UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, et al., Plaintiffs, v. R. ALEXANDER ACOSTA, Secretary, United States Department of Labor, et al., Defendants.	Civil Action No. 19-166 (TJK)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiffs move for summary judgment on the ground that there is no genuine dispute as to any material fact and plaintiffs are entitled to judgment as a matter of law. As explained in the accompanying memorandum, defendants violated the Administrative Procedure Act by rescinding provisions of a rule issued in May 2016 that required establishments with 250 or more employees to electronically submit to OSHA information from OSHA Forms 300 and 301. The challenged rule, entitled "Tracking of Workplace Injuries and Illnesses," 84 Fed. Reg. 380 (Jan. 25, 2019) (the Rollback Rule), reverses key aspects of the final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) (the Electronic Reporting Rule). The Court should enter judgment for plaintiffs, declare that defendants' rescission of the requirements of the Electronic Reporting Rule is unlawful, and vacate that portion of the Rollback Rule.

Dated: June 7, 2019

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
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INTRODUCTION

On January 25, 2019, the Occupational Safety and Health Administration, a component of the Department of Labor under the authority of Secretary of Labor R. Alexander Acosta (collectively, OSHA) issued a final rule entitled "Tracking of Workplace Injuries and Illnesses," 84 Fed. Reg. 380 (Jan. 25, 2019) (the Rollback Rule). The Rollback Rule rescinds provisions of the final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) (the Electronic Reporting Rule), that required establishments with 250 or more employees to submit electronically certain work-related injury and illness data recorded on OSHA Forms 300 and 301. When OSHA promulgated the Electronic Reporting Rule, it announced that it would post the data on its website to, among other reasons, allow public health organizations to identify and analyze threats to worker health and safety and to develop solutions. OSHA explained that the Form 300 and 301 data collected under the Electronic Reporting Rule does not include personally identifiable information (PII) and is subject to release under the Freedom of Information Act (FOIA). The same data is available at the worksite to employees, former employees, and their representatives. In a related case, this Court concluded that the records submitted under the Electronic Reporting Rule do not include PII and would be available under FOIA. *PC Health Research Grp. v. Acosta*, 363 F. Supp. 3d 1, 15–17 (D.D.C. 2018) (*PC HRG*).

In announcing the Rollback Rule, OSHA reversed course and asserted that, no matter the benefits for worker health and safety, OSHA should not collect the information at all, unless it could eliminate any risk to worker privacy from the inadvertent disclosure of erroneously submitted PII, or from the reidentification of individuals from anonymized information. OSHA did not provide a reasoned or rational explanation for reversing its position, and its rescission of the Electronic Reporting Rule is arbitrary and capricious.

STATEMENT OF FACTS[1]

I. Statutory and Regulatory Background

A. The Occupational Safety and Health Act

The Occupational Safety and Health Act (OSH Act) was enacted in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), by, among other means, "providing for appropriate reporting procedures … [that] will help achieve the objectives of this [Act] and accurately describe the nature of the occupational safety and health problem," *id.* § 651(b)(12). To accomplish this goal, the Act authorizes the Secretary of Labor to promulgate regulations requiring employers to "make, keep and preserve, and make available to the Secretary," occupational health records. *Id.* § 657(c)(1); *see id.* § 673(e). The Act further directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." *Id.* § 657(c)(2); *see id.* § 673(e). The Act also provides that, "to further the purposes of this chapter, the Secretary ... shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics." *Id.* § 673(a). The Secretary has delegated these statutory responsibilities and authorities to OSHA. *See Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 868 (D.C. Cir. 2002).

Since 1971, OSHA has promulgated regulations "to require employers to record and report work-related fatalities, injuries, and illnesses." 29 C.F.R. § 1904.0; *see* 81 Fed. Reg. at 29,625 (citing 36 Fed. Reg. 12,612 (July 2, 1971)). OSHA requires employers with more than 10

[1] Plaintiffs allege unlawful agency action in violation of the APA. Pursuant to Local Civil Rule 7(h)(2), this memorandum includes a statement of facts with specific references to the administrative record, as well as background information about the Electronic Reporting Rule. Pursuant to Local Civil Rule 7(n), the parties will prepare an appendix containing copies of the portions of the administrative record cited in any party's memoranda and file it within 14 days following the final submission.

employees in most industries to maintain records of occupational injuries and illnesses. *See* 29 C.F.R. § 1904; 81 Fed. Reg. at 29,624. Those establishments must record each employee injury and illness on a "Log" (the OSHA Form 300) and must prepare a supplementary "Incident Report" that provides additional details about each case recorded (the OSHA Form 301). At the end of each year, such establishments are required to prepare an "Annual Summary Form" (the OSHA Form 300A) derived from the information in the Log. *See* 29 C.F.R. § 1904.32(b); *see generally* OSHA Forms 300, 300A, and 301, 2019-AR00780–82.

Although employers have long been required to complete and maintain OSHA Forms 300, 300A, and 301, and to make them available at the worksite to employees, former employees, and their representatives, the forms were not collected by OSHA in a comprehensive or systematic way. 81 Fed. Reg. at 29,632. Rather, OSHA collected injury and illness data during onsite inspections. *Id.* In addition, from 1997 to 2012, OSHA received such data through the OSHA Data Initiative (ODI), an annual survey through which OSHA requested Form 300A data from approximately 80,000 large establishments in high-hazard industries. *Id.* at 29,628. Since 2015, OSHA has required employers to submit reports of work-related fatalities and severe injuries, and OSHA allows such reports to be submitted electronically. *See* 79 Fed. Reg. 56,130 (Sept. 18, 2014).

To provide OSHA a more effective way of targeting its resources, as well as for research and other purposes, federal agencies and advisory groups beginning in the 1980s recommended that OSHA develop a system requiring employers to provide OSHA with injury and illness data from OSHA Forms 300, 300A, and 301. *See* Report of the National Academy of Sciences, *A Smarter National Surveillance System for Occupational Safety and Health in the 21st Century*

(2019), Attachment to Comment of Celeste Monforton, American Public Health Association, 2019-AR00473–74 (NAS Report at ix–x).

B. The Electronic Reporting Rule

On May 12, 2016, OSHA issued the Electronic Reporting Rule. *See* 81 Fed. Reg. at 29,624. The Rule, effective January 1, 2017, required the electronic submission to OSHA of certain information from OSHA Forms 300, 300A, and 301 that employers were already required to keep, but which had been previously available only by request or by posting at the worksite. *Id.* at 29,668. In a section entitled "Benefits of Electronic Data Collection," OSHA explained that, "[w]ith the information obtained through this final rule, employers, employees, employee representatives, the government, and researchers may be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses." 81 Fed. Reg. at 29,629.

The Electronic Reporting Rule included phased-in submission deadlines for covered establishments to electronically submit their injury and illness records to OSHA. *See id.* at 29,640. In the first year, establishments with 250 or more employees were required to submit the summary Form 300A data for calendar-year 2016 by July 1, 2017. *Id.* In the following year, such employers were required to submit their 2017 Form 300A data, and certain information from Forms 300 and 301, by July 1, 2018. *Id.* Beginning in 2019, the Rule required such establishments to submit the required information from all three forms for the preceding calendar year by March 2.[2] *Id.*

When it issued the Electronic Reporting Rule, OSHA repeatedly emphasized that it would "post the establishment-specific injury and illness data it collects under this final rule on its public

[2] The Electronic Reporting Rule also requires certain establishments in high-risk industries with 20 or more employees to submit Form 300A data by the same deadlines, but it did not require any establishment with fewer than 250 employees to submit information from Forms 300 and 301. 81 Fed. Reg. at 29,668.

Web site at www.osha.gov." *Id.* at 29,625; *see also id.* at 29,649–50, 29,657, 29,662. OSHA explained that it would make available all of the fields collected in OSHA Forms 300 and 300A, and would make available the fields from OSHA Form 301 that do not include PII. *Id.* at 29,632.[3]

The Electronic Reporting Rule did not require employers to submit all the information recorded on Forms 300 and 301: On Form 300, it did not allow the submission of employee name (column B). *See id.* at 29,692; Form 300, 2019-AR00780. From the left side of Form 301 (Fields 1–9), it did not allow the submission of employee name, employee address, name of treating physician or health care provider, or name and address of treating facility (Fields 1, 2, 6, and 7). *See* 81 Fed. Reg. at 29,632; Form 301, 2019-AR00782.

