IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH, RESEARCH GROUP, et al.,	
Plaintiffs,	Civil Action No. 18-cv-1729-TJK
v.	
ALEXANDER ACOSTA, Secretary, United States Department of Labor, et al.,	
Defendants.	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In May 2018, the Occupational Safety and Health Administration (OSHA) rescinded without notice and comment the Electronic Reporting Rule's requirement that covered establishments submit, by July 1, 2018, certain work-related injury and illness data recorded on their 2017 OSHA Forms 300 and 301. When OSHA promulgated the Rule, it stated its intention that the data it collected would be publicly available to allow public health organizations to use the data to analyze threats to worker health and safety and to develop solutions. Consistent with OSHA's statement, plaintiffs—three public health organizations—planned to use the data in their work. Absent preliminary relief, however, plaintiffs will be unable to do so, because further delay in enforcing the Rule will diminish the quantity and quality of data collected, if it can be collected at all.

OSHA argues that plaintiffs' motion should be denied because plaintiffs lack standing and cannot satisfy the preliminary injunction factors. Many of OSHA's arguments are based on assertions belied by the rulemaking record. Most importantly, OSHA does not seriously dispute that suspension of a compliance deadline promulgated through notice-and-comment rulemaking is a legislative rule that itself requires notice-and-comment procedures that were not followed here. Accordingly, the Court should enjoin OSHA to comply with the Electronic Reporting Rule and collect the 2017 Form 300 and 301 data.

ARGUMENT

I. Plaintiffs seek a preliminary injunction to maintain the current requirements of the Electronic Reporting Rule.

As a threshold matter, OSHA incorrectly claims that plaintiffs seek "to change the status quo" by seeking a "mandatory" injunction and, therefore, should be held to a higher standard

than if the injunction sought was "prohibitory." Defs. Opp. 8. OSHA is wrong both as a matter of fact and as a matter of law.

Factually, it is OSHA that has deviated from the status quo by suspending a key substantive component of the Electronic Reporting Rule. OSHA claims that its refusal to require or allow the submission of the 2017 Form 300 and 301 data maintains "the same state of affairs that has prevailed since the forms were promulgated in 2001." *Id.* The state of affairs, however, changed substantially with the promulgation of the Electronic Reporting Rule in November 2016, which requires establishments to submit—and OSHA to collect—the 2017 OSHA Form 300 and 301 data by July 1, 2018. *See* 29 C.F.R. § 1904.41(c)(1). The requirements of the 2016 Rule constitute the status quo against which OSHA's action and plaintiffs' motion should be judged.

Legally, OSHA is mistaken with regard to the appropriate standard. For purposes of a preliminary injunction, the D.C. Circuit has "rejected any distinction between a mandatory and prohibitory injunction." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (recognizing that "whether an injunction in the APA context is mandatory or prohibitory … depends on an essentially arbitrary criterion: whether the agency decision was of a sort that could be given practical effect before plaintiffs could get into court"); *see also id.* (citing *United States v. W. Elec. Co.*, 46 F.3d 1198, 1206 (D.C. Cir. 1995) (observing that "the 'mandatory' injunction has not yet been devised that could not be stated in 'prohibitory' terms")). Moreover, whether framed as mandatory or prohibitory, the applicable standard does not vary: "A party seeking a preliminary injunction must make a 'clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence

of preliminary relief, a balance of the equities in its favor, and accord with the public interest.'" *Id.* As discussed below, plaintiffs satisfy that standard in this case.

II. Plaintiffs have standing to contest OSHA's unlawful suspension of the Rule's requirements.

OSHA argues that plaintiffs lack standing because a preliminary injunction requiring OSHA to comply with the Electronic Reporting Rule and collect the Form 300 and 301 data may not result in plaintiffs obtaining useful material. According to OSHA, plaintiffs could access the material only by making a Freedom of Information Act (FOIA) request, but would not receive the material under FOIA because it would be exempt from disclosure. Defs. Opp. 9–10. OSHA's position runs counter to the agency's own longstanding view that the data required to be submitted from the Form 300 and 301 is not exempt from disclosure and, in any event, is wrong.

