UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19-166 (TJK)
PATRICK PIZZELLA,[1] Acting Secretary, United States Department of Labor, et al.,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATORY MATERIALS

INTRODUCTION

OSHA begins its argument by observing that "if it had never suggested, or adopted, a rule requiring employers to submit data from Forms 300 and 301"—as it did by issuing the Electronic Reporting Rule—"it is difficult to imagine th[is] case[] would exist" because the Rollback Rule is an improvement "compared to the agency's pre-2016 practices." Def. Mem. at 10. Be that as it may, the law is clear that OSHA may not defend the Rollback Rule as though it had never adopted the Electronic Reporting Rule. Rather, "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); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). In particular, when, as in this case, an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," "a reasoned explanation is needed for disregarding [such] facts and circumstances." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). OSHA's defense of the Rollback Rule ignores this well-established principle: OSHA provides no satisfactory explanation for abandoning its prior policy and rejecting the findings and conclusions on which it based the Electronic Reporting Rule. Accordingly, the Rollback Rule must be set aside as arbitrary and capricious.

ARGUMENT

I. Plaintiffs have standing.

OSHA attacks plaintiffs' standing on two grounds. First, OSHA asserts that plaintiffs—despite being deprived by the Rollback Rule of information integral to their core activities—have not suffered an informational injury because their right to the information arises from FOIA.

Second, OSHA argues that plaintiffs cannot establish organizational standing because they have not demonstrated that, since the issuance of the Rollback Rule, they have obtained the information from an alternate source at increased cost. Both arguments lack merit.

A. Plaintiffs have informational standing.

"A plaintiff claiming informational standing must (1) identify a statute that, on plaintiff's reading, directly requires the defendant to disclose information that the plaintiff has a right to obtain, (2) show that plaintiff has been denied the information to which plaintiff is entitled, and (3) provide a credible claim that the information would be helpful to plaintiff." *Envtl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 36 (D.D.C. 2015) (citations, quotation marks, and brackets omitted). Plaintiffs have done so. Absent OSHA's unlawful action, FOIA would require OSHA to disclose the data at issue; plaintiffs are being denied the information; and the information would help plaintiffs identify and analyze the causes of workplace injuries and illnesses and develop solutions. *See, e.g.*, Carome Decl. ¶ 11 (explaining that the Rollback Rule "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"); Benjamin Decl. ¶ 6 ("Without [the OSHA Form 300 and 301] data, it is harder to identify hazards, determine whether hazards are being properly controlled, and develop effective measures to eliminate the hazards and prevent injuries, illnesses, and deaths."); Harrison Decl. ¶ 9 ("[T]he Rollback Rule has caused CSTE and it 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 occurred to target prevention activities, whether by regulation, education, or changes in equipment and process design.").

This Court determined in a related case that plaintiffs have standing to challenge OSHA's suspension of the July 2018 deadline for covered employers to submit their 2017 Form 300 and 301 data. *See Pub. Citizen Health Research Grp. v. Acosta* (*PC HRG*), 363 F. Supp. 3d 1, 11–17 (D.D.C. 2018). The Court found that plaintiffs had satisfied the injury-in-fact requirement because they alleged a deprivation of information integral to their core activities. *Id.* at 12 (citing *Action All. of Senior Citizens of Greater Philad. v. Heckler*, 789 F.2d 931, 937–38 (D.C. Cir. 1986); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.* (*PETA*), 797 F.3d 1087, 1095 (D.C. Cir. 2015); and *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)). In addition, the loss of access to the information was "without question" traceable to OSHA's suspension of the reporting deadline, *id.*, and it was "likely that Plaintiffs would, through FOIA, obtain beneficial workplace injury and illness data from OSHA's Electronic Reporting Rule records," *id.* at 17.