Under the rule, OSHA would collect but not release information from the other fields from the left side of Form 301: date of birth, date of hire, gender, whether treated in an emergency room, and whether hospitalized overnight (Fields 3, 4, 5, 8, and 9). *See* 81 Fed. Reg. at 29,632, 29,661–62. The rule also required submission of the information from the right side of Form 301 (Fields 10–18). *See id.* at 29,632; Form 301, 2019-AR00782. With regard to those fields, the agency pledged to provide "additional guidance to the[] instructions [on these forms] to inform employers not to include personally identifiable information (PII) or confidential business information (CBI) within these fields." 81 Fed. Reg. at 29,659.

OSHA repeatedly emphasized that the information collected would be made public "in accordance with FOIA." *Id.* at 29,658–62. OSHA reiterated that the fields it would collect from Forms 300 and 301 "will not include personally-identifiable information." *Id.* at 29,663. OSHA

[3] OSHA defines PII as "information [that] can be used to distinguish or trace an individual's identify, such as their name, Social Security number, biometric records, etc. alone, or when combined with other personal or identifying information [that] is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." 81 Fed. Reg. at 29,664 (adopting definition from May 22, 2007 OMB Memorandum).

further noted that it "has effective safeguards in place to prevent the disclosure of personal or confidential information contained in the recordkeeping forms and submitted to OSHA," *id.* at 29,661, and that it would post information only after the agency conducted a review using "software that will search for, and de-identify, personally identifiable information," *id.* at 29,662.

OSHA explained that making the data available outside of the agency would further OSHA's mission of improving worker health and safety through its reputational effects on employers because establishments would want to be seen as safe workplaces by employees, customers, and investors. *Id.* at 29,629. OSHA similarly identified direct benefits for workers, who would be able to access case-specific information anonymously, compare their employers to industry standards, and seek out jobs with employers with established safety records. *Id.* at 29,630–31. In addition, OSHA concluded that the worker safety data would be useful for consumers, businesses, and investors deciding with whom to do business. *Id.* at 29,631 (explaining that data would be particularly useful to "people who believe that low injury rates are correlated with high production quality"). Other beneficiaries of the Electronic Reporting Rule included workplace health and safety professionals looking to target their services to the areas of greatest need, as well as unions, trade groups, and industries hoping to "evaluate the effectiveness" of safety programs. *Id.* Finally, the agency identified benefits for researchers, who could better explore the "distribution and determinants of workplace injuries," and county, state, territorial, and other public health officials, who could use the information to identify "newly-emerging hazards" and otherwise improve "injury and illness surveillance." *Id.* OSHA also concluded that the reporting requirement would "improve the accuracy of" the data itself—as employers would take more care to accurately record their data once they knew that the information would be available for review. *Id.* at 29,631–32.

C. OSHA's delay of the July 2017 deadline to submit 2016 Form 300A data

On June 28, 2017, shortly before the first submission deadline, OSHA issued a notice of proposed rulemaking to delay the initial deadline for electronic submission of 2016 Form 300A data from July 1, 2017, to December 1, 2017. *See* Proposed Rule, Improve Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,261 (June 28, 2017). On November 24, 2017, OSHA published a final rule delaying the first filing deadline for five months, to December 15, 2017. *See* Final Rule, Improve Tracking of Workplace Injuries and Illnesses: Delay of Compliance Date, 82 Fed. Reg. 55,761 (Nov. 24, 2017). This rule did not alter any other deadlines.

D. OSHA's suspension of the July 2018 deadline to submit Form 300 and 301 data

The Electronic Reporting Rule required covered employers to submit 2017 Form 300 and 301 data by July 1, 2018. 81 Fed. Reg. at 29,640. OSHA did not engage in notice-and-comment rulemaking to delay or suspend that deadline. Instead, in May 2018, OSHA announced on its website that it would not accept the submission of 2017 Form 300 and 301 data required by the Electronic Reporting Rule because OSHA intended to issue a notice of proposed rulemaking to reconsider, revise, or remove the provisions of the rule that required electronic submission of Form 300 and 301 data.

OSHA's suspension—without notice and comment and without a reasoned explanation—of the Electronic Reporting Rule's July 2018 deadline for submitting Form 300 and 301 data was challenged under the Administrative Procedure Act (APA) by the same three public health organizations that are plaintiffs here. *See* Compl., *PC HRG*, No. 18-1729 (D.D.C. July 25, 2018), ECF No. 1. In that case, plaintiffs filed a motion for a preliminary injunction seeking an order enjoining OSHA's suspension of the Rule. *See* Pls.' Mot. Prelim. Inj., ECF No. 7. And OSHA

moved to dismiss the complaint on two grounds. *See* Defs. Mot. Dismiss, ECF No. 13. First, OSHA argued that plaintiffs lacked standing because their injury would not be redressed by a favorable decision because OSHA would withhold the data under FOIA's exemptions for information the disclosure of which would constitute an unwarranted invasion of personal privacy. Second, OSHA argued that its suspension of the rule was a mere policy statement regarding prosecutorial discretion that was not subject to judicial review under the APA.

On December 12, 2018, the Court denied OSHA's motion to dismiss. *PC HRG*, 363 F. Supp. 3d at 7. The Court held that plaintiffs have standing to proceed with their claims because the records that OSHA would collect do not contain PII; thus, plaintiffs could use FOIA to obtain useful workplace injury and illness data from records submitted to OSHA under the rule. *Id.* at 11–17. The Court further found that the agency's delay is not a policy statement about enforcement discretion, but a wholesale suspension of the rule's reporting requirement that is "'tantamount to amending or revoking a rule.'" *Id.* at 18 (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017)). The Court explained that "[t]he amendment or revocation of an agency rule amounts to substantive rulemaking subject to the APA's constraints and generally reviewable by courts." *Id.* (citing *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983)). As such, OSHA's suspension of the reporting requirements "is subject to the APA's procedural requirements for the promulgation of rules." *Id.* at 19. With regard to the substantive requirements of the APA, the Court held that OSHA's reversal of its previous decision implementing its statutory mandate to issue regulations necessary to collect occupational safety and health data is subject to judicial review. *Id.* at 19–20.

At the same time, the Court denied plaintiffs' request for a preliminary injunction, explaining that plaintiffs' injury is not *irreparable* because, if they prevail on the merits of their

claims, "the Court may still declare the earlier suspension of the Rule unlawful, require OSHA to recognize the July 2018 submission deadline, and give Plaintiffs the relief they seek—data that employers should have been required to submit to OSHA by July 2018." *Id.* at 21. On December 17, 2018, plaintiffs filed a motion for summary judgment seeking such relief. *See* Pls.' Mot. Summ. J., ECF No. 18. OSHA filed a response but offered no defense on the merits, effectively conceding that OSHA's suspension of the July 2018 submission deadline violated the APA. *See, e.g.*, *Bancoult v. McNamara*, 227 F. Supp. 2d 144, 149 (D.D.C. 2002) ("[I]f the opposing party files a responsive memorandum, but fails to address certain arguments made by the moving party, the court may treat those arguments as conceded."). Instead, OSHA argued that the Court should enter a stay pending a decision in this case because if OSHA is found to have complied with the substantive requirements of the APA when it issued the Rollback Rule to rescind the submission requirement for data from 2018 and later, it retroactively cured OSHA's procedural violation of the APA with regard to its suspension of the submission requirement for 2017 data. *See* Defs.' Opp'n, ECF No. 26. In reply, plaintiffs explained that OSHA is wrong because "an agency may not promulgate a rule suspending a final rule and then claim that post-promulgation notice and comment procedures cure the failure to follow, in the first instance, the procedures required by the APA." *Nat. Res. Def. Council v. NHTSA*, 894 F.3d 95, 115 (2d Cir. 2018). Indeed, this Court found that OSHA's rulemaking to rescind the submission requirement in the future did not create a risk of irreparable harm in connection with the earlier suspension because "permanently rescinding the Rule *after* that compliance deadline passed and the obligations of covered employers were allegedly unlawfully postponed" would "not affect any alleged harm caused to Plaintiffs by [OSHA]'s original suspension of the July 2018 deadline—loss of access to data employers were required to submit by that date." *PC HRG*, 363 F. Supp. 3d at 21 (emphasis in original).