Throughout the rulemaking process, OSHA stated its intention to publicly post the complete Form 300 and 301 dataset, and explained that it would do so, among other reasons, to improve the ability of public health organizations (like plaintiffs) to analyze the causes of work-related injury and disease in the United States and to develop solutions to reduce or eliminate such injury and disease. *See* Final Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29624, 29631 (May 12, 2016). Before OSHA promulgated the Rule, plaintiffs and others could not access the data in the OSHA forms in a systematic way, although the forms could be obtained on request by workers at a particular establishment or through FOIA with regard to forms that OSHA had collected on an ad hoc basis. Although OSHA has abandoned its intention to publicly post the data, the fact that plaintiffs would have to use FOIA to obtain it does not diminish the harm that they are suffering from OSHA's refusal to collect it: Unless OSHA lifts its unlawful suspension of the Rule and collects the data, plaintiffs cannot obtain the records. *See People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C.

Cir. 2015) (stating that "denial of access to bird-related … information including, in particular, investigatory information" caused by agency's failure to act, constituted "cognizable injury sufficient to support standing"); *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 939 & n.9 (D.C. Cir. 1986) (describing plaintiffs as "injured by a loss of information" due to agency's failure to issue regulations); *Citizens for Responsibility & Ethics in Washington v. Exec. Office of President*, 587 F. Supp. 2d 48, 60–61 (D.D.C. 2008) (holding plaintiffs who had pending FOIA requests and intended to file future FOIA requests had standing to contest unlawful government policy that would result in the destruction of records).

Plaintiffs have established, and OSHA does not contest, that plaintiffs intend to use the data that, under the Rule, OSHA is required to collect, for the purpose of tracking, investigating, and working to prevent work-related injury and disease, s*ee* Pls. Mem. 6–8, 15–16, and that they will use FOIA to obtain the data if OSHA does not publicly post the information. For example, Public Citizen submitted four FOIA requests from October 2017 through February 2018 for the injury and illness data that establishments were required to submit to OSHA by December 15, 2017, has continued to submit FOIA requests for the injury and illness data submitted to OSHA, most recently on July 9, 2018, and will continue to submit future requests to OSHA on a regular basis for records submitted pursuant to the Rule. *See* Second Carome Decl. ¶¶ 3–6 & Ex. A. The indefinite suspension of the Rule cuts off plaintiffs' access to the data, making it more difficult for plaintiffs to analyze the causes of workplace injuries and illnesses and work toward preventing them. *See* Pls. Mem. 6–8, 15–16; Carome Decl. ¶¶ 3–4; Harrison Decl. ¶¶ 5, 7; Benjamin Decl. ¶¶ 3–4.

OSHA asserts with no analysis that some of the data may be exempt from disclosure under FOIA Exemptions 6 and 7(C), Defs. Opp. 9, and that plaintiffs' ability to obtain useful

information through FOIA is therefore a "question of considerable complexity and doubt," *id.* 11. The Form 300 and 301 data does not fall within the scope of Exemptions 6 and 7(C). "Exemptions 6 and 7(C) seek to protect the privacy of individuals identified in certain agency records." *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 6 (D.C. Cir. 2011). The Electronic Reporting Rule, however, does not require establishments to submit fields from either form that identify individuals, either by name or otherwise. *See* 81 Fed. Reg. at 29650.[1] Accordingly, prior to the promulgation of the Rule, OSHA regularly disclosed the same portions of the OSHA Forms 300 and 301 that it had in its possession, when that information was sought through FOIA. *See* 81 Fed. Reg. at 29650. Similarly, since 2001, OSHA regulations have required that employers provide copies of the same parts of the OSHA Form 300 and the Form 301 to any current employees, former employees, and employee representatives. *See* 29 C.F.R. § 1904.35. "OSHA authorized this right of access after balancing the privacy rights of individuals with the public interest for disclosure," and concluding that the public interest outweighed any potential privacy interest. *See* 81 Fed. Reg. at 29661. Further, OSHA reached this conclusion notwithstanding that it could not prevent the dissemination of the information in the Form 300 or 301 after its release. *See id.* (citation omitted).

