rule," rather than a decision to issue a new rule or rescind an existing one. 139 F. Supp. 3d at 39. But the Public Health Plaintiffs overlook the court's observation that "the decision to withdraw a proposed rule is subject to the same underlying requirement of 'reasoned decisionmaking[]' that generally applies" in APA cases. *Id.* (citations omitted). Additionally, throughout its opinion, the court's analysis rested on the same APA principles that apply here. *See, e.g., id.* at 41 (outlining the standard for arbitrary-and-capricious review before assessing whether the agency's decision was supported by the administrative

record). In other words, even though the agency in *McCarthy* was *eligible* for greater-than-usual deference, the court needed no such leeway to conclude that the agency engaged in reasoned decision-making.

Plaintiffs' failure to engage with the court's reasoning in *McCarthy* is significant because they do not point to a single case where a court has second-guessed an agency's decision about the information that would be most helpful to its enforcement strategy. *See* 84 Fed. Reg. at 389 ("OSHA has accordingly concluded that worker privacy concerns and OSHA's resource priorities—including fully utilizing the 300A data that it already has collected from 214,574 establishments—outweigh the uncertain benefits of seeking to collect and process the data from Forms 300 and 301."). Particularly in the absence of such authority, there is "no basis for reordering agency priorities" here. *In re Barr Labs.*, 930 F.2d at 76.

3. Once OSHA Had Chosen Not to Publicize the Data from Forms 300 and 301, the Agency Did Not Need to Consider the "Benefits" of Involuntarily Disclosing the Data Under FOIA.

Both sets of Plaintiff argue that, in deciding whether to *collect* the data from Forms 300 and 301, OSHA was required to consider the alleged benefits of involuntarily *disclosing* the data in the wake of a FOIA request. *See* States' Opp'n Br. 3-9, 11-15; Pub. Health Opp'n Br. 13-18. That contention is extraordinary. In Plaintiffs' view, agencies that have chosen not to publish information, and that believe the information is exempt under FOIA, must nonetheless consider the purported benefits of disclosing that information under FOIA when deciding whether to collect the information in the first place. Unsurprisingly, Plaintiffs do not cite a single case imposing such an obligation on agencies. Nor do they contest that, as Defendants previously noted, FOIA does not "saddle agencies with any new obligations to make additional documents in order to satisfy the needs of researchers or investigators." *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1287 (D.C. Cir. 1993). Nor do Plaintiffs point to any other instruction from

Congress requiring agencies to consider the downstream benefits of a disclosure under FOIA in this context.

Instead, Plaintiffs raise two principal arguments on this point. First, the Public Health Plaintiffs contend that OSHA was required to consider the "external benefits of *collecting* the Form 300 and 301 data" because it considered those benefits "when it issued the Electronic Reporting Rule." Pub. Health Opp'n Br. 15 (emphasis added). But the premise of that argument is wrong. OSHA never considered the external benefits of *collecting* the 300 and 301 data; it considered the benefits of voluntarily *publishing* the data. *See, e.g.*, 81 Fed. Reg. at 29,625 (announcing OSHA's intention to "post the establishment-specific injury and illness data it collects under this final rule on its public Web site"). And as Defendants explained in their opening brief, OSHA's initial decision to publish the data was always non-binding because that intention was announced only in the Electronic Reporting Rule's preamble. *See* Defs.' Br. 33. Accordingly, OSHA was free to—and did—change its mind about whether to publish the data without notice and comment. *See id.*

Moreover, as the State Plaintiffs acknowledge, OSHA made the choice not to publish any 300 and 301 data before it even issued the Notice of Proposed Rulemaking for the Revised Rule. *See* States' Opp'n Br. 4.[9] As such, OSHA was under no obligation to consider the benefits of publishing the data; that decision had already been made. Put differently, OSHA considered the benefits of publishing the data when it promulgated the Electronic Reporting Rule because the agency assumed—correctly at the time—that it would publish the data from Forms 300 and 301.

[9] The State Plaintiffs claim that this is somehow evidence that OSHA "lacked an 'open mind' during this rulemaking." States' Opp'n Br. 4 n.2 (citations omitted). But *this* rulemaking concerned only whether OSHA should "rescind[] the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301." Proposed Rule, Tracking of Workplace Injuries & Illnesses, Fed. Reg. 36,494 at 36,494 (July 30, 2018). The fact that OSHA made a separate determination about whether to *publish* any such data does not suggest the agency had made up its mind about whether to *collect* the data.

But when OSHA issued the Revised Rule, that assumption about data publication was no longer correct, and OSHA thus did not need to consider the "benefits" of an action it had separately decided not to take.