E. The Rollback Rule

On July 30, 2018, OSHA issued a notice of proposed rulemaking to rescind the electronic filing requirement for Form 300 and 301 data. *See* Proposed Rule, Tracking of Workplace Injuries and Illnesses, 83 Fed. Reg. 36,494 (July 30, 2018). OSHA stated that it proposed to end collection of OSHA Form 300 and 301 data to eliminate any risk to worker privacy from disclosure of PII under FOIA, *see id.* at 36,497—although the Rule does not require the submission of such information and it would in any event be exempt from disclosure. Although OSHA acknowledged that PII would be exempt from disclosure, OSHA expressed concern that a federal court might erroneously order the release of exempt information. *Id.* Thus, OSHA proposed to stop collecting the Form 300 and 301 data altogether.

On January 25, 2019, OSHA issued the Rollback Rule and rescinded the Electronic Reporting Rule's requirement that establishments with 250 or more employees submit electronically certain information recorded on Forms 300 and 301. *See* 84 Fed. Reg. 380.

II. The Plaintiffs

Plaintiffs are three public health organizations—Public Citizen Health Research Group, American Public Health Association, and Council of State and Territorial Epidemiologists—that rely on the type of workplace health data required to be submitted to OSHA under the Electronic Reporting Rule and made available under FOIA to track, investigate, and reduce or prevent work-related injury and disease. Plaintiffs are injured by the Rollback Rule because they and their members have lost access to a detailed, comprehensive, and important source of timely workplace injury and illness information, which plaintiffs and their members intended to use to identify and analyze the causes of workplace injuries and illnesses and develop solutions.

Public Citizen Health Research Group (HRG) is a division of Public Citizen, a nonprofit research, litigation, and advocacy organization that represents the public interest before the executive branch, Congress, and the courts. Among other things, HRG promotes research-based, system-wide changes in health care policy, including in the area of occupational health, and advocates for improved safety standards at work sites. Compl. ¶ 5. HRG frequently uses information reported to government agencies and made available to the public, or obtained under FOIA, to analyze threats to human health, and HRG had intended to use the work-related injury and illness data submitted to OSHA under the Electronic Reporting Rule to conduct research on issues of workplace health and safety. OSHA's rescission of the requirement that covered employers submit their Form 300 and 301 data substantially limits the type and amount of workplace injury and illness information that HRG will be able to use to conduct research, making it more difficult for HRG to analyze threats to worker health and safety and advocate for improved standards. Carome Decl. ¶¶ 3, 7, 11.

American Public Health Association (APHA) is a public health advocacy group and professional association that promotes public health policies grounded in research. APHA has an Occupational Health and Safety Section with members from a variety of disciplines. Compl. ¶ 6; Benjamin Decl. ¶ 2. APHA's members intended to use the work-related injury and illness data that was required to be submitted to OSHA under the Electronic Reporting Rule to conduct research on issues of workplace health and safety, collaborate with community-based organizations that educate workers about on-the-job safety, and facilitate health promotion activities related to the workplace. Benjamin Decl. ¶ 4. The Rollback Rule has interfered with the ability of APHA and its members to identify hazards, determine whether hazards are being properly controlled, and develop effective measures to eliminate the hazards and prevent injuries, illnesses, and deaths. The

Rollback Rule substantially limits the type and amount of information that APHA and its members will be able to use to promote occupational health, and it impairs their ability to fulfill their missions. *Id.* ¶ 6.

Council of State and Territorial Epidemiologists (CSTE) is an organization of member states and territories representing public health epidemiologists. CSTE provides technical advice and assistance to partner organizations and to the federal Centers for Disease Control and Prevention. CSTE members track work-related injuries, relying on multiple sources of data, including reports by employers to regulatory agencies. CSTE and its members rely on the type of data required to be reported under the Electronic Reporting Rule to effectively track, investigate and prevent work-related injury and disease in the United States. Compl. ¶ 7; Harrison Decl. ¶ 4, 5, 7. The Rollback Rule limits the type and amount of workplace injury and illness information available to CSTE and its members, impairing their ability to analyze threats to worker health and safety and develop solutions. Workplace injury and illness data submitted to state health agencies from a variety of public and private sources is less complete than the national data set that would have been available had OSHA not rescinded the requirement that covered employers submit Form 300 and 301 information. Thus, the Rollback Rule has caused CSTE and its members to lose access to an important source of timely, establishment-specific injury and illness information, impairing their ability to use structured information about how injuries and illnesses occur to target prevention activities, whether by regulation, education, or changes in equipment and process design. Harrison Decl. ¶ 9.

Plaintiffs have standing to pursue their claims, both on behalf of themselves and on behalf of their members, because they have been deprived of information integral to their core activities, their injuries flow directly from OSHA's rescission of the Electronic Reporting Rule's requirement

that covered employers submit certain information from Forms 300 and 301, and their injuries are likely to be redressed if the Court vacates the Rollback Rule and reinstates the requirements of the Electronic Reporting Rule. *See PC HRG*, 363 F. Supp. 3d at 11–17 (finding that plaintiffs have standing to challenge OSHA's suspension of a submission deadline in the Electronic Reporting Rule).

STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where, as here, review is based entirely on publicly-available documents and the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F. 3d 1077, 1083 (D.C. Cir. 2001).

Under the APA, the Court "shall hold unlawful and set aside agency action" that is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is "arbitrary and capricious" if the action was not based on a "reasoned analysis" that indicates 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," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 43 (1983) (internal quotation marks omitted), and if the record indicates that the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *id*. at 43. Where, as here, an agency rescinds the requirements of a rule, it must at the very least demonstrate "awareness that it is

changing position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And it must explain either how circumstances have changed such that the new position is consistent with its original reasoning, *Fox*, 556 U.S. at 515, or why it is now choosing to "disregard[] facts and circumstances that underlay or were engendered by the prior policy," *id.* at 516.

ARGUMENT

OSHA's rescission of the Electronic Reporting Rule's requirement that establishments with 250 or more employees electronically submit certain information from Forms 300 and 301 is arbitrary and capricious and should be set aside. First, OSHA's primary justification for rescinding the requirement—to protect worker privacy—is irrational because the Electronic Reporting Rule provided extensive safeguards to protect personal privacy. In promulgating the Rollback Rule, OSHA failed to provide a reasoned explanation for disregarding its past findings on the sufficiency of those safeguards. Instead, OSHA relied on a series of erroneous assertions to justify abandoning the reporting requirement.

Second, OSHA failed to consider the benefits of collecting Form 300 and 301 data for purposes *other* than OSHA enforcement targeting, despite having relied on such benefits when it promulgated the Electronic Reporting Rule and announced that the data collected would be made public. OSHA ignored such public benefits based on its assertion that none of the data would be subject to disclosure under FOIA, an assertion that is both wrong as a matter of law and inconsistent with OSHA's primary justification for rescinding the reporting requirement.

Third, OSHA failed to address significant substantive comments. In particular, OSHA ignored comments outlining the past benefits that the agency and its partners had gained from

Form 300 and 301 data, and discounted the findings from a National Academy of Sciences report applauding the Electronic Reporting Rule.

Finally, OSHA's assertion that the Rollback Rule will provide cost savings is unsupported and largely irrelevant because OSHA failed to compare any cost savings to the value of the benefits lost by rescission of the reporting requirements.

I. OSHA's conclusion that the Rollback Rule is needed to protect worker privacy is arbitrary and capricious.

OSHA's assertion that eliminating the Form 300 and 301 reporting requirements is necessary to protect worker privacy, *see* 84 Fed. Reg. at 381, is "irrational given the relevant evidence in the record," *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 n.56 (D.C. Cir. 1983). OSHA thoroughly considered privacy concerns when it issued the Electronic Reporting Rule and concluded that the rule—along with other legal requirements—would prevent the disclosure of any PII about workers. In issuing the Rollback Rule, OSHA did not explain why it no longer views such safeguards as sufficient. Because OSHA's privacy justification for the Rollback Rule "rests upon factual findings that contradict those which underlay its prior policy," *Fox*, 556 U.S. at 515, and because OSHA has provided no "reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy," *id.* at 515–16, OSHA's rescission of the Electronic Reporting Rule is arbitrary and capricious.