[1] The fields that employers are required to submit to OSHA from the Form 300 log of work-related injuries include: case number; job title; where the event occurred; a description of the injury; a checkbox choice for the outcome (death, days away from work, or remained at work); the number of days away from work or on restricted duty; and a checkbox choice for the type of illness (injury, skin disorder, respiratory condition, poisoning, hearing loss, all other illnesses). *See* OSHA, Injury & Illness Recordkeeping Forms - 300, 300A, 301, https://www.osha.gov/recordkeeping/RKforms.html. The fields that OSHA will collect from the OSHA Form 301 (fields 10 through 18) ask employers to provide certain general information about each case: case number; date of event; time employee began work; time of event; what employee was doing just before incident; what happened; what was the injury or illness; what object or substance directly harmed the employee; and if the employee died, when did death occur. *See id.* None of these fields identify individual employees.

In addition, since 2015, OSHA has required employers to report to OSHA "severe injuries" within 24 hours, *see* 79 Fed. Reg. 56129 (Sept. 18, 2014), and, since 1994, has required employers to report fatalities within 8 hours, *see id.* at 56141. The agency posts establishment-specific information about work-related fatality and severe injury reports on its website on a rolling basis. *See* OSHA, Fatality Inspection Data, https://www.osha.gov/dep/fatcat/dep_fatcat.html; OSHA, Severe Injury Reports, https://www.osha.gov/severeinjury/index.html. Similarly, the Mine Safety and Health Administration (MSHA), the Federal Railroad Administration (FRA), and the Federal Aviation Administration (FAA) all post injury and illness data on their websites. *See* 81 Fed. Reg. at 29656. OSHA has offered no evidence that these disclosures have effected an unwarranted (or in the words of Exemption 6, "clearly unwarranted") "invasion of personal privacy."

Consistent with the practice of OSHA and other agencies, OSHA explained in the Electronic Reporting Rule that it would publish collected data in accordance with FOIA and, that—in accordance with its longstanding views on the application of FOIA exemptions to these forms—it would publicly post "all collected data fields on the 300 Log," as well as "[a]ll collected data fields on the right-hand side of the [301] form (Fields 10 through 18)." *Id.* at 29632, 29658. OSHA also noted that some commenters were concerned that the posted information would enable the public to identify injured or ill employees. 81 Fed. Reg. at 29662. The agency concluded that it was "less likely that employees in such large establishments will be identified based on the posted recordkeeping data" because only establishments with 250 or more employees were required to submit the OSHA Forms 300 and 301. *Id.* Ultimately, after considering numerous comments raising privacy concerns, OSHA concluded that it could

publicly disclose the collected portions of the OSHA Form 300 and the right-hand side of the OSHA Form 301 consistent with FOIA. *See id.* at 29660–62.

Because OSHA's unlawful suspension of the Rule has unlawfully cut plaintiffs off from obtaining the records, as OSHA intended to enable them to do when it issued the Rule, plaintiffs have standing to challenge OSHA's suspension of the reporting requirement.

III. Plaintiffs have a strong likelihood of success on the merits.

A. OSHA acted unlawfully by suspending the Rule's reporting requirement without undertaking notice-and-comment procedures.

OSHA does not dispute that it rescinded the Electronic Reporting Rule's requirement that employers submit 2017 Form 300 and 301 data and that it did so without undertaking notice-and-comment rulemaking. Instead, OSHA argues that its rescission of the Rule's requirements was a general statement of policy "exempt from notice-and-comments requirements." Defs. Opp. 14. As the D.C. Circuit has stated, however, "[s]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking." *Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983). Thus, as plaintiffs explained in their opening memorandum, numerous cases hold that an agency decision to suspend a final regulation without engaging in notice-and-comment rulemaking violates the Administrative Procedure Act (APA). *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (concluding that an agency action that "suspended [a] rule's compliance deadlines … [is] tantamount to amending or revoking a rule," and collecting cases); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 163 (D.D.C. 2017) (holding that an agency's suspension of a compliance deadline established by regulation required notice and comment rulemaking); *see also Bauer v. DeVos*, No. CV 17-1330 (RDM), 2018 WL 4353656, at *14–17 (D.D.C. Sept. 12, 2018) (finding procedural requirement of Higher Education Act,

which applies in same circumstances as notice and comment under APA, applies to suspension of effective date of final regulation).

