

No. 22-1002

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL NURSES UNITED,  
NEW YORK STATE NURSES ASSOCIATION,  
PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS,  
AMERICAN FEDERATION OF TEACHERS,  
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AND  
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION;  
UNITED STATES DEPARTMENT OF LABOR;  
MARTIN J. WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES  
DEPARTMENT OF LABOR, AND DOUGLAS L. PARKER, IN HIS OFFICIAL CAPACITY AS  
ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,  
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Mandamus

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**REPLY BRIEF BY PETITIONERS**

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January 27, 2022

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## INTRODUCTION

Two years into a public health emergency that has claimed the lives of at least 3,492 healthcare workers, infected at least 884,388 with COVID-19,<sup>1</sup> and overburdened the healthcare system, the Occupational Safety & Health Administration (OSHA) announced on December 27, 2021, that “it is withdrawing” its emergency temporary standard protecting healthcare workers even though there is no permanent standard to replace it. Union’s Pet., Ex. 1 at 1. This is despite the Agency’s own June 27, 2021, findings that the emergency temporary standard is “necessary” to protect these workers from “grave danger.” 86 Fed. Reg. 32376, 32377 (June 21, 2021) (attached hereto as Exhibit 1) (Healthcare ETS). The Agency has never disclaimed those findings or suggested that they are no longer valid, either in the December 27 announcement or in its Opposition filed with this Court. OSHA has failed to fulfill the mandatory duty the Occupational Safety & Health Act (Act) imposes on it by failing to leave the ETS in place until it is superseded by a permanent standard.

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<sup>1</sup> CDC COVID Data Tracker, Cases & Deaths among Healthcare Personnel, Posted: Wednesday, January 26, 2022 4:24 PM ET. <https://covid.cdc.gov/covid-data-tracker/#health-care-personnel>. Only a small fraction of deaths and infections reported to CDC include information on employment status, so the toll of COVID-19 on healthcare workers is likely higher than these numbers suggest.

The Act expressly provides that an ETS “shall be effective until superseded by a [permanent] standard promulgated in accordance with the [expedited] procedures prescribed in [Section 6(c)(3)].” 29 U.S.C. § 655(c)(2). The same Section requires that “[t]he Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard.” 29 U.S.C. § 655(c)(3). Yet the Agency now informs this Court that it “currently anticipates that it will be able to complete this rulemaking within six to nine months” from now. Opp’n at 6. In other words, the Agency intends to leave healthcare workers exposed to “grave danger” without “necessary” protections for a minimum of six months.

OSHA’s only response is that the statute cannot possibly mean what it expressly states and that OSHA ordinarily has discretion to set priorities in the promulgation of permanent standards under other sections of the Act. But the relevant provisions of the Act are unambiguous and create a clear, mandatory duty. No reasonable reading of those provisions allows OSHA to leave workers unprotected from a grave danger for an indeterminate amount of time before promulgating a permanent standard. Whatever discretion OSHA may have in other contexts, it does not have the discretion to abandon healthcare workers while it formulates a final rule on a timetable of its own choosing.

There is no support—in the statute’s text or purpose—for the proposition that the Act’s express six-month timeline for OSHA to issue a permanent standard is discretionary, but that what is at most an implied six-month expiration date for the ETS is mandatory.

## **ARGUMENT**

### **1. OSHA Does Not Dispute That It Has a Mandatory Duty to Protect Healthcare Workers from Grave Danger.**

Section 6(c) *requires* OSHA to issue an ETS when it determines that employees face a “grave danger” and an ETS is “necessary” to protect workers from that grave danger. 29 USC 655(c)(1). OSHA concedes this. Opp’n at 9. OSHA has made both findings here and has not and could not, under present circumstances, withdraw them.