A. The Electronic Reporting Rule posed no risk to worker privacy.

In the preamble to the Rollback Rule, OSHA asserted that eliminating the requirement that covered establishments submit certain fields from their Forms 300 and 301 was necessary "[t]o protect worker privacy." 84 Fed. Reg. at 381. In particular, OSHA pointed to the potential for release of PII. Just three years earlier, however, OSHA concluded that the Electronic Reporting Rule provided adequate safeguards to address such concerns. OSHA noted that "other government

agencies are able to handle v[e]ry large amounts of PII," and pledged to "follow accepted procedures and protocols to prevent the release of such information." *Id.* at 29,660. Thus, the Electronic Reporting Rule included multi-layered protections designed to ensure that PII, to the extent it was collected, would not be disclosed. *See id.* at 29,665. OSHA thus stated that "procedures are in place to ensure that individually-identifiable information, including health information, will not be publicly posted on the OSHA Web site." *Id.*

First, to "minimize any potential release or unauthorized access," OSHA determined that it would not even collect several fields of information on the relevant forms. *Id*. at 29,661. OSHA instructed establishments that they should not—and in fact would not be able to—submit personal information from Form 300 (including employee name) and Form 301 (including employee name, employee address, name of the treating physician or healthcare professional, and name and address of the facility where any off-site health treatment was provided). *Id.* at 29,692. In addition, OSHA would refuse to release—whether in a database on its website or in response to a FOIA request—several other categories of information that was not PII but might nonetheless pose a potential privacy risk, such as information under the heading of "[i]nformation about the employee" on Form 301—including the employee's date of birth, date hired, gender, and whether the employee was treated in an emergency room or hospitalized overnight. *See id.* at 9,632; OSHA Form 301, 2019-AR0782.

Second, to minimize the chance that reporting establishments would inadvertently include PII in the fields that OSHA intended to release, OSHA stated that it would "add additional guidance to these instructions to inform employers not to include personally identifiable information (PII) or confidential business information (CBI) within these fields." 81 Fed. Reg. at 29,659. As this Court noted in its opinion in *PC HRG*, such guidance minimizes the risk of

inadvertent reporting of PII: "[N]othing in the form instructions requires employers to include any identifying information about the employee or the employer there. In fact, the forms specifically instruct otherwise." 363 F. Supp. 3d at 16.

Third, OSHA intended to use software to scrub the submitted fields of any PII that might have been mistakenly included despite OSHA's instructions. In the preamble to the Electronic Reporting Rule, OSHA explained that it "plans to review the information submitted by employers for personally identifiable information. As part of this review, the Agency will use software that will search for, and de-identify, personally identifiable information before the submitted data are posted." 81 Fed. Reg. at 29,662. Further, OSHA pledged to release only the information that it would be required to disclose under FOIA, noting that if a "data field includes any personally-identifiable information, such as a name or Social Security number, OSHA will apply Exemption 6 or 7(c) and not release that information." *Id.* at 29,658.

B. OSHA failed to provide a reasoned explanation for disregarding its past determination that the Electronic Reporting Rule protected worker privacy.

In 2016, OSHA determined that "it has effective safeguards in place to prevent the disclosure of personal or confidential information contained in the recordkeeping forms and submitted to OSHA." 81 Fed. Reg. at 29,661. In issuing the Rollback Rule, however, OSHA stated that it "shares … commenters' concern that collection of data from Forms 300 and 301 poses a risk of the release of PII"—notwithstanding OSHA's acknowledgment that those commenters were under the "*mistaken* impression that employers would be required to submit PII such as name, address, or the name of the treating physician under the prior final rule." 84 Fed. Reg. at 384 (emphasis added). OSHA provided no "reasoned explanation … for disregarding" its prior factual finding that the risk to worker privacy from the Electronic Reporting Rule was minimal. *Fox*, 556 U.S. at 515–16.

OSHA's newfound distrust of the protections in the Electronic Reporting Rule rests on an impossibly high standard for preventing inadvertent disclosure. In an effort to justify the rollback, OSHA noted that "[n]o commenters provided evidence" to rebut the conclusion that OSHA "would not be able to guarantee that all PII inadvertently submitted to OSHA would be protected from disclosure." 84 Fed. Reg. at 384. In effect, OSHA has concluded that unless the multi-layered set of protections built into the Electronic Reporting Rule can "guarantee" a system that is "100% effective," *id.* at 385, the risk of inadvertent disclosure of erroneously submitted PII justifies a complete reversal of its prior conclusions that the safeguards are sufficient and that the benefits to worker safety outweighed any costs, including risks to privacy.

OSHA's reversal is irrational. The risk of disclosure of any PII inadvertently submitted under the Electronic Reporting Rule would be so remote that OSHA's description of the risk depends on a hypothetical series of errors—all of which the agency found, just three years ago, were unlikely to occur. First, employers would have to err by mistakenly submitting information that they are instructed *not* to submit. Such errors would be difficult to commit because OSHA controls the portal and restricts the fields from Forms 300 and 301 that are collected. Second, OSHA would have to err by failing to identify and redact erroneously-submitted information. Such errors would also be unlikely because, as explained in the Electronic Reporting Rule, OSHA would use software designed to find and eliminate such information prior to release. Third, a federal district court would have to err by overriding OSHA's redactions and ordering the release of inadvertently submitted PII, and that erroneous decision would have to be affirmed by the court of appeals. Because OSHA's decision to abandon the Electronic reporting Rule "relies on one unsubstantiated conclusion heaped on top of another," it is arbitrary and capricious. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

Further, OSHA offered no explanation for why the controls it put in place would be any less effective than the systems used across the government by agencies that regularly collect, analyze, and publish anonymized versions of sensitive information about workers. For example, the Mine Safety and Health Administration (MSHA) collects extensive PII, including employee names, social security numbers, mailing addresses, and other contact information about injuries and illnesses experienced by mine workers. *See* 30 C.F.R. § 50.20; Preparation and submission of MSHA Report Form 7000-1—Mine Accident, Injury, and Illness Report; https://www.dol.gov/oasam/ocio/programs/pia/msha/MSHA-MSIS.htm. Much of the information that OSHA now claims is too personal even to collect—such as a description of what the employee was doing when injured and what the resulting injury was—are not only collected by MSHA but are regularly disclosed on a public website as part of MSHA's workplace safety monitoring and reporting. *See* 81 Fed. Reg. at 29,683; Comment of Georges Benjamin, APHA, 2019-AR01095–96 (describing the narrative descriptions in the Mine Data Retrieval System).

OSHA is correct, of course, that the "experience of MSHA and other federal and state agencies with collecting and publishing similar data … does not mean OSHA is *required* to collect the data from Forms 300 and 301." 84 Fed. Reg. at 387 (emphasis added). But the question here is not whether OSHA was required to collect the information, but whether it provided a reasoned explanation for reversing course. As the D.C. Circuit recently explained, "the baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule never been promulgated." *Air All. Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018).

C. OSHA's concerns about the risk of "re-identification" and the "sensitivity" of de-identified data are unfounded and do not justify rescinding the reporting requirements.

As justification for the Rollback Rule, OSHA introduces two new fears about the data collected from Forms 300 and 301: the risk that information other than PII may lead to the "re-identification" of certain workers, and the potential that workers will object to the release of "sensitive" information even when anonymized. Neither concern is based on a real threat to personal privacy, and neither provides a sound basis for rescinding the reporting requirements.

1. The risk of re-identification is low.

Longstanding OSHA regulations *require* employers to release the data at issue to employees, former employees, or employee representatives, upon request. *See* 29 C.F.R. § 1904.35(b)(2)(v). Thus, as OSHA itself has noted, "[e]mployees or their representatives can also obtain and make public most of the information from these records at any time, if they wish." 81 Fed. Reg. at 29,684. In the Rollback Rule, OSHA tried to minimize the significance of this longstanding disclosure requirement by arguing that it is limited to those with a "need to know." *See* 84 Fed. Reg. at 383. But the category of requesters entitled to the data is broader than OSHA's framing suggests: It includes *all* employees, former employees, and their representatives, not only those directly involved in an incident. Accordingly, to the extent that OSHA is concerned about employees learning private information about their injured co-workers from the de-identified sections of Forms 300 and 301, such a risk was neither created nor exacerbated by the Rollback Rule. Moreover, in rescinding the Electronic Reporting Rule, OSHA offered no evidence that the existing mandatory disclosure regime has had any negative effect on worker privacy.