These cases dictate the outcome here. Under the Electronic Reporting Rule, establishments were required by law to submit their 2017 OSHA Forms 300 and 301 by July 1, 2018. The May 2018 announcement lifted that requirement in no uncertain terms: "Covered establishments with 250 or more employees are only required to provide their 2017 Form 300A summary data. ***OSHA is not accepting Form 300 and 301 information at this time.***" *See* OSHA, Final Rule Issued to Improve Tracking of Workplace Injuries and Illnesses, https://www.osha.gov/recordkeeping/finalrule/index.html (located in section entitled "Compliance schedule") (emphasis in original) (last visited Sept. 20, 2018); *cf. Clean Air Council*, 862 F.3d at 8 (explaining that when determining whether a stay "affects regulated parties' 'rights or obligations'" there is no basis to differentiate between agency action imposing a compliance deadline or suspending a deadline).

Further, OSHA's subsequent action illustrates that, outside of litigation, it understands that lifting the reporting requirement is a substantive rule that requires notice-and-comment procedures: OSHA has now issued a notice of proposed rulemaking to eliminate the requirement that establishments submit OSHA Forms 300 and 301. *See* Proposed Rule, *Tracking of Workplace Injuries and Illnesses*, 83 Fed. Reg. 36494, 26497, 36507 (July 30, 2018). However, the July notice of proposed rulemaking does not cure the failure to conduct rulemaking before suspending the requirement. "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." *NRDC v. NHTSA*, 894 F.3d 95, 115 (2d Cir. 2018) (citation omitted).

Tellingly, neither of the cases on which OSHA relies involve agency statements suspending regulations. In *Association of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015), the court concluded that the agency action at issue—a notice providing guidance to aviation safety inspectors—was not a legislative rule because it did not alter the existing regulatory regime. Notably, the court explained that "if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule *must* be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *id.* at 718 (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1109 (D.C. Cir. 1993)) (emphasis added). In *NAACP v. Trump*, 298 F. Supp. 3d 209, 236 (D.D.C. 2018), the court held that a memorandum rescinding a prior memorandum that had established the Deferred Action for Childhood Arrivals (DACA) program was not subject to notice-and-comment requirements because both were policy statements. Finally, in *EPIC v. DHS*, 653 F.3d 1, 7–8 (D.C. Cir. 2011), the court concluded that the Department of Homeland Security's announcement that it would use new technology to screen airline passengers was *not* a general statement of policy, but was a substantive rulemaking that required notice and comment procedures. To the extent that the case is relevant here, it supports plaintiffs. Thus here, where OSHA does not contest that the Electronic Reporting Rule is a legislative rule, OSHA's May 2018 announcement suspending the July 1, 2018, deadline required notice-and-comment rulemaking.

OSHA also appears to claim that its action should not be subject to review because it was a "temporary step" of "prosecutorial discretion" to "not enforce" the July 1, 2018, deadline while the rulemaking is underway. *See* Defs. Opp. 15. This characterization does not accurately reflect the nature of OSHA's action, which provided that OSHA will neither require nor accept the submission of Form 300 and 301 information as required by the Rule. Moreover, as the D.C.

Circuit has held, an agency lacks the authority "not to enforce a lawfully issued final rule while it reconsiders it." *Clean Air Council*, 862 F.3d at 7–9 (punctuation omitted). The same is true here.[2]

Because OSHA was required to follow notice-and-comment procedures prior to suspending the Electronic Reporting Rule, its action must be set aside.