Although OSHA argues that plaintiffs cannot establish an informational injury because their statutory entitlement to the information is based on FOIA rather than the OSH Act or the Electronic Reporting Rule, *see* Def. Mem. at 12–14, this Court has already held that the "extra step" of having to use FOIA to obtain the collected data does not defeat plaintiffs' standing. *Id.*at 14 (citing *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 727 (D.C. Cir. 2015)). While observing that the availability of FOIA will not suffice to establish standing in every case where an organization "alleges an informational injury due to some agency action or inaction," the Court explained that FOIA can provide a workable basis "where the specific information that would be subject to Plaintiffs' FOIA request—the data fields comprising Forms 300 and 301 that covered employers must submit—is clear from the record." *Id.*

OSHA nonetheless argues that FOIA "cannot give rise to informational standing" because FOIA obligates agencies to disclose only records they have and OSHA "does not have" the data at issue. Def. Mem. at 14. OSHA's argument misses the mark. "For standing purposes at this stage in the litigation, the Court must assume that Plaintiffs will prevail on the merits." *Envtl. Integrity Project*, 139 F. Supp. 3d at 37; *see also Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449–51 (1989) (holding that plaintiffs had standing to bring suit alleging that a committee was subject to the requirements of the Federal Advisory Committee Act (FACA), because plaintiffs could seek access to the committee's records if FACA applied). Here, as in *Environmental Integrity Project*, "even though Plaintiffs seek information that is not currently in the possession of the [agency], they would be entitled to the sought-after information if they were to prevail on the merits, and they accordingly meet the first two requirements for informational standing." 139 F. Supp. 3d at 37. Indeed, in both *PETA*, 797 F.3d at 1095, and *Action Alliance*, 789 F.2d at 937, the D.C. Circuit found that plaintiffs had standing to challenge an agency's failure to obtain information without requiring plaintiffs to demonstrate that they had a statutory right to information that the government did not possess.

OSHA next argues that plaintiffs cannot establish informational standing by joining the disclosure obligation in FOIA with the information-collection obligation in the Electronic Reporting Rule. The single, unreported decision OSHA cites in support of its argument, however, does not go nearly so far. Def. Mem. at 15 (citing *Judicial Watch, Inc. v. Office of Dir. of Nat'l Intelligence*, No. 17-508, 2018 WL 1440186 (D.D.C. Mar. 22, 2018)). In *Judicial Watch*, the plaintiff argued that an Intelligence Community Directive (ICD) required the government to create a document and that, once created, the plaintiff could seek the document under FOIA. The court found that plaintiff had not established that it had suffered an informational injury because it could

not show either that the ICD required creation of the document or that, once created, the document would be subject to release under FOIA. 2018 WL 1440186, at *1–*3. Here, in contrast, plaintiffs do not seek the creation of anything. Rather, plaintiffs seek to have the government collect extant records as required by the Electronic Reporting Rule, and this Court has already determined that, once collected, such records would have to be released under FOIA. *PC HRG*, 363 F. Supp. 3d at 14. Further, the court in *Judicial Watch* observed that there was "no express or implied interrelation between" the ICD and FOIA. 2018 WL 1440186, at *3. Here, just the opposite is true. The preamble to the Electronic Reporting Rule mentions FOIA forty times, and it emphasizes that the Form 300 and 301 data will be made public "in accordance with FOIA." 81 Fed. Reg. at 29,658–62.

Moreover, while relying on the unreported decision in *Judicial Watch*, OSHA ignores the cases where informational injury was established in situations where the agency's information-gathering and information-disclosure obligations arose from different statutes. For example, in *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir 2017), environmental groups challenged an EPA rule that exempted farms from reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). The groups asserted standing based on their informational injury, because the rule diminished the amount of information that would be collected by the agency and disclosed to the groups. The EPA argued that the groups lacked standing to challenge the CERCLA portions of the rule, "because while both statutes require reporting, CERCLA (unlike EPCRA) has no requirement of *disclosure*." *Id.* at 533 (emphasis in original). "Thus, in the EPA's view, the CERCLA portion of the rule inflict[ed] no informational injury" on the environmental groups. *Id.* The D.C. Circuit rejected EPA's argument. Because the

information collected under CERCLA would be subject to disclosure under a different statute, EPCRA, the groups had informational standing. *Id.* at 533–34.