OSHA found that healthcare workers face the greatest danger of all workers from occupational exposure to COVID-19. 86 Fed. Reg. 32381, 32411. The grave danger faced by healthcare workers is even greater today than when OSHA first issued the ETS in June 2021, and when the Unions petitioned this court three weeks ago. During the past few weeks, the number of COVID-19 infections among health care workers has exploded, reaching record high levels. The Centers for Disease Control (CDC) reports 68,043 new infections among nursing home staff for the week ending January 16, 2022, and preliminary data showing 52,252 infections for the week ending January 23, 2022. For the week ending December

26, 2021, CDC had reported 13,308 infections; infections among nursing home workers have increased by more than 400% since that time. The rate of infection among healthcare workers is so high that some hospitals claim they cannot operate without requiring COVID-19 positive employees to report to work, further increasing the spread of COVID-19 in the workplace.<sup>2</sup>

OSHA also found that an ETS was “necessary” because its existing standards, non-binding guidance, and the Act’s general duty clause were not effective in protecting healthcare workers from exposure to COVID-19. 86 Fed. Reg. 32413, 32415-21. It reiterated those findings in November 2021 when it issued an ETS covering non-healthcare workers. Vaccination and Testing: Emergency Temporary Standard, 86 Fed. Reg. 61402, 61440-45 (Nov. 5, 2021). Even in its December announcement, OSHA stated, “OSHA believes the danger faced by healthcare workers continues to be of the highest concern and measures to prevent the spread of COVID-19 are still needed to protect them.” Union’s Pet., Ex. 1 at 1. OSHA also specifically found that vaccination does not eliminate the grave danger facing healthcare workers. 86 Fed. Reg. 32382, 32399. Thus, the multi-pronged mitigation measures required by the ETS, *e.g.*, respiratory protection, ventilation, physical distancing, testing, isolation, quarantine, and

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<sup>2</sup> <https://www.washingtonpost.com/health/2022/01/23/hospital-workers-covid-isolation-cdc/>.

medical removal protection, remain more “necessary” than ever to prevent exposure to and transmission of coronavirus in healthcare settings and to protect healthcare workers from infection, serious illness and death from COVID-19.

In fact, Assistant Secretary Parker in his declaration to this Court admits that other measures are not adequate to protect healthcare workers:

OSHA noted [in its December 27 statement] that the Vaccination and Testing ETS [now enjoined], and the CMS Vaccination requirements, would provide protection to Healthcare workers in the interim . . . . While, as OSHA noted in the preamble, *these requirements are not as protective as the Healthcare ETS*, they still provided some protection.

Parker Decl. ¶ 5 (emphasis added) “[S]ome protection” is not enough, and OSHA already found that the measures in the Healthcare ETS were necessary to protect workers from the grave danger posed by COVID.

In fact, OSHA makes no attempt in its Opposition to argue that a grave danger no longer exists or that an ETS is no longer necessary. Instead, it offers unsupported statements that its decision to rely on other enforcement tools in the interim was “reasonable.” Opp’n 22. But *no* argument of any kind follows those naked assertions of reasonableness.

## **2. While OSHA May Have Broad Discretion in Other Contexts, It Does Not Have Discretion Here.**

OSHA argues that its discretion to set priorities under Section 6(g) of the Act allows it to determine “the timeframe for finalizing” a COVID-19 healthcare rule and to “change priorities at any stage of the rulemaking process.” Opp’n at 9.

But OSHA's discretion in other contexts is inapposite here. Once OSHA makes the two findings that *require* it to issue an ETS, the statute mandates that OSHA prioritize completing the rulemaking initiated by an ETS expeditiously.<sup>3</sup>

Earlier cases cited by OSHA interpreting section 6(g) do not give OSHA the wide-ranging discretion it claims. None of those cases involved a hazard that OSHA had already determined posed a grave danger and for which it had found an ETS was necessary. Opp'n at 10-11. Indeed, all the cases cited by OSHA as support for the claim of discretion under Section 6(c) are cases that arose under a completely different subsection, namely 6(b). *Nat'l Cong. Of Hisp. Am. Citizens v. Marshall (El Congreso I)*, 554 F.2d 1196 (D.C. Cir. 1977) (rulemaking on field sanitation standards for agricultural workers); *Nat'l Cong. Of Hisp. Am. Citizens v. Marshall (El Congreso II)*, 626 F.2d 882 (D.C. Cir. 1979) (same); *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Chao*, 361 F.3d 249, 254 (3d Cir. 2004) (decision not to issue a rule on metalworking fluids); *Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996) (rule on second-hand smoke exposure). And in each of those cases, OSHA convinced the court that it was addressing higher priority occupational hazards

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<sup>3</sup> The Act's legislative history underscores that this is a mandate: "upon publication of such an emergency temporary standard, the Secretary *must* begin a regular standard-setting procedure for such hazard, which proceeding *must* be completed within six months." S. REP. No. 91-1282, 91st Cong., 2d Sess. 5184 (1970) (emphasis added).

while here OSHA acknowledges that no workers are at greater risk from this life-threatening pandemic than healthcare workers. 86 Fed. Reg 32381, 32411.