Second, contrary to Plaintiffs' suggestion, OSHA did not need to consider the alleged benefits of disclosing the 300 and 301 data under FOIA for the sake of consistent reasoning. Although the privacy of employees whose health records OSHA proposes to collect is an interest that falls squarely within the agency's purview; the second- and third-order effects of the agency involuntarily releasing the data from those records is not. *See* Defs.' Br. 34-35. Put differently, if an agency is going to collect sensitive information, then its subsequent ability (or lack thereof) to *protect* that information is part and parcel of the decision to gather the information in the first place. But absent an instruction to the contrary from Congress, an agency need not conduct a cost-benefit analysis of every eventual FOIA release that could be ordered when the agency is deciding whether to take an action that involves the creation or collection of information (as most agency actions do).

The State Plaintiffs claim there is no basis for an "agency-purview distinction," States' Opp'n Br. 7, but the lone case they cite—*Michigan v. EPA*, 135 S. Ct. 2699 (2015)—confirms why such a distinction is appropriate. There, in assessing what constitutes an agency's "consideration of the relevant factors," the Court looked to the specific provision of the Clean Air Act that was at issue. *Michigan*, 135 S. Ct. at 2706 (citation omitted). The Court held that the relevant provision—a section of the statute directing the EPA "to regulate power plants if it 'finds such regulation is appropriate and necessary'"—should be read to require the EPA to consider costs because "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *Id.* at 2706-07. The Court thus focused on the considerations that would

traditionally be relevant in issuing a similar regulation—*i.e.*, the considerations that are generally within the agency's purview.

Here, the relevant provision of the Occupational Safety and Health Act ("OSH Act") instructs OSHA to promulgate regulations to require employers to make "periodic reports" on certain "work-related deaths, injuries and illnesses." 29 U.S.C. § 657(c)(2). In deciding how to craft those regulations, it would be akin to malpractice for OSHA to ignore the privacy of the very employees whose "deaths, injuries and illnesses" are the subject of those reports. By contrast, nothing in the OSH Act suggests that OSHA must take account of any societal benefits that would come from involuntarily disclosing the collected information under FOIA.

In any event, Plaintiffs' challenge to the consistency of OSHA's reasoning is irrelevant because the agency *did* consider the alleged benefits stemming from disclosure of 300 and 301 data. In fact, OSHA walked through the alleged benefits the agency had previously identified and that Plaintiffs now cite—including "providing data to employers, workers, unions and academics"—but concluded that "the scope of any such benefits is uncertain," particularly given that "OSHA never quantified" those benefits when it issued the Electronic Reporting Rule. 84 Fed. Reg. at 393. And although an agency may not be able to disregard uncertain benefits *entirely*, *see Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004), an agency's decision to prioritize a more certain course of action is well within its discretion to choose how to "allocate its resources in the optimal way[.]" *In re Barr Labs., Inc.*, 930 F.2d at 76. OSHA reasonably exercised that discretion here. It found that "investing in a program to collect, process, and analyze data from hundreds of thousands of Forms 300 and 301 would constrain OSHA's ability to achieve [its] . . . priority enforcement goals." 84 Fed. Reg. at 393. In light of that fact, OSHA concluded that the "uncertain benefits" of collecting the 300 and 301 data do not "justify

the diversion of OSHA's resources from other agency initiatives with a proven record of effectiveness." *Id.*

At bottom, although Plaintiffs "might disagree with the Agency's conclusions" about the value it should place on any benefits of disclosure, OSHA's "explanation is plain and coherent[.]" *McCarthy*, 139 F. Supp. 3d at 40. Because OSHA "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," its decision to issue the Revised Rule was neither arbitrary nor capricious. *Ark Initiative*, 816 F.3d at 127 (quoting *State Farm*, 463 U.S. at 43).

B. Plaintiffs' Remaining APA Challenges Are Meritless.

The lion's share of Plaintiffs' briefing focuses on the substantive reasonableness of OSHA's decision-making. And for the reasons outlined above, the Revised Rule easily clears the APA's substantive bar. That leaves just two APA arguments in this case—one from each set of Plaintiffs.

First, the Public Health Plaintiffs maintain that OSHA did not adequately respond to public comments. However, they substantially scale back that argument in their Opposition and Reply brief. *Compare* Pub. Health Pls.' Mot. Summ. J. 30-40, ECF No. 16, *with* Pub. Health Opp'n Br. 18-20. Specifically, the Public Health Plaintiffs now highlight just one item to which OSHA allegedly failed to respond: the report of the National Academy of Sciences, Engineering, and Medicine ("NAS Report"). But the record forecloses their claim that OSHA "entirely discounted the findings of the report." Pub. Health Opp'n Br. 18.[10] For instance, OSHA discussed at length the report's recommendations concerning "the benefits of collection identified by commenters," such as "expanding and targeting outreach to employers." 84 Fed. Reg. at 391. As OSHA

[10] As the Public Health Plaintiffs acknowledge, OSHA actually *credited* certain NAS Report recommendations—a fact that belies any claim that OSHA simply discounted the report's findings. *See* 84 Fed. Reg. at 396.

recognized though, these approaches "would require substantial investment of time and money to develop." *Id.* Accordingly, OSHA explained that, "at this juncture, the protection of worker safety and health will best be furthered by," *inter alia*, "utilizing the 300A and severe injury data [OSHA] is already collecting and analyzing for enforcement and compliance assistance activities." *Id.* at 391-92.