Similarly, in *Citizens for Responsibility & Ethics in Washington v. Executive Office of the President*, 587 F. Supp. 2d 48, 59–61 (D.D.C. 2008), the court held that the plaintiffs had informational standing to challenge the government's failure to preserve records as required by the Federal Records Act (FRA), even though the informational injuries flowed from the plaintiffs' inability to use FOIA to obtain the records. And in *Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 5–6 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999), the court held that the plaintiffs had standing to challenge a regulation promulgated pursuant to the Records Disposal Act (RDA), where implementation of the regulation would prevent certain records from being accessible to the plaintiffs through FOIA.

These reported decisions support plaintiffs' standing in this case. Here, the record demonstrates that, if the Electronic Reporting Rule is restored and OSHA collects the Form 300 and 301 data, plaintiffs will use FOIA to obtain that information for use in their work. *See, e.g.*, Carome Decl. ¶ 7 ("HRG has submitted a series of Freedom of Information Act (FOIA) requests seeking the records submitted to OSHA under the Electronic Reporting Rule. HRG will continue to use FOIA to request such records in the future.").

Finally, OSHA attempts to support its position with a policy argument, predicting that a decision for plaintiffs would provide standing for any potential FOIA requester to challenge any "agency decision that implicates the creation of information." Def. Mem. at 16. Plaintiffs, however are not asking OSHA to *create* information. They seek to challenge unlawful agency action that will prevent them from accessing information that the agency is legally required to *collect*, and

where the characteristics of the information is so well-established that a court can determine whether it is likely to be released under FOIA.

B. Plaintiffs have shown organizational impacts sufficient to support both informational and organizational standing.

OSHA also argues that, in addition to showing informational injury, plaintiffs must demonstrate that the Rollback Rule has forced them to expend resources trying to collect from other sources the type of data that would have been available under the Electronic Reporting Rule. Def. Mem. at 17–18. OSHA's argument should be rejected.

OSHA bases its argument on its observation that the Court in *PC HRG* cited three informational injury cases in which the plaintiffs had diverted resources to counteract the deprivation of information. Def. Mem. at 18. But neither *PC HRG* nor those cases suggest that a diversion of resources is required to establish informational standing. Informational standing requires only a showing that the plaintiff has been denied access to information that a statute requires the defendant to disclose, and that there "is no reason to doubt [the organization's] claim that the information would help" it. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016); *see Campaign Legal Ctr. v. Fed. Election Comm'n*, 245 F. Supp. 3d 119, 123 (D.D.C. 2017) (explaining that the plaintiffs asserted both informational standing based on agency action that deprived them of information to which they were statutorily entitled, and organizational standing based on the adverse effect that the agency decision had on their organizational interests). Because, for the reasons explained above, plaintiffs "have already established their informational standing by alleging that they were deprived of information to which they are entitled by statute, and demonstrating that there is no reason to doubt their claims that the information would be helpful to them," they "need not satisfy [the] requirements for organizational standing as well." *Campaign Legal Ctr.*, 245 F. Supp. 3d at 128 (citations omitted).

Moreover, even if plaintiffs had not established informational standing, they could still establish organizational standing based on the deprivation of information plus a demonstration of the negative consequences for their work. *See Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, 358 F. Supp. 3d 66, 77–78 (D.D.C. 2019) (using same loss-of-information allegation to analyze both informational standing and organizational standing), *appeal filed*, No. 19-5130 (D.C. Cir.). Although OSHA asserts that plaintiffs "have not provided any evidence that they have spent resources to counteract their alleged deprivation of information," Def. Mem. at 18, plaintiffs have submitted three declarations that demonstrate that the deprivation has had concrete impacts that impede their ability to perform their organizational functions. As the declarations state, plaintiffs are three public health organizations that use workplace injury and illness data—of the type required to be submitted to OSHA under the Electronic Reporting Rule—to identify and analyze the causes of workplace injuries and illnesses and develop solutions. Carome Decl. ¶¶ 2, 3, 5; Benjamin Decl. ¶¶ 2, 4; Harrison Decl. ¶¶ 4, 5, 7. The Rollback Rule has impeded plaintiffs' work by depriving them of access to a comprehensive source of workplace injury and illness data. Although plaintiffs will continue to use data available from other sources, such data is not as complete and is more difficult to gather. Carome Decl. ¶ 11; Benjamin Decl. ¶ 6; Harrison Decl. ¶¶ 2, 7, 9. For example, individual workers and their representatives have a right to obtain the Form 300 and 301 data for their particular workplaces, 29 C.F.R. § 1904.35(b)(2)(v), and there is no restriction on what they may do with the data once obtained. 81 Fed. Reg. at 29,684 ("Employees or their representatives can also obtain and make public most of the information from these records at any time, if they wish."). But finding employees and unions to request such data and report it to plaintiffs is much more burdensome than receiving a complete dataset from OSHA, as plaintiffs could have done but for the Rollback Rule.