B. OSHA's rescission of the Rule's requirements was arbitrary and capricious.

In addition, OSHA's suspension of the July 1, 2018, deadline for submitting OSHA Forms 300 and 301 is arbitrary and capricious because future reconsideration of the Rule is not an adequate basis upon which to suspend the deadline. *See* Pls. Mem. 12–14. OSHA nowhere argues that reconsideration alone comports with the APA, effectively conceding that the ground it invoked in May 2018 is insufficient. Rather, in opposition, OSHA relies exclusively on the grounds in the notice of proposed rulemaking promulgated July 30, 2018, for a potential rescission of the requirement that establishments submit the OSHA Forms 300 and 301. Defs. Mem. 15–16. Although OSHA understandably wants to shift the Court's attention away from its sparse May 2018 announcement and toward the more-thorough July 30, 2018, notice of proposed rulemaking, "because 'a reviewing court ... must judge the propriety of [agency] action solely by the grounds invoked by the agency,' *post hoc* explanations that the agency did not articulate when it acted are insufficient." *NAACP*, 298 F. Supp. 3d at 237 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (emphasis in original).

In May 2018, when OSHA announced the suspension of the July 1, 2018, deadline, OSHA nowhere mentioned employee privacy. OSHA stated only that it was not accepting

[2] OSHA claims to have identified "many instances" where agencies have delayed or suspended effective dates without notice and comment, specifically identifying two actions taken by the Pipeline and Hazardous Materials Safety Administration and the Animal and Plant Health Inspection Service. *See* Defs. Opp. 14. Regardless of whether those actions were proper—and OSHA does not point to any judicial decisions indicating that they were—they do not excuse OSHA's unlawful suspension of the Electronic Reporting Rule.

submissions because it planned to issue a notice of proposed rulemaking to reconsider the Electronic Reporting Rule's requirement that covered establishments electronically submit OSHA Form 300 and 301 data. *See* OSHA, Final Rule Issued to Improve Tracking of Workplace Injuries and Illnesses, https://www.osha.gov/recordkeeping/finalrule/index.html (located in section entitled "Compliance schedule"). As the D.C. Circuit recently held, however, "the mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated effective dates specifically chosen … on the basis of public input and reasoned explanation." *See Air Alliance Houston v. EPA*, No. 17-1155, 2018 WL 4000490, at *12 (D.C. Cir. Aug. 17, 2018). "[A] decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *Id.* (quoting *NRDC v. NHTSA*, 894 F.3d at 111–12). OSHA cannot bootstrap a *post-hoc* explanation into the analysis of its May 2018 suspension by reference to reasoning that it did not offer until two months later. Such an exception would make a mockery of the bedrock *Chenery* requirement that judicial review of administrative decisionmaking is limited to the reasons the agency stated at the time of its decision.

IV. Without preliminary relief, plaintiffs are likely to suffer irreparable harm.

OSHA argues that plaintiffs have failed to establish their entitlement to preliminary relief because "they face no irreparable harm from the regular pace of litigation" and will not be injured by "delayed access to information." Defs. Opp. 11. OSHA's argument is not well taken for several reasons.

First, as the D.C. Circuit recently held, organizations like plaintiffs suffer a likelihood of irreparable injury where the actions taken by the defendant have "perceptibly impaired the organization's programs" in a way that "directly conflict[s] with the organization's mission." *League of Women Voters*, 838 F.3d at 8 (internal quotation marks, citation, and brackets

omitted). Plaintiffs explained in their opening memorandum that the suspension of the Electronic Reporting Rule impairs their ability to obtain and analyze workplace safety data, impeding their advocacy for better workplace safety measures. *See* Pls. Mem. 15–16. OSHA is in the midst of a rulemaking to rescind the requirement that establishments electronically submit their Form 300 and 301 data, and if this litigation proceeds in the ordinary course, it is likely that OSHA will rescind the reporting requirement during the pendency of the litigation. Once OSHA rescinds the requirement, the harm to plaintiffs will be irremediable because plaintiffs will forever lose access to the complete dataset. *See supra* pp. 3–4; *see also* 83 Fed. Reg. at 36507 (proposing amendment to 29 C.F.R. § 1904.41(a)(1) to eliminate the requirement that establishments submit Forms 300 and 301).