The statutory distinction between the instant situation and the cases OSHA cites is crucial because subsection 6(b) is not intended to apply to the emergency situations described in subsection 6(c) when time is of the essence to save workers' lives from a "grave danger," but rather to ordinary rulemaking to mitigate against the lower, "significant risk" of occupational harm. *See Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 749-50 (D.C. Cir. 2011). Thus, unlike in the cases cited by OSHA, this is not a scenario in which OSHA has discretion to weigh and balance competing priorities on non-urgent matters, but rather, a national emergency in which the risk of serious illness and death is disproportionately falling on healthcare workers who deserve the protection mandated by the statute.

**3. OSHA Has a Continuing Mandatory Duty to Maintain "Necessary" Protections for Healthcare Workers Against The "Grave Danger" They Still Face.**

Seven months have now passed since OSHA issued the ETS, and OSHA concedes that an ETS is "necessary" to protect healthcare workers from the "grave danger" that they continue to face. Yet, OSHA announced that it is withdrawing the ETS because it cannot complete the rulemaking to replace it with a permanent standard within the six-month timetable "contemplated" by the Act. OSHA acknowledges that "no court has considered whether an ETS remains in effect and

enforceable when the Secretary is unable to finalize a permanent standard in a timeframe approaching the one contemplated by the OSH Act.” Opp’n at 23.

While some cases, in *dicta*, suggest an ETS remains in effect for only six months, no court has ever so held. In cases where such dicta exists, the courts invalidated the ETS before the six-month deadline arrived. *See Asbestos Info. Ass’n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984); *Florida Peach Growers v. U.S. Dep’t of Labor*, 489 F.2d 120, 127 (5th Cir. 1974). In contrast, in cases where the ETS either was not challenged or was not stayed, OSHA’s past practice has been to leave ETSs in effect for longer than six months until a final rule was in place. For example, on January 7, 1978, OSHA issued an ETS concerning Acrylonitrile, but it did not issue a permanent standard until October 3, 1978—nine months later. *See* 43 Fed. Reg. 45762 (October 3, 1978). No action was taken to withdraw the ETS after six months. In fact, the final standard expressly stated that it “superseded” the ETS and expressly withdrew the ETS. *Id.* at 45762, 45808. Similarly, on May 3, 1973, OSHA issued an ETS addressing 14 carcinogens, which was amended on July 27, 1973. A final standard did not issue until January 29, 1974, with an effective date of February 11, 1974. OSHA did not withdraw the ETS during those nine months. *See* 39 Fed. Reg. 3756, 3797 (Jan. 29, 1974). *See also* *Asbestos*, 37 Fed. Reg. 11318, 11322 (July 7, 1972) (providing ETS remains in effect until the effective

date of the permanent standard). In no previous case has OSHA treated an ETS as lapsed before a permanent standard was issued.

OSHA's past practice is consistent with the plain language of Section 6(c)(2) of the Act which provides that an ETS "shall be effective until superseded by a [permanent] standard." 29 U.S.C. § 655(c)(2). That language must be interpreted to mean that so long as the conditions triggering the duty to adopt an ETS continue, as OSHA concedes they do here, OSHA has a duty to maintain the protections of the ETS until they are replaced by the protections of a permanent standard.

Whether or not OSHA is correct that in today's regulatory environment a six-month deadline for moving from an ETS to a permanent standard is unreasonable, Congress did not intend to leave workers unprotected in the interim and this Court should not read the Act to permit that result. It is not credible to suggest that Congress granted OSHA the authority to protect workers on an urgent basis without notice and comment, but also intended that those protections would lapse if OSHA could not finish the rulemaking process in six months. OSHA's announcement that it will withdraw the ETS was thus contrary to the clear, unambiguous command of Section 6(c)(2) that there be no temporal gap in the protection of workers from grave danger.