Thus, this case does not raise the concern, noted by OSHA, that plaintiffs are pursuing "abstract societal interests." Def. Mem. at 18 (citing *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011)). Rather, as plaintiffs' declarations show, the challenged agency action here puts barriers in the way of plaintiffs' ability to do their work. *See Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 41–42 (D.D.C. 2019) (holding that the plaintiff had organizational standing to challenge a delay rule that denied it information because its independent research efforts "will not provide access to the same quality of information that would be available" but for the delay of the prior regulation), *appeal filed*, No. 19-5137 (D.C. Cir.); *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 76, 78 (holding that the plaintiff had organizational standing to challenge the stay of a data collection regulation because, but for the stay, the plaintiff "would have been able to make its reports and advocacy more robust with additional data and analysis").

II. The Rollback Rule is arbitrary and capricious because OSHA has failed to justify reversing course.

OSHA argues that the Court should not set aside the Rollback Rule because "an agency may change its mind." Def. Mem. at 2. But when an agency reverses course, it must provide a reasoned explanation, including its reasons for disregarding the findings and conclusions on which it based its prior policy. *Fox*, 556 U.S. at 515–16. OSHA has failed to do so: Its asserted justifications for the Rollback Rule ignore the agency's prior findings, and rest on errors of law and factual assertions that lack a rational foundation in the record.

A. The Electronic Reporting Rule poses no meaningful risk to worker privacy.

OSHA argues that it reassessed the reporting requirements in the Electronic Reporting Rule and "determined that collecting the data from Forms 300 and 301 would pose a meaningful threat to worker privacy." Def. Mem. at 20. In attempting to defend its about-face on this issue, OSHA cites extensively to the preamble to the Rollback Rule but ignores its contrary factual findings

from three years earlier as set forth in the preamble to the Electronic Reporting Rule. OSHA's failure to meaningfully address those findings is fatal to its defense of the Rollback Rule.

OSHA cannot avoid the fact, which it explicitly recognized in promulgating the Electronic Reporting Rule, that the anonymized Form 300 and 301 information that would be collected under the Electronic Reporting Rule is not "private" or "confidential" within the normal meaning of those words because employees, former employees, and their representatives can obtain and disclose the information for their workplace. 29 C.F.R. § 1904.35(b)(2)(v); *see* 81 Fed. Reg. at 29,684 ("Employees or their representatives can also obtain and make public most of the information from these records at any time, if they wish."). OSHA now attempts to sidestep this fact by claiming that such data is released "on a case-by-case basis only to those with a 'need to know,'" Def. Mem. at 21 (quoting 84 Fed. Reg. at 384); *id.* at 23. OSHA's new claim is not only contrary to its previous acknowledgment that the information is freely available, but unsupported by the record and, indeed, false. As plaintiffs explained in their opening brief, the workplace disclosure obligation is not limited to those with a "need to know," *see* Pls. Mem. at 20, and when OSHA has collected such data during workplace inspections, it has routinely disclosed it under FOIA without regard to the identity of the requester, *id.* at 22 (citing 81 Fed. Reg. at 29,632).