Furthermore, when it issued the Electronic Reporting Rule, OSHA concluded that the risk of reidentification is low. OSHA explained that "the final rule requires only establishments with

250 or more employees to submit information from all three OSHA recordkeeping forms," and that "it is less likely that employees in such large establishments will be identified based on the posted recordkeeping data." 81 Fed. Reg. at 29,662. In issuing the Rollback Rule, OSHA failed to explain its change in position. OSHA likewise failed to acknowledge this Court's finding, in *PC HRG*, that OSHA's concern about re-identification was mere "speculation." 363 F. Supp. 3d at 16. As this Court stated, "an agency withholding records on the ground that they might be connected to a particular individual must show 'threats to privacy interests more palpable than mere possibilities.'" *Id.* (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976)).

2. Sensitive information is protected by current regulations.

In the Rollback Rule, OSHA argues that data from Forms 300 and 301 submitted under the Electronic Reporting Rule could contain "sensitive" information that should not be disclosed even if it cannot be linked to a particular worker. *See* 84 Fed. Reg. at 383, 385. OSHA does not adequately substantiate this concern, and it does not provide a reasoned basis for rescinding the reporting requirements of the Electronic Report Rule.

OSHA provided a mechanism in the Electronic Reporting Rule to address "privacy concern cases"—defined in 29 C.F.R. § 1904.29(b)(7) as those involving: "(i) an injury or illness to an intimate body part or the reproductive system; (ii) an injury or illness resulting from a sexual assault; (iii) a mental illness; (iv) a work-related HIV infection, hepatitis case, or tuberculosis case; (v) needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log." The underlying regulations provide a first layer of protection. For privacy concern cases, 29 C.F.R. § 1904.29(b)(6) instructs employers that they "may not enter the employee's name on the OSHA

300 Log." At the time such regulations were issued in 2001, OSHA believed that "[b]y excluding the name of the injured or ill employee throughout the recordkeeping process, employee privacy *is assured*." 66 Fed. Reg. 5,915, 5,999 (Jan. 19, 2001) (emphasis added). In the Electronic Reporting Rule, OSHA outlined an additional layer of protection by promising to "conduct a special review of submitted privacy concern case information to ensure that the identity of the employee is protected." 81 Fed. Reg. at 29,664.

In issuing the Rollback Rule, OSHA focused on the possibility that "sensitive information about workers" could be included in the narrative sections of Form 301, 84 Fed. Reg. at 385, but OSHA failed to acknowledge the special oversight for privacy concern cases that it previously determined was adequate to protect sensitive de-identified data. Moreover, OSHA relied on speculation about a small number of special cases as a basis to rescind the reporting requirement for *all* worker injury data, no matter how mundane, although privacy interests vary depending on the nature of the injury. *See Prison Legal News v. Samuels*, 787 F.3d 1142, 1150 (D.C. Cir. 2015). Moreover, the agency provided "no factual findings supporting the reality of the threat." *Sorenson Commc'ns Inc.*, 755 F.3d at 706. "Speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis …." *Horsehead Resource Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994); *see also NRDC v. U.S. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) (finding that "mere speculation" does not provide "adequate grounds upon which to sustain an agency's action").

D. OSHA's assertion that the Rollback Rule is needed to protect worker privacy is contrary to FOIA.

OSHA recognized in the Electronic Reporting Rule that the Form 300 and 301 data that employers were required to submit is subject to release under FOIA. Indeed, when such information was obtained by OSHA in the past, it was routinely disclosed upon request. *See* 81

Fed. Reg. at 29,632. In issuing the Rollback Rule, OSHA ignores this history and makes two contradictory claims. On the one hand, OSHA asserts that *all* of "the 300 and 301 data would be exempt from disclosure under FOIA Exemptions 6 and 7(c)." 84 Fed. Reg. at 386. On the other hand, OSHA asserts that it should not even collect such data because it might be released under FOIA and harm the privacy interests of injured workers. The logical inconsistency in OSHA's position demonstrates that its primary rationale for the Rollback Rule is arbitrary and capricious. Should a court decide to order the release of this information under FOIA, OSHA's primary justification for not collecting the data would have been determined to be without merit.

1. FOIA requires the release of the Form 300 and 301 data that employers were required to submit under the Electronic Reporting Rule.

In the Rollback Rule, OSHA asserts that FOIA exemptions 6 and 7(c) would shield the data from Forms 300 and 301. *See* 84 Fed. Reg. at 386. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy," 5 U.S.C. § 552(b)(6) (emphasis added), and exemption 7(c) covers "records or information compiled for law enforcement purposes" whose production "could reasonably be expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C). Neither exemption supports OSHA's claim that the data at issue can be withheld from disclosure under FOIA.

First, "FOIA's strong presumption in favor of disclosure … is at its zenith" in the exemption 6 analysis. *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (internal citations and quotation marks omitted). Indeed, in *Rose* the Supreme Court, noting that the redaction of names and identifying characteristics of individuals may serve the underlying purpose of exemption 6, rejected the kind of "100% effective" argument on which OSHA rests the Rollback Rule. *Rose*, 425 U.S. at 375 (citations omitted). Such an argument, the Court explained,

"implies that Congress barred disclosure in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever … [and] ignores Congress' limitation of the exemption to cases of 'clearly unwarranted' invasions of personal privacy." *Id.* at 378–79.

The D.C. Circuit applies a similar analysis under exemption 7(c). Although the exemption may "authorize the redaction of the names and identifying information of private citizens"—as OSHA would do here—agencies may not "exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1094 (D.C. Cir. 2014) (quoting *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995)).

In *PC HRG*, this Court recognized that OSHA's efforts to use exemptions 6 and 7(c) as a blanket excuse to prevent disclosure of the Form 300 and 301 data would almost certainly fail. The Court noted that, to be covered by exemption 6 or 7(c), "the release of the information must implicate 'personal privacy'; that is, it must risk release into the public knowledge about an individual's private information." 363 F. Supp. 3d at 15 (citing *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003)). The Court reasoned that the exemptions would not apply to "the de-identified data and descriptions from these forms regarding workplace injuries and illnesses." *Id.* Further, the Court expressed doubt that exemption 7(c) would even apply to data collected under a general reporting requirement, rather than through investigation of a specific, allegedly illegal incident. *Id.* at 15 n.4 (citing *Bartko v U.S. Dep't of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018)). Finally, the Court concluded that, even if certain information in some fields needed to be redacted, useful information from the forms is segregable and would have to be released. *Id.* at

15–16; *see also* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

2. FOIA establishes the appropriate standard for protecting personal privacy.

When it issued the Electronic Reporting Rule, OSHA explained that the information collected would be disclosed only as allowed by FOIA. FOIA reflects Congress's judgment about the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966), U.S. Code Cong. & Admin. News 1966, pp. 2418, 2428). As this Court has noted, "in applying either exemption [(6 or 7(c))], courts must 'balance the privacy interests that would be compromised by disclosure against the public interest in the release of the requested information.'" *PC HRG*, 363 F. Supp. 3d at 14 (quoting *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 158 (D.D.C. 2017)). This approach reflects Congress's judgment that, under FOIA, the existence of privacy interests does not necessarily demand an exemption from disclosure. Rather, "a privacy interest may be substantial—more than *de minimis*—and yet be insufficient to overcome the public interest in disclosure." *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008).

Although OSHA takes the position that all personal information is private, even after it is de-identified, the Supreme Court has already considered and rejected that view. As the Court observed in *U.S. Department of State v. Ray*, disclosure of even "highly personal information regarding marital and employment status, children, [and] living conditions," for example, "constitutes only a *de minimis* invasion of privacy when the identities of the interviewees are

unknown." 502 U.S. 164, 175 (1991). An "invasion of privacy" only "becomes significant when the personal information is linked to particular [individuals]." *Id.* at 176.

Other statutory schemes similarly reflect Congress's judgment that individuals' privacy interests can largely be addressed through effective anonymizing systems. Under HIPAA, for instance, information can be released, including for research purposes, once it is "de-identified"—when "the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information." 45 C.F.R § 164.514; HHS, Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule 5–6 (2012), https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveredentities/De-identification/hhs_deid_guidance.pdf ("[T]he Privacy Rule does not restrict the use or disclosure of de-identified health information, as it is no longer considered protected health information."). District Courts have accepted this conclusion, finding that "[o]nce medical records have been appropriately redacted and de-identified, patient privacy concerns dissipate and HIPAA poses no obstacle to the production of the redacted records." *Roth v. Sunrise Senior Living Mgmt., Inc*., No. 2:11-CV-4567, 2012 WL 748401, at *2 (E.D. Pa. Mar. 8, 2012); *see also Miller v. Allstate Fire & Cas. Ins. Co*., No. 07–260, 2009 WL 700142, at *4 (W.D. Pa. Mar. 17, 2009) (noting that the redaction process would "obviate any of the patient privacy interests potentially at stake"); *Caines v. Addiction Research & Treatment Corp.*, No. 06Civ.3399, 2007 WL 895140, at *1 (S.D.N.Y. Mar. 20, 2007) (observing that the "routine" practice of providing records that reflect medical treatment with the identities of patients redacted "is fully consistent with the privacy provisions of HIPAA").