OSHA had, and continues to have, a statutory duty to maintain the ETS until it is replaced with a permanent standard. If section 6(c)(2) of the Act is interpreted to mean what it says--that an ETS must remain in effect until superseded by a permanent standard, 29 USC 655(c)(2) -- then OSHA violated its mandatory duty by announcing that it was withdrawing the ETS and mandamus is proper to ensure the ETS remains in effect. But even if section 6(c)(3) of the Act is interpreted to mean that an ETS expires after six months, 29 U.S.C. § 655(c)(3), then OSHA has still violated its duty to replace the ETS with a permanent standard within six months and mandamus is proper to compel the agency to do so. Instead, OSHA reads both parts of the Section in a manner at odds with its clear purpose, giving the agency discretion to issue a permanent rule after the six-months statutory deadline while, at the same time, forcing the agency to withdraw the ETS after six months regardless of whether a permanent standard has replaced it. This construction of the statute is inconsistent, illogical, and contrary to its clear purpose.

**4. OSHA Has Not Articulated a Cognizable or Reasonable Basis for Withdrawing the ETS.**

OSHA's Opposition leaves this Court with no cognizable rationale for the Agency's announced action. If OSHA withdraws the ETS, as it has announced it will do, the Act requires OSHA to publish a statement in the Federal Register explaining why it is doing so. 29 U.S.C. § 655(e). OSHA has just done that to

withdraw the vaccinate-or-test ETS, stating its reasons for doing so in the Federal Register. See <https://public-inspection.federalregister.gov/2022-01532.pdf>. Here, in announcing its intent to withdraw the ETS last December, OSHA stated that it “plans to publish a notice in the Federal Register to implement this announcement.” Union’s Pet., Ex. 1 at 1. Now, OSHA informs the Court it intends to do no such thing. Opp’n at 5 n.2. The Court cannot credit the OSHA press release, affidavits filed in court, or statements of counsel. The statute requires an explanation in the Federal Register, which OSHA has not published. This Court can uphold OSHA’s actions only on grounds the Agency has properly articulated. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). An order directing OSHA to keep the ETS in effect and remand for further action by OSHA is warranted on that basis alone. See *Int’l Union, United Mine Workers of Am. v. U.S. Dep’t of Labor*, 358 F.3d 40, 45 (D.C. Cir. 2004).

Moreover, even if this Court could consider the rationale now advanced by the Agency outside the Federal Register and even if the rationale could justify ignoring an express legislative duty, the rationale is not credible for two reasons.

First, the rationale advanced in this Court is conspicuously absent from the December 27 announcement. The earlier announcement stated only “given that OSHA anticipates a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act,” OSHA intended to withdraw the ETS. Pet.,

Ex. 1 at 1. But now, the Agency advances a different post-hoc rationale—competing priorities and a lack of resources. The shifting rationale discredits both.

In fact, much of OSHA’s delay is likely caused by the fact that, at least until this Petition was filed, OSHA did not intend to publish a final Healthcare-COVID standard, but instead planned to address the issue in a standard regulating exposure to all infectious diseases. OSHA’s December 2021 Regulatory Agenda listed the next action for the Healthcare ETS as “undetermined.”

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AD36>). The Regulatory Agenda discussed the risks healthcare workers face from COVID-19 under an entry for an infectious disease standard—a rulemaking OSHA first initiated in 2010 and for which it does not expect to publish a *proposed* rule until April 2022.

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AC46>).

Second, OSHA exaggerates the limits of its resources and the work necessary to complete the rulemaking. Congress appropriated \$100 million in the American Rescue Plan (“ARP”) to OSHA “to carry out COVID-19 related worker protection activities.” American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2101, 135 Stat. 4, 30. OSHA can use that money to supplement its resources and promptly complete the COVID-19 rulemaking.

OSHA also exaggerates the resources needed to complete the rulemaking. For example, Assistant Secretary Parker cites over 400 comments the Agency must address (a very small number in modern rulemaking proceedings), Parker Declaration ¶ 8, but our review suggests that more than half are 1-3 pages long, only a handful raise significant issues requiring a response, and most simply urge OSHA not to go beyond CDC guidelines.<sup>4</sup> Further, OSHA has already completed many of the analytic steps it cites as reason for delay.<sup>5</sup>

## **5. Mandamus Is the Appropriate Remedy to Ensure Healthcare Workers Are Protected From Grave Danger.**

Finally, OSHA is wrong when it argues that the factors usually considered by the Court under *TRAC v. FCC*, 750 F.2d 70 (D.C Cir.1984), do not favor relief

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<sup>4</sup> This statement is based on our review of the docket entries at <https://www.regulations.gov/search/comment?filter=OSHA-2020-0004> and is consistent with modern experience in rulemaking.