In the Rollback Rule, OSHA asserted that there is a risk that anonymized data submitted under the Electronic Reporting Rule, when joined with information from other sources, could lead to the reidentification of the injured worker. OSHA tries to support its assertions about the risk of reidentification by citing comments explaining that the risk is greatest where a reviewer can connect data reported on a form with an "observable symptom," or when individuals are "known to be victims" of a workplace assault or accident. 2019-AR01750-51. But those possibilities exist with or without the Electronic Reporting Rule, because any employee, former employee, or

employee representative—including the coworkers most likely to reidentify the injured worker—has a right to the same information from Forms 300 and 301 that OSHA now says is too sensitive to even collect. OSHA cannot find support for its reidentification concerns in what it calls the "common-sense conclusion that exposing sensitive information to a wider audience poses a greater threat to privacy," Def. Mem. at 23, because reidentification is most likely to occur among coworkers who have access to the data even without the Electronic Reporting Rule. Thus, the Rollback Rule does not diminish the risk of reidentification, but it does block access to anonymized data for use in research, which undermines efforts to protect worker health and safety.

OSHA's response to plaintiffs' arguments about the risk of releasing "sensitive" worker information is even less convincing. In the preamble to the Rollback Rule, OSHA argued that Form 300 and 301 data should not be collected because it "could contain sensitive information about workers" even when those workers are not identified. 84 Fed. Reg. at 385. In response, plaintiffs explained that existing regulations, including those dealing with "privacy concern" cases, adequately protect such data. Pls. Mem. at 21–22 (citing 29 C.F.R. § 1904.29(b)(6) & (7)). OSHA's only response is to repeat the same flawed reasoning it asserted regarding reidentification, citing a comment that observed that the risk of reidentification is greatest where "unusual injuries or illnesses" are reported. Def. Mem. at 24 (citing 2019-AR01035). As explained above, that risk is the same even without the Electronic Reporting Rule.

Moreover, OSHA's arguments regarding whether the data at issue must be released under FOIA—which are linked to the newfound privacy concerns that it claims justify the Rollback Rule—continue to shift without any reasoned or rational explanation. When it issued the Electronic Reporting Rule, OSHA stated that it would disclose the information collected under the rule "consistent with FOIA," and it explained that the fields it would collect from Forms 300 and 301

are not exempt from disclosure and are "generally released by OSHA in response to a FOIA request." 81 Fed. Reg. at 29,658. OSHA observed that release of the information had been OSHA's "consistent policy" since at least 2004, when its earlier position that the information was exempt was rejected by the courts. *Id.* When it issued the Rollback Rule, OSHA reversed course and, without explaining why its view of FOIA had changed, asserted that the data would be exempt from disclosure. 84 Fed. Reg. at 386. OSHA realized, however, that its new position undermines its primary justifications for the Rollback Rule—to protect worker privacy and save the costs associated with processing FOIA requests. Thus, OSHA asserted that although OSHA believes the data is exempt from disclosure, it will not collect the data because "OSHA still could be required by a court to release the data." 84 Fed. Reg. at 386 (citing this Court's decision in *PC HRG*).

In its brief, OSHA backs away from its suggestion that the data would be exempt from disclosure, *see* Def. Mem. at 26 (acknowledging "the probability that Form 300 and 301 data would be released under FOIA"), and instead argues that the Rollback Rule is an expression of OSHA's determination that worker privacy deserves protection greater than that afforded by FOIA, *id.* at 24 (arguing that FOIA does not set "the ceiling for an agency's concern for individual privacy"). OSHA's argument comes too late to save the Rollback Rule because OSHA did not suggest that it had decided to apply a higher standard for protecting personal privacy when it issued the Rollback Rule, and "agency action may be upheld only on grounds articulated by the agency." *NRDC v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court … must judge the propriety of [agency] action solely by the grounds invoked by the agency."). To the contrary, OSHA maintained in the rulemaking that its standard for protecting personal privacy is the same as that embodied in FOIA, even as OSHA's view of what FOIA requires shifted. 84 Fed. Reg. at 386 (describing information deserving of privacy protection

as that which is exempt from disclosure under FOIA). Thus, as explained in plaintiffs' opening brief, the Rollback Rule is irrational because to the extent FOIA's protections cover all privacy interests OSHA recognizes as legitimate, there is no need to avoid collecting information to avoid FOIA releases that would infringe privacy. Pls. Mem. at 23.