Second, in support of its assertion that "delayed access to information" is not an irreparable harm, OSHA cites several cases where plaintiffs sought to expedite processing of FOIA requests. Defs. Opp. 11–12. Those cases are inapposite, because this case is not brought under FOIA and does not seek processing of a FOIA request. Rather, because the agency is in the midst of rulemaking to rescind the requirement that establishments submit OSHA Forms 300 and 301, the alternative here is not *delayed* disclosure, but a permanent loss of access to a complete set of workplace safety data.

Third, any delay in resolving this case will diminish the quantity and quality of data OSHA is able to collect. As the head of OSHA during the rulemaking process has explained, "[t]he intent of the rule from the beginning was to provide these data as quickly as possible, since stale data would be of little value." Sherman Decl. Ex. A ¶ 23 (Decl. of David Michaels, *Public Citizen Foundation v. Dep't of Labor*, No. 18 Civ. 117 (EGS) (D.D.C. June 29, 2018), ECF No. 15). Indeed, prior to OSHA's about-face with respect to publicly posting the data, the agency

had anticipated publicly disclosing the OSHA Form 300 and 301 data "as it is collected" and "as quickly as possible" to avoid staleness. OMB Information Collection Request Documents, Supporting Statement A (July 26, 2016), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1218-002. OSHA concedes as much, arguing that the relief plaintiffs seek will be of limited utility because it is "unclear to what extent establishments would file the 2017 data if OSHA began collecting it on a future date" because the "regulatory filing date [of July 1, 2018] has passed and establishments are compiling 2018 data." Defs. Opp. 9. Thus, OSHA concludes that even if plaintiffs obtain preliminary relief, "[t]he quality of the data OSHA might collect … is far from clear." *Id.* 10. Because the data has value to plaintiffs now, but the value will diminish over time, plaintiffs will suffer irreparable harm absent a preliminary injunction.

V. The balance of equities strongly weighs in plaintiffs' favor, and the public interest favors an injunction.

OSHA "cannot suffer harm from an injunction that merely ends an unlawful practice," and "there is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 13. Thus, OSHA is left to claim that the motion should be denied because submission of Form 300 and 301 data will expose the data to possible Internet breaches or to the risk that federal courts will erroneously order the release of information subject to withholding under FOIA. *See* Defs. Opp. 16–17.

With respect to the former, the agency has submitted no evidence to support its speculation. In the Electronic Reporting Rule, OSHA concluded that it would be able to safeguard the information collected under the Rule. *See* 81 Fed. Reg. at 29662–63 ("OSHA disagrees with commenters who suggested the Agency will not be able to protect employee information."). OSHA and other federal agencies currently collect and safeguard similar data on

a regular basis. *See* 81 Fed. Reg. at 29656 (discussing collection of injury and illness data by OSHA, FRA, MSHA, and FAA).

With respect to the latter, as described above, and as OSHA concluded in the Electronic Reporting Rule, no records will be publicly disclosed that contravene FOIA's exemptions. *See supra* pp. 4–6; 81 Fed. Reg. at 29663 ("With respect to the posting … of information from the 300 Log and 301 Incident Report … such posting will not include personally-identifiable information. Again, the goal of the final rule is to disseminate injury and illness data, not to disseminate personal information about employers or employees."). If OSHA is correct that the information is exempt, it will not be released. And if OSHA is not correct, by definition the release will not constitute a clearly unwarranted or unwarranted invasion of personal privacy, as required to fall under FOIA Exemptions 6 and 7(C).

Finally, an "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest." *League of Women Voters*, 838 F.3d at 12. OSHA's blatant violations of the substantive and procedural requirements of the APA counsel strongly in favor of a preliminary injunction to require the agency to enforce the Electronic Reporting Rule. *See supra* pp. 7–12.

CONCLUSION

This Court should grant plaintiffs' motion for a preliminary injunction, enjoin OSHA to lift the suspension of the July 1, 2018, deadline, and order OSHA to require and accept the Form 300 and 301 submissions required by the Electronic Reporting Rule within 30 days.

Dated: September 21, 2018

Respectfully submitted,

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