The Public Health Plaintiffs attempt to dismiss this engagement with the NAS Report by arguing that OSHA relied only on the fact that report's recommendations "would involve some costs[.]" Pub. Health Opp'n Br. 20. But as with many of Plaintiffs' arguments, this ignores the comparison that OSHA drew between two policy options. OSHA was not motivated solely by the fact that developing different means of enforcement targeting would be costly; it was the opportunity cost of pursuing those new and expensive approaches—*i.e.*, taking away resources from effective enforcement strategies that rely on data OSHA is already collecting—that tipped the scales.[11] OSHA, accordingly, more than satisfied its "not 'particularly demanding'" obligation to respond to comments that relied on the NAS Report. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C. Cir. 2012) (citation omitted).

The final remaining APA issue is the State Plaintiffs' claim that the Revised Rule was not a "logical outgrowth" of the NPRM. *See* States' Opp'n Br. 15-18. As an initial matter, the State Plaintiffs do not argue that they lacked adequate notice of any of the actual changes OSHA made to its regulations. As the cases cited by Plaintiffs confirm, the APA's requirement of adequate notice is principally about ensuring that regulated parties have notice of the requirements that *they*

[11] The Public Health Plaintiffs' remaining argument about the NAS Report—that OSHA was required to consider the benefits of involuntarily disclosing the 300 and 301 data in response to a FOIA request, *see* Pub. Health Opp'n Br. 19—merely rehashes Plaintiffs' other arguments about the alleged benefits of disclosure. *See supra* at 15-19.

will be subjected to. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1078 (D.C. Cir. 2009) (holding that the agency "failed to provide adequate notice" of a new "method[] for resolving rail rate disputes too small to bring under ordinary procedures"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (holding that the EPA failed to provide "adequate notice" of a new regulatory requirement that would affect when a refinery could be considered "small").

Here, by contrast, the State Plaintiffs claim only that they lacked notice that OSHA could decide that a manual system for reviewing data, which is more expensive than software, would be they agency's preferred means of protecting worker privacy. *See* States' Opp'n Br. 15-16. Even assuming the "logical outgrowth" test applies to such a decision, the NPRM for the Revised Rule gave the State Plaintiffs plenty of notice that they "reasonably should have filed their comments on" the costs of different forms of data review "during the notice-and-comment period." *CSX Transp.*, 584 F.3d at 1080. In the NPRM for the Revised Rule, OSHA sought comment on the "risks to worker privacy," and it expressly asked how it could "make [those risks] less likely, and *what resources would be required*" to do so. 83 Fed. Reg. at 36,500 (emphasis added). OSHA's conclusion—that a two-tiered system of manual review would make the risks less likely—grew directly from that provision of the NPRM. OSHA also flagged its interest in learning more about the "challenges" that "other agencies and organizations" have "faced in using [de-identification] systems to keep PII protected." 83 Fed. Reg. at 36,500. That request similarly laid the foundation for OSHA's conclusion that "software cannot guarantee full scrubbing of PII and has no ability to judge re-identifiable information"—a conclusion that led the agency to decide that manual review would be necessary. 84 Fed. Reg. at 400. There is thus a direct line from OSHA's NPRM to the analysis in its final rule; the APA does not require more.

CONCLUSION

For the foregoing reasons, together with the reasons in Defendants' opening brief, the Public Health Plaintiffs lack standing to bring their claims, and the Court should dismiss their action. Additionally, the Court should grant Defendants' motion for summary judgment and deny Plaintiffs' motions for summary judgment.[12]

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Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRAD P. ROSENBERG
Assistant Branch Director

/s/ Michael H. Baer
MICHAEL H. BAER
Trial Attorney (New York Bar No. 5384300)
U.S. Department of Justice,
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Telephone: (202) 305-8573
Facsimile: (202) 616-8460
E-mail: Michael.H.Baer@usdoj.gov

Counsel for Defendants

[12] In their Opposition and Reply brief, the State Plaintiffs ask the Court to "permanently enjoin[]" the Revised Rule—a request that was absent from their opening brief, where they sought only vacatur. *Compare* States' Opp'n Br. 18, *with* States' Mem. Supp. Mot. Summ. J. 27, ECF No. 18-1. It is not clear what additional relief the State Plaintiffs believe they could receive from enjoining a vacated rule, but in any event, a permanent injunction is not a remedial option here. Rather, if the Court were to rule for Plaintiffs on the merits, the only question would be whether to "vacate the agency's [decision]" or to remand without vacatur if "'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so[.]" *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)).