Finally, with regard to the safeguards to protect worker privacy that OSHA found sufficient when it issued the Electronic Reporting Rule but dismissed as inadequate when it issued the Rollback Rule, *see* Pls. Mem. at 15–19, OSHA asserts that it provided a reasoned explanation for reversing its position because plaintiffs have not demonstrated that there is zero risk of a breach of personal privacy. Def. Mem. at 23, 27. But plaintiffs do not need to make such an extreme case. They have shown that OSHA was correct when it determined, at the time it issued the Electronic Reporting Rule, that the release of personal or reidentifiable data is extremely unlikely to occur. OSHA's "mere speculation" that a series of unlikely errors might result in the unintended release of personal data is not "adequate grounds upon which to sustain [the] agency's action." *NRDC*, 859 F.2d at 210. Rather, OSHA's conclusion that the Rollback Rule is needed to protect worker privacy is arbitrary and capricious because it "rests upon factual findings that contradict those which underlay its prior policy," and OSHA has provided no "reasoned explanation … for disregarding [those] facts and circumstances." *Fox*, 556 U.S. at 515–16.

B. OSHA failed to consider the benefits of collecting the Form 300 and 301 data for purposes other than OSHA enforcement targeting.

OSHA asserts that it abandoned the Electronic Reporting Rule's requirement that it collect Form 300 and 301 data because it had not used such information for enforcement targeting in the past and is "'unsure how much benefit such data would have'" for this purpose. Def. Mem. at 30 (quoting 84 Fed. Reg. at 388). But enforcement targeting was only a small part of the expected benefits of the Electronic Reporting Rule. In a section of the preamble entitled "Benefits of

Electronic Data Collection," OSHA explained that the Electronic Reporting Rule would allow "employers, employees, employee representatives, the government, and researchers … to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses." 81 Fed. Reg. at 29,629. Specifically, OSHA explained that collecting the Form 300 and 301 data would allow workers to access the information anonymously and make cross-industry comparisons, *id*. at 28,730; would improve safety by reputational effect because employers want to be regarded as promoters of safe workplaces by their employees, potential employees, investors, and consumers, *id*. at 29,629–631; would 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 would provide researchers and public health officials with the information necessary to identify hazards and develop solutions, *id*. OSHA asserts that because the Electronic Reporting Rule required only collection of the data and not its publication, "OSHA was under no obligation to consider the benefits of publication in promulgating" the Rollback Rule. Def. Mem. at 33; *see id.* at 34 n.15 ("The downstream effects of the release of such information under FOIA is not, accordingly, a factor that OSHA was required to consider."). OSHA is wrong for three reasons.

First, OSHA misstates the issue when it asserts that that it did not need to "factor in" such benefits because FOIA does not obligate agencies to collect data, it only requires disclosure once the government has the records. *Id.* at 34. Contrary to OSHA's suggestion, plaintiffs have never argued that FOIA requires OSHA to collect the Form 300 and 301 data. Rather, it is the Electronic Reporting Rule that requires OSHA to collect the information. In any event, the source of the obligation to collect the data has nothing to do with whether the effects of other laws, including FOIA, would add to the benefits of collecting it.

Second, OSHA cannot avoid addressing the external benefits of the Electronic Reporting Rule's data-collection mandate by arguing that OSHA would choose not to publish the data, because dissemination of the information, and ultimately its publication, would be required by law once the data was collected. As this Court held in *PC HRG*, 363 F. Supp. 3d at 15–17, the Form 300 and 301 data OSHA was required to collect under the Electronic Reporting Rule is subject to disclosure under FOIA, and there is no question that, once collected, the data would be the subject of multiple FOIA requests. *See, e.g.*, Carome Decl. ¶ 7 ("HRG has submitted a series of Freedom of Information Act (FOIA) requests seeking the records submitted to OSHA under the Electronic Reporting Rule. HRG will continue to use FOIA to request such records in the future."). Because the data would be requested repeatedly and regularly, OSHA would be required by FOIA to publish the material, rather than limit its dissemination to individual requesters. *See* 5 U.S.C. § 552(a)(2)(D) (requiring agencies to "make available for public inspection in an electronic format" copies of all records released to a FOIA requester that "are likely to become the subject of subsequent requests for substantially the same records" or "that have been requested 3 or more times").