In issuing the Rollback Rule, OSHA paid lip service to the standards established in FOIA, but asserted that it was necessary to rescind the reporting requirements to protect worker privacy because a federal district court might err and order the release of exempt information, and a reviewing court might affirm such an erroneous decision. OSHA argues that its earlier losses in litigation concerning the application of various FOIA exemptions "demonstrate the power of courts to order OSHA to release injury and illness data that OSHA considers sensitive information exempt from disclosure, over OSHA's objections." 84 Fed. Reg. at 386. But the takeaway from these losses is not that the courts erred or that FOIA provides inadequate protection. Rather, these losses have established that OSHA's view in those cases was incorrect. For example, in *New York Times Co. v. U.S. Department of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004), the court held that the information on Form 300A is not covered by exemption 4, as OSHA had claimed. OSHA accepted the court's ruling and thereafter stated that the information on the OSHA recordkeeping forms … is not confidential … information." 81 Fed. Reg. at 29,658.

In short, OSHA's new position that it must revise its regulation because courts cannot be trusted to protect personal privacy cannot be sustained. *See* 83 Fed. Reg. at 36,498 (stating that unless and until there is Supreme Court or "sufficient circuit-court" precedent holding that Form 300 and 301 data is exempt from disclosure under FOIA, the risk of judicial error is so high that reporting requirements must be rescinded). OSHA's new-found disagreement with potential future judicial decisions is an insufficient basis for reversing its position.

E. Comments submitted on behalf of workers do not support OSHA's purported privacy concerns.

Tellingly, although OSHA claims that its about-face on reporting is motivated by a desire to protect worker privacy, workers and their advocates did not oppose the Electronic Reporting Rule and did not support the Rollback Rule. For example, the International Brotherhood of

Teamsters commented that it found the privacy assertions by OSHA "incredulous, frivolous, and unfounded." 2019-AR01935. "As stated in our 2014 comments, we are satisfied with OSHA's statements about the information pertaining to employee privacy concerns that would be included and excluded from the forms (300A, 300, and 301) covered by this proposed rule. With these protective provisions in place, and given our own experiences with access to personal information, we are not concerned and do not anticipate any concerns by our members about their privacy." 2019-AR01937. Other groups opposing the rollback—and calling the concerns about worker privacy unfounded or even cynical—included the AFL-CIO, the United Food and Commercial Workers International Union, and the United Steelworkers Union. *See* 2019-AR02522; 2019-AR01354; 2019-AR02450.

In a section of the Rollback Rule preamble focusing on privacy concerns for needlestick injuries and other potential blood-contamination events, *see* 84 Fed. Reg. at 386, OSHA framed the American Nurses Association (ANA) comment as "concern[ed] about potential disclosure of sensitive worker information." Yet OSHA acknowledged that the ANA wrote in *support* of the Electronic Reporting Rule, which it believed provided "important" case-level data and included adequate protections for worker privacy. *Id*. All OSHA offered in response was a continued invocation of the remote "possibility of personal information being reported to OSHA inadvertently … despite the prohibition against recording names." *Id.* Invocation of FOIA exemption 6, however, "requires 'threats to privacy interests more palpable than mere possibilities.'" *Arieff v. U.S. Dep't of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983) (quoting *Rose*, 425 U.S. at 389 n.19).

II. OSHA's failure to consider the benefits of collecting Form 300 and 301 data for purposes other than OSHA enforcement targeting renders the Rollback Rule arbitrary and capricious.

When it issued the Electronic Reporting Rule, OSHA recited a litany of benefits that would flow from the collection of Form 300 and 301 data. *See* 81 Fed. Reg. at 29,629–32. For example, OSHA found that the data would allow workers to access case-specific information anonymously and make cross-industry comparisons, *id*. at 28,730; improve safety by reputational effect, because establishments will want to be regarded as safe workplaces by their employees, potential employees, investors, and consumers, *id*. at 29,629–631; move the labor market toward a focus on establishment safety, as jobseekers could gain more complete information on the safety records of their potential employers, *id*. at 29,631; and provide researchers and public health officials with the information necessary to identify hazards and develop solutions, *id*. at 29,631. In the NPRM for the Rollback Rule, OSHA acknowledged that "more effective identification and targeting of workplace hazards by OSHA and better evaluations of OSHA interventions" are only "two of the benefits of the [Electronic Reporting] rule." 83 Fed. Reg. at 36,498.

When it issued the final Rollback Rule, however, OSHA wrote off benefits that were a central foundation for the Electronic Reporting Rule in just a few sentences, contending "that many of the benefits discussed by commenters would not materialize" because OSHA "would not make the data public even if collected." 84 Fed. Reg. at 391. Yet as explained above, if collected, much of the Form 300 and 301 data will be subject to release under FOIA. Moreover, in the Rollback Rule, OSHA failed to explain the basis for its change in position regarding disclosure under FOIA. When an agency changes position, it must at the very least demonstrate "awareness that it is changing position." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515). It must explain either how circumstances have changed such that the new position is consistent with its

original reasoning or why it is now choosing to "disregard[] facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515–16.

Second, in the Rollback Rule, OSHA "acknowledge[d] that the 300 and 301 data would have benefits for occupational safety and health research, but note[d] that researchers already have access to BLS [Bureau of Labor Statistics] data and severe injury data." 84 Fed. Reg. at 391. These data sources, however, are not substitutes for the research that could be produced using the timely, case-specific data produced on Forms 300 and 301. As OSHA acknowledged in the Electronic Reporting Rule preamble, the Survey of Occupational Injuries and Illnesses, which is the main data set produced by BLS, "provides annual rates and numbers of work-related injuries and illnesses, but BLS is prohibited from releasing establishment-specific data to OSHA or the general public." 81 Fed. Reg. at 29,627. The "severe injury reports" similarly provide far less usable data to researchers. OSHA noted as much in the preamble to the Electronic Reporting Rule, explaining that, although 29 C.F.R. § 1904.39 requires incident-specific reporting of fatalities and other severe injuries, these "reports do not include the establishment's injury and illness records unless OSHA also collects these records during a subsequent inspection." *Id.* at 29,628–29. Without this contextualizing data, the one-off and "fortunately rare" reports, *id.* at 29,628, are far less useful for researchers.

Finally, OSHA "entirely failed to consider" many of the other benefits it previously identified. *State Farm*, 463 U.S. at 43. For that reason as well, the Rollback Rule is arbitrary and capricious. *See id.*

III. The Rollback Rule is arbitrary and capricious because OSHA failed to consider and respond to major substantive comments.

As the D.C. Circuit has "frequently held," an agency decision is "arbitrary or capricious where the agency has failed to respond to major substantive comments." *Sierra Club v. EPA*, 863

F.3d 834, 838 (D.C. Cir. 2017) (citing *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993); *NRDC v. EPA*, 859 F.2d 156, 188–89 (D.C. Cir. 1988)). Although agencies are not required to respond to every issue raised by commenters, they must respond to "those comments that are relevant and significant," *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007), particularly "comments which, if true, … would require a change in the proposed rule," *Louisiana Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin*., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (ellipsis in original; citation omitted). This requirement allows reviewing courts to "see what major issues of policy were ventilated … and why the agency reacted to them as it did." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015) (ellipsis in original; citation omitted). "An agency's failure to respond to relevant and significant public comments generally 'demonstrates that the agency's decision was not based on a consideration of the relevant factors.'" *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)).

In the preamble to the Rollback Rule, OSHA does not meaningfully address commenters' numerous substantive objections and proposed alternatives to the rescission. This failure renders the agency's decision to revoke the Form 300 and 301 reporting requirements arbitrary and capricious.

A. OSHA did not provide a sufficient justification for disregarding the additional benefits of data collection for enforcement, compliance, and training that federal and state government partners articulated.