<sup>5</sup> For example, OSHA has already satisfied the requirements of the Paperwork Reduction Act. The ETS included a review of the paperwork work requirements imposed by the ETS and requested comments on the estimates. 86 Fed. Reg. 32560-62. A search of the docket (OSHA-2021-003), reveals that no comments were submitted on the paperwork review and estimate.

<https://www.regulations.gov/search?filter=osha-2021-003>).

OSHA also determined that the requirements for an Initial Regulatory Flexibility Analysis and SBBREFA panel did not apply due to the emergency nature of the ETS. 86 Fed. Reg. 32558. OSHA found that it was “not required to convene a small entity panel under section 609(b).” *Id.* Nevertheless, OSHA examined the impact of the ETS on small and very small entities as part of OSHA’s analysis of feasibility. *Id.* 32488-92.

The agency also found it satisfied the requirements of other statutes and Executive Orders. 86 Fed. Reg. 32558-62.

here. Of the six factors this Court weighs to decide whether mandamus is appropriate, our argument, *supra*, addresses whether OSHA's proposed delay is reasonable under the statute given the Agency's other priorities. Incredibly, OSHA argues that the Unions point to no "interests prejudiced by delay other than the impact on human health and welfare." Opp'n at 18 n. 4. Given the toll COVID-19 has taken on America's workforce, and healthcare workers in particular, the economy, and everyone's daily lives over the past two years, that should be enough. As the Court recognized in *TRAC*, "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." 750 F.2d at 80 (citations omitted). *See also Public Citizen v. Aucter*, 702 F.2d 1150, 1157 (D.C Cir. 1983).<sup>6</sup>

This Court should direct OSHA to maintain the ETS in effect until it is superseded by a permanent standard, as the Act requires.<sup>7</sup> In addition to the

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<sup>6</sup> OSHA's observation that the delay here is not "so egregious as to warrant mandamus" under the prior cases is simply not relevant. Opp'n at 12. In none of those earlier cases had OSHA issued an ETS after finding employees are exposed to grave danger. Delays that might be tolerable when OSHA is weighing competing regulatory priorities that pose similar risks are not tolerable when OSHA has found that workers face a grave danger and that existing OSHA standards and other remedies under the Act will not protect workers from that grave danger.

<sup>7</sup> If circumstances warrant, OSHA could modify the ETS without notice and comment before it completes work on the final COVID-19 healthcare standard. *See Florida Peach v. U.S. Dep't of Labor*, 489 F.2d at 127.

mandatory nature of the ETS in respect to healthcare employers, a federal COVID standard for healthcare workers has the effect of requiring state OSHA programs to adopt similar requirements, serving to establish uniform, minimum national standards. 86 Fed. Reg. 32422.

In addition to directing OSHA to retain the ETS in effect, this Court should direct OSHA to complete a rulemaking to replace the COVID-19 Healthcare ETS with a permanent COVID-19 standard within 30 days. As OSHA recognizes, courts in earlier cases under Section 6(b) have ordered the Agency to adhere to a timetable and to report to the Court on its progress. *See, e.g., In re: Int'l Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (Court ordered OSHA to adhere to its existing deadlines). *Cf. Oil, Chemical and Atomic Workers Union v. OSHA*, 145 F.3d 120 (3rd Cir. 1998) (Court ordered mandatory mediation to establish timetable for rulemaking). *See also* Opp'n at 22 n. 7. This Court should similarly direct OSHA to adopt a permanent standard within 30 days. The Court should also direct OSHA to file status reports to inform the Court on its progress.

## CONCLUSION

For the foregoing reasons, and those described in our Petition for Writ of Mandamus, this Court should direct OSHA to maintain the Healthcare ETS in effect until superseded by a permanent COVID-19 Healthcare standard, and to issue such permanent standard within 30 days.

Dated: January 27, 2022

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Reply Brief contains 3,663 words, and therefore is in compliance with the word limit set by the Court's Order dated January 6, 2022 (Doc. No. 1929499) and by Fed. R. App. P. 21(d)(1), excluding the documents required by Fed. R. App. P. 21(a)(2)(C).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 365 Times New Roman 14-point font.

/s/ Nicole J. Daro

*Counsel for Petitioner NNU*

January 27, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of January 2022, I caused the Reply Brief of Petitioners to be electronically filed via the Court's CM/ECF system, providing service on all counsel of record.

/s/ Nicole J. Daro

*Counsel for Petitioner NNU*

January 27, 2022