Third, having considered the external benefits of collecting the Form 300 and 301 data when it issued the Electronic Reporting Rule, OSHA cannot lawfully rescind the rule without addressing those benefits and explaining either how circumstances have changed so that its 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 516. OSHA ignores that the Electronic Reporting Rule sets the status quo, and instead argues that the court should defer to OSHA's assessment of its informational needs. OSHA relies on *Environmental Integrity Project v. McCarthy*, but that case is inapposite because it involved a

different standard of review. There, plaintiffs challenged an agency's decision to withdraw a *proposed* rule that explored several regulatory options, including "two 'co-proposed' rules" that would have imposed reporting obligations on regulated entities, and "three other possible 'alternative approaches,'" including the use of existing information instead of imposing new reporting requirements. 138 F. Supp. 3d at 32. The agency ultimately decided to use the existing information approach to focus its regulatory activities and withdrew the proposed rule. *Id.* at 34. Here, in contrast, plaintiffs challenge OSHA's decision to rescind an *existing* rule. As explained in *Environmental Integrity Project*, this distinction determines the standard of review. The agency's decision in *Environmental Integrity Project* was entitled to greater deference than OSHA's decision here "because a decision that 'alters the regulatory status quo' requires 'more persuasive justification than does the decision to retain an existing rule.'" *Id.* at 39 (quoting *Williams Nat. Gas Co. v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989)); *see Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004) (holding that the withdrawal of a proposed rule is entitled to greater deference than a decision "to rescind an existing one"). Thus, while an agency might have broad discretion to choose not to proceed with an information-collection rule to achieve broader public benefits that exceed its own needs for information, once it has issued such a rule in part to achieve such broader benefits, it can rescind the rule only if it provides a rational explanation for why it no longer thinks those benefits justify the rule.

OSHA further argues that it would have rescinded the provisions of the Electronic Reporting Rule even if it had been required to consider the benefits of disclosure, because the scope of such benefits is "uncertain" and "speculative" because "OSHA cannot know how a range of entities will use the 300 and 301 data until that data has been provided." Def. Mem. at 35 (citing

84 Fed. Reg. at 393). OSHA's argument ignores the administrative record, which is replete with comments from plaintiffs and others setting forth clear plans for how they would use the data. *See, e.g.*, 2019-AR01021 (comment of NIOSH); 2019-AR01799 (comment of UCLA Labor Occupational Safety and Health Program); 2019-AR01381 (comment of International Union, United Automobile, Aerospace, and Agricultural Workers of America); 2019-AR01655 (comment of Public Citizen); 2019-AR01087 (comment of APHA); 2019-AR-01079) (comment of CSTE); 2019-AR01203 (comment of more than 100 organizations and individuals in the public health community). And just three years ago, OSHA concluded that the concrete benefits of data collection and dissemination "include[d] increased prevention of workplace injuries and illnesses as a result of expanded access to timely, establishment-specific injury/illness information by … employers, employees, employee representatives, potential employees, customers, potential customers, and researchers." 81 Fed. Reg. at 29,625. In fact, the agency concluded that public disclosure *alone*—without any analysis by third parties—would provide a benefit by "'nudg[ing]' some employers to abate hazards and thereby prevent workplace injuries and illnesses" even without any agency enforcement activity. 81 Fed. Reg. at 29,629. By dismissing these benefits as "uncertain," OSHA has failed to provide a reasoned explanation for rescinding the Electronic Reporting Rule. "The mere fact that the magnitude of … [an] effect[] is *uncertain* is no justification for *disregarding* the effect entirely." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (emphasis in original). Moreover, the agency has provided no explanation sufficient to satisfy *Fox* for why benefits that it found sufficiently substantial to justify the rule are now merely "speculative."