Throughout the preamble to the Rollback Rule, OSHA repeatedly claimed that "the extent of any incremental benefits of collecting the data from Forms 300 and 301 for OSHA enforcement and compliance assistance activities is uncertain." 84 Fed. Reg. at 381. This assertion ignores the numerous examples of clear, non-speculative enforcement and compliance benefits that

commenters put forward. Because OSHA's response to these examples was cursory at best—merely reiterating the refrain that the benefits were "uncertain"—the agency has not fulfilled its obligation to respond to relevant and significant comments.

Commenters on the proposed Rollback Rule outlined concrete examples of the benefits that OSHA *itself* has already derived from pilot projects involving the widespread collection of Forms 300 and 301, beyond those gathered during the inspection process. Particularly notable is the comment by David Michaels, a former Assistant Secretary of Labor for Occupational Safety and Health, Jordan Barab, a former Deputy Assistant Secretary of Labor for Occupational Safety and Health, and Gregory Wagner, a former Deputy Assistant Secretary for Mine Safety and Health. *See* 2019-AR01133–34. These commenters—all involved in the development and promulgation of the Electronic Reporting Rule—drew OSHA's attention to two test projects in which the agency had used data from Forms 300 and 301, or comparable information, to further its enforcement and compliance mission. *See* Comment of Michaels, Barab, and Wagner, 2019-AR01135–36.

First, the commenters pointed to the agency's existing use of detailed severe injury reports, which contain "data comparable to those included in Forms 300 and 301," to "better understand injury causation, and to develop and target compliance assistance materials based on this understanding." 2019-AR01136. In one instance, the commenters explained, such information had enabled OSHA to identify an increase in reports of amputations among workers operating food slicers in grocery store delis, after which it prepared a fact sheet to "help[] employers and workers prevent finger amputations." *Id.* Because "OSHA inspectors rarely visit grocery stores or delicatessens," widespread data collection was the only way the agency could "learn[] about the extent of the problem." *Id.*; *see also* Comment of NIOSH, 2019-AR01023 (describing a 2016 OSHA report outlining how "collection of [severe injury] data enabled it to observe a

concentration of a very particular type of injury in specific industries"). Second, the former officials described the success of a pilot program in the Texas Area office, where staff "collected Forms 300 and 301 and analyzed three years of injury data" for injuries in a select industry, mobile home manufacturing. *See* 2019-AR01136. Using this data alone—aggregated "by hand" at the local office—OSHA staff were able to "identify the five types of injuries that accounted for 80 percent of all injuries in these establishments," encourage the creation of specific safety and health programs, and establish regular check-ins with these establishments to track improvements. *Id.* As a result, "injury rates dropped in these establishments," leading to estimated savings of $2 million in workers' compensation costs. *Id.*

Although the examples discussed in the comment belie OSHA's claim that it "has no prior experience using the case-specific data collected on Forms 300 and 301 for … compliance assistance," 84 Fed. Reg. at 388, the agency's only response was to state that it "agrees that data from Forms 300 and 301 and similar data can be helpful, but disagrees that its past experience justifies the broad collection envisioned in 2016," *id.* at 392. OSHA's "wan responses to these comments," which it mentioned only obliquely in the text of the preamble, prevents the Court from "see[ing] what major issues of policy were ventilated ... and why the agency reacted to them as it did." *Del. Dep't of Nat. Res. & Envtl. Control*, 785 F.3d at 15 (citation omitted). This "fail[ure] to respond to major substantive comments," *Sierra Club*, 863 F.3d at 838, renders the Rollback Rule arbitrary and capricious.

In addition, OSHA failed to explain its decision to entirely disregard the myriad direct enforcement and compliance benefits, in addition to targeting decisions, that federal and state partners articulated in their comments. For example, the National Institute for Occupational Safety and Health (NIOSH), the OSHA counterpart within the Centers for Disease Control, told OSHA

that the benefit of the data would not be "speculative and uncertain" because NIOSH had both the "experience and capacity" and "interest in using th[e] data" to further their shared interests in compliance support and enforcement. *See* Comment of NIOSH, at 2019-AR01021. NIOSH outlined the concrete ways that it has, through state partnerships, used analogous narrative text data from workers' compensation systems—data "not easy to obtain or access" through states, organizations, and insurance companies—to "summariz[e] claims by industry and cause, and to suggest prevention activities." 2019-AR01023–24. NIOSH offered to use this existing capacity to help OSHA develop a program to leverage the data for its own enforcement programs. *See* 2019-AR01021.

Similarly, the Washington State Department of Labor and Industries outlined its experience using case-level data to improve compliance, enforcement, and prevention efforts. The agency had used "similar data to data gathered on the OSHA Form 301[] to determine the primary causes of injury to truckers" and "develop[] … training materials determined to be of high value to the trucking industry." *See* Comment of David Bonauto, Washington Dep't of Labor and Industries, 2019-AR00995. It had similarly identified the emerging threat of hop-dust related respiratory disease by looking at several years of individualized workers' compensation data. *Id.*

OSHA offered little in response to these concrete examples and future plans for using the OSHA Form 300 and 301 data for enforcement and compliance activities. With regard to the comments from NIOSH, OSHA merely expressed an "appreciat[ion for] the value of interagency efforts to achieve the shared goals of preventing occupational injuries and illnesses," but repeated its professed concern about "the burden on OSHA to collect the data." 84 Fed. Reg. at 389. The response to the examples of state-level enforcement and compliance efforts, like in Washington State, was likewise cursory: OSHA stated that the states' use of worker compensation data

demonstrated that there was no need for centralized federal collection of OSHA incident forms. *Id.* at 394. Although OSHA acknowledged that the "costs" of such decentralized collections would be high, OSHA justified its reversal on the value of a centralized database by again arguing that the costs to the agency would not outweigh the "uncertain" benefits. *Id*.

Over and over, commenters provided examples of real-world benefits that initiatives similar to the Forms 300 and 301 reporting requirements had generated. And over and over, OSHA responded by returning to its unquantified cost-benefit analysis—stating that it continued to believe the benefits were "uncertain," even in the face of evidence to the contrary. These comments articulating benefits, "if true, would … cast doubt on the reasonableness of [the] position taken by the agency." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (citation omitted). Rather than respond in full, however, OSHA continued to repeat that the benefits were "uncertain"—preordaining its conclusion that even a reasonable amount of costs would outweigh the benefits. In fact, several commenters pushed the agency to provide an explanation of why it had "re-evaluated" the benefits of the Forms 300 and 301 requirements that, in 2016, it had found "significantly exceed the annual costs." *See* Comment of Michaels, Barab, and Wagner, at 2019-AR01145 (explaining that OSHA did not provide "even the tiniest bit of information about the methods employed for this re-evaluation"); 81 Fed. Reg. at 29,674. OSHA offered no response.

B. OSHA did not adequately address the comments stating that the agencies' findings contradicted the conclusions of the National Academies of Sciences' report.

To survive arbitrary and capricious review, an agency must demonstrate that it has "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.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Under this standard,

"an agency cannot ignore evidence contradicting its position.'" *Genuine Parts Co. v. Envtl. Prot. Agency*, 890 F.3d 304, 312 (D.C. Cir. 2018) (quoting *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)). In promulgating the Rollback Rule, OSHA ignored an obvious and significant category of contradictory evidence—a National Academy of Sciences, Engineering, and Medicine report ("NAS Report") that the agency itself had requested, in concert with NIOSH and BLS.

In January 2018—just six months before OSHA issued the Rollback Rule NPRM—the NAS committee published a detailed, consensus report, after "more than a year of deliberations," advocating for "[occupational health and safety] surveillance as a national priority." *See* Attachment to Comment of Celeste Monforton, American Public Health Association, OSHA-2013-0023-1965, 2019-AR00474, 2019-AR00496 (NAS Report at ix, 8). The study, *A Smarter National Surveillance System for Occupational Safety and Health in the 21st Century*, concluded that OSHA's "targeting and priority-setting efforts have been hindered by a lack of data, particularly establishment-level information, to evaluate the hazards and risks at individual worksites." 2019-AR00664 (NAS Report at 176). In a five-page subsection applauding the Electronic Reporting Rule, the committee concluded that the new regulation would "serve a key role by providing data essential for injury and illness surveillance." 2019-AR00667 (NAS Report at 179). The report had clear relevance for the agency's decision in proposing the Rollback Rule: The agency itself had requested the report, together with NIOSH and BLS, *see* 84 Fed. Reg. at 391 n.6; and the President's then nominee for Assistant Secretary of Labor, Scott Mugno, had signed off on its conclusions, *see* 2019-AR00469 (NAS Report at v); Comment of Michaels, Barab, and Wagner, 2019-AR01139. Nonetheless, OSHA only mentioned the report once in the entire NPRM. The agency cited it *approvingly* for an unrelated question about the Rollback Rule's EIN-reporting requirement, *see* 83 Fed. Reg. at 36,500, but "inexplicably ignor[ed] the most recent best available

evidence" offering divergent findings on the benefits of the Electronic Reporting Rule, *see* Comment of Peg Seminario, AFL-CIO, 2019-AR02596.

Unsurprisingly, then, the report and its contrary conclusions formed the centerpiece of several commenters' responses in opposition to the agency's proposal. Several organizations entered the full report into the administrative record and pointed the agency to specific areas where the NAS Report directly contradicted the justification offered for the Rollback Rule. *See, e.g.*, 2019-AR00463 (APHA); 2019-AR02132 (International Brotherhood of Teamsters). Even a group that ultimately *opposed* the preservation of the Electronic Reporting Rule's Form 300 and 301 requirements took OSHA to task for not acknowledging this significant set of conclusions and recommendations. *See* Comment of ORCHSE Strategies, 2019-AR01343 (noting "[n]or is there any reference to a recent study by the National Academy of Sciences").

Commenters pointed to several assertions in the NPRM that directly contradicted the findings of the NAS Report. For instance, as several commenters noted, the report concluded that the Electronic Reporting Rule would "provide[] a much-enhanced source of injury and illnesses data that can be used for effective targeting of interventions and prevention efforts as well as compliance activity," and noted that "these data are not currently available to agencies or the public from other surveys." 2019-AR00664 (NAS Report at 176). These findings undercut OSHA's assertion in the Rollback Rule's NPRM—reiterated again in the final rule—that "[c]ollection of the summary data gives OSHA the information it needs to identify and target establishments with high rates of work-related injuries and illnesses." 83 Fed. Reg. at 36,498; *see also* 84 Fed. Reg. at 381.

Similarly, commenters pointed to the NAS report's careful consideration of the privacy concerns at stake in any data-collection system: Although the committee considered "protecting

data" to be a "guiding principle" of its work, so too was "disseminat[ing] widely" any data set collected, to allow "the use of surveillance information for action by all stakeholders." 2019-AR00520 (NAS Report at 32). As the three former Department of Labor officials noted, the NAS Report contained "extensive examination of worker privacy issues" but "d[id] not raise privacy concerns about OSHA collecting and posting on the web the Form 300, 301 and 300A data." *See* Comment of Michaels, Barab, and Wagner, 2019-AR01141. Finally, OSHA received comments pointing out that its newfound determination that the supposed privacy risks outweighed any benefits to dissemination directly contradicted several of the key recommendations of the NAS Report, which encouraged OSHA, NIOSH, and BLS to "develop a publicly available and easily searchable injury and illness database" and otherwise "provide ongoing analysis and dissemination of these data." *See* Comment of Peg Seminario, AFL-CIO, 2019-AR02598; 2019-AR00668 (NAS Report at 180). As commenters explained, OSHA "would be rejecting [these recommendations] if it eliminates the requirement that large establishments electronically submit data from Forms 300 and 301[.]" Comment of Michaels, Barab, and Wagner, 2019-AR01141.

OSHA's limited response to these arguments—by both commenters and in the NAS report—do not meet the basic standards for rational decisionmaking. In the final rule, OSHA stated that it would address the NAS findings only as specifically mentioned by commenters, 84 Fed. Reg. at 391 n.6, even though commenters had taken the agency to task for proposing a rule in direct contravention of all of the NAS Report's foundational findings. *See* Comment of Michaels, Barab, and Wagner, 2019-AR01141 ("[T]he recent study … concluded that the requirement that large establishments electronically submit Form 300 and 301 will enhance worker safety and health. Given all this, it would be arbitrary and capricious for OSHA to rescind a significant component of that requirement without consideration of NASEM's recommendations or without

having conducted any meaningful analysis of the effects of that rescission."). Moreover, the responses OSHA provided reiterated that it could ignore the benefits of data collection to other federal government agencies, states, and researchers because "OSHA would not make the data public even if collected." 84 Fed. Reg. at 391. Yet OSHA did not explain why its conclusions about the risks and benefits of publicity so strongly contradict the findings of the NAS report. As to the benefits for researchers, OSHA "acknowledge[d] that the 300 and 301 data would have benefits for occupational safety and health research," but it "note[d] that researchers already have access to BLS data and severe injury data." *Id*. This argument contradicts the NAS Report finding that "[t]he OSHA electronic reporting rule will serve a key role by providing data essential for injury and illness surveillance not available from the" BLS's survey of occupational injuries and illnesses. 2019-AR00667 (NAS Report at 179).

The NAS Report offered a substantive description of the benefits of developing robust information gathering and processing systems. OSHA's failure to address head on the findings of the NAS Report render its decision to rescind the Form 300 and 301 reporting requirements arbitrary and capricious. Courts have long noted the special status of findings from the National Academy of Sciences, a group that "serves as the federal government's scientific adviser, convening distinguished scholars to address scientific and technical issues confronting society." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1267 (D.C. Cir. 2004). Although NAS reports are not binding on OSHA, the D.C. Circuit has expressed "concern" at an agency's "refusal without reasons to accept [an] NAS-NRC panel's recommendations." *Holland-Rantos Co. v. U.S. Dep't of Health, Educ. & Welfare*, 587 F.2d 1173, 1175 (D.C. Cir. 1978) (per curiam). More generally, the D.C. Circuit has found that "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential

standards of our review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010). Here, OSHA offered only conclusory explanations, spending less than one page of the preamble tackling a more than 300-page report that offers conclusions about the value of the Electronic Reporting Rule that conflict with OSHA's decision in the Rollback Rule. Because the agency has "rel[ied] on portions of studies in the record that support its position, while ignoring cross sections in those studies that do not," its action was arbitrary and capricious. *Genuine Parts Co.*, 890 F.3d at 313.

IV. OSHA's assertions regarding cost savings do not justify rescinding the reporting requirements of the Electronic Reporting Rule.

In an attempt to justify the Rollback Rule, OSHA described various additional costs of the Electronic Reporting Rule and then pointed to what it calculated as $16 million in cost savings from rescinding the rule's requirements. 84 Fed. Reg. at 381. Because, however, OSHA has entirely discounted the benefits of collecting workplace injury and illness data, any cost-benefit analysis—even using the faulty and inflated estimates in the preamble to the Rollback Rule—fails the APA's requirement of reasoned decisionmaking.

First, OSHA has overstated the costs to the agency to implement the Electronic Reporting Rule. The web portal for submission of Form 300 and 301 data is nearly complete, as demonstrated by OSHA's estimate of the remaining cost. *See* 84 Fed. Reg. at 400. Further, although in the Rollback Rule OSHA estimated that completing the portal would cost $450,000, *id.*, just weeks later it lowered the estimate to $318,000, *see* Def.'s Mot. for Stay & Memo. in Opp'n to Pl.'s Mot. at 13, *PC HRG*, No. 18-cv-1729 (D.D.C. Mar. 4, 2019), ECF 26.

Second, OSHA overestimated the ongoing cost of responding to FOIA requests for the data submitted under the Electronic Reporting Rule by assuming that every information field will need to undergo two rounds of manual review. *See* 84 Fed. Reg. at 400. In fact, many fields that would

be submitted are extremely unlikely to contain any PII, and OSHA previously acknowledged that software can handle most redactions tasks. 81 Fed. Reg. at 29,662. Instead of identifying any shortcomings of the existing software solutions, OSHA merely reset the bar to an impossibly high level: perfection. *See* 84 Fed. Reg. at 385 ("Although OSHA previously thought to address this issue with software, de-identification software is not 100% effective, and OSHA believes that some PII could be released even after being processed through the software.").

CONCLUSION

OSHA rescinded key aspects of the Electronic Reporting Rule without providing a reasoned explanation for reversing course. The Court should enter summary judgment for plaintiffs, declare OSHA's action unlawful, and reinstate the Electronic Reporting Rule's requirement that establishments with 250 or more employees electronically submit certain information from Forms 300 and 301.

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Respectfully submitted,

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