Finally, to the extent OSHA currently claims to lack knowledge of how external entities would use the data at issue, it is only because of OSHA's own unlawful conduct. The Electronic

Reporting Rule required the submission of 2017 Form 300 and 301 data by July 1, 2018, 81 Fed. Reg. at 29,640, but OSHA suspended the deadline without notice and comment and without a reasoned explanation. The suspension was challenged under the APA, *see* Compl., *PC HRG*, No. 18-1729 (D.D.C. July 25, 2018), ECF No. 1, and plaintiffs moved for summary judgment, *see* Pls.' Mot. Summ. J., ECF No. 18. OSHA filed a response, *see* Defs.' Opp'n, ECF No. 26, but offered no defense on the merits, effectively conceding that OSHA's suspension of the July 2018 submission deadline violated the APA. But for OSHA's unlawful suspension of the July 2018 submission deadline, OSHA would have been able to evaluate the real-world benefits of collecting the Form 300 and 301 data when considering whether to rescind the rule requiring it to collect that data. OSHA should not be allowed to use its own unlawful conduct as a basis for arguing that the external benefits are "uncertain."

C. OSHA failed to respond adequately to relevant and significant public comments.

In their opening brief, plaintiffs explained in detail that the Rollback Rule is arbitrary and capricious because OSHA failed to respond meaningfully to major substantive comments. Pls. Mem. at 30–40. OSHA's response is to assert that the mere mention of a comment is sufficient to fulfill the agency's obligation. Def. Mem. at 36. For example, neither the preamble to the Rollback Rule nor OSHA's brief explains why the agency entirely discounted the findings of the report of the National Academy of Sciences, Engineering, and Medicine (NAS Report) when it issued the Rollback Rule. Instead, OSHA's brief observes that it mentioned the NAS Report ten times in the preamble to the Rollback Rule and asserts that the number of mentions is enough to render plaintiffs' "characterization of the record … inaccurate." Def. Mem. at 39. But OSHA's ten references to the NAS Report do not demonstrate that the agency grappled with this significant source of evidence. Indeed, two of those ten mentions are entirely unhelpful to OSHA. The two

references on page 396 of the Rollback Rule's preamble *credit* the NAS Report's recommendation—which OSHA adopted—that the agency require the submission of Employer Identification Numbers (EIN). *See* 84 Fed. Reg. at 396 (identifying comments noting that OSHA's decision to require EINs was "consistent with recommendations from the NAS Report"). Though it accepted this suggestion without question, OSHA discounted the rest of the report's findings without explanation.

Contrary to OSHA's assertion, the remaining mentions of the NAS Report do not demonstrate that the agency adequately considered the "major issues of policy" and explained "why the agency reacted to them as it did." Def. Mem. at 39 (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). OSHA offered only two reasons for rejecting the NAS Report's findings on the value of data collection and dissemination for conducting enforcement, improving research, and encouraging employers to improve worker safety standards. First, it contended that "many of the benefits discussed by commenters" and identified in the NAS Report, "would not materialize" because the data would not be made public. 84 Fed. Reg. at 391. But as the plaintiffs have explained, Pls. Mem. at 23–25, the data would in fact be made public via FOIA. Indeed, this Court has already so held, *PC HRG*, 363 F. Supp. 3d at 15–16, and OSHA itself now admits it is "probab[le]," Def. Mem. at 26, that the data would be subject to release under FOIA. As a result, it is irrational to refuse to consider the benefits of dissemination on the grounds that dissemination would not occur.

OSHA's second defense of its unreasoned dismissal of the NAS Report's recommendations fares no better. OSHA argued that it did not have to consider further the benefits outlined in the NAS Report because implementing those suggestions "would require substantial investment of time and money." 84 Fed. Reg. at 391. But the fact that implementing government programs costs

money is not, as OSHA now contends, a "cogent[] observ[ation]." Def. Mem. at 39. To survive arbitrary and capricious review, the agency must actually "examine the relevant data." *State Farm,* 463 U.S. at 43. Here, OSHA rejected data about benefits merely because of the truism that they would involve some costs, abdicating its responsibility to offer "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). OSHA's tally of references cannot hide this failure.

CONCLUSION

The Court should deny OSHA's motion to dismiss, grant plaintiffs' motion for summary judgment, deny OSHA's cross-motion for summary judgment, vacate the Rollback Rule and reinstate the Electronic Reporting Rule.

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Respectfully submitted,

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