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' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, plaintiffs hereby move the Court for an order enjoining defendants to lift the suspension of the rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29624 (May 12, 2016), and ordering defendants to require and accept the submissions required by the rule within 30 days. In support of this motion, plaintiffs submit the accompanying (1) memorandum in support, (2) declarations of Michael A. Carome, Robert Harrison, and Georges Benjamin, and (3) proposed order.

Pursuant to Local Civil Rule 7(m), I called defendants' counsel on September 6, 2018, to discuss this motion in a good-faith effort to determine whether there is any opposition to the relief sought and to attempt to narrow any areas of disagreement. I spoke with Damon William Taaffe, who stated that defendants will oppose this motion.

Dated: September 7, 2018

Respectfully submitted,

/s/ Sean M. Sherman
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This suit challenges the decision of the Occupational Safety and Health Administration, a component of the Department of Labor under the authority of Secretary of Labor Alexander Acosta (collectively, OSHA), to indefinitely suspend substantive provisions of a rule entitled "Improve Tracking of Workplace Injuries and Illnesses." *See* 81 Fed. Reg. 29624 (May 12, 2016) (the Electronic Reporting Rule). The Rule required certain covered establishments, by July 1, 2018, to submit electronically to OSHA data from three forms detailing their 2017 work-related injuries and illnesses: OSHA Forms 300, 301, and 300A. *See* 29 C.F.R. § 1904.41(c)(1). Despite the deadline in the Rule, OSHA announced on its website that it would not require, or even accept, the submission of OSHA Forms 300 and 301, because it intends to reconsider the Rule.

OSHA's partial suspension of the Rule without undertaking notice-and-comment procedures and without a reasoned explanation violates the procedural and substantive requirements of the Administrative Procedure Act (APA). Because plaintiffs are likely to succeed on the merits of their APA claims and plaintiffs will suffer irreparable harm without preliminary injunctive relief, and because the balance of the equities and public interest weigh strongly in plaintiffs' favor, this Court should grant plaintiffs' motion for a preliminary injunction, enjoin OSHA's unlawful suspension of the Rule, and order OSHA to require and accept submissions required by the Electronic Reporting Rule within 30 days.

BACKGROUND

I. OSHA's recordkeeping and reporting regulations

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 mandates that "[e]ach employer shall make, keep and preserve, and make available" records of workplace injuries and illnesses "as the Secretary [of the Department of Labor] … may prescribe by regulation as necessary or appropriate for the enforcement of [the Act] or for developing information regarding the causes and prevention of occupational accidents and illnesses." *Id.* § 657(c)(1); *see also id.* § 673(a), (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 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).

Accordingly, 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 29625 (citing 36 Fed. Reg. 12612 (July 2, 1971)). OSHA's current regulations mandate that employers with more than 10 employees in most industries keep at their establishments records of occupational injuries and illnesses. *See* 29 C.F.R. part 1904; 81 Fed. Reg. at 29624.

OSHA regulations provide that those establishments must record each recordable 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 a summary report derived from the information in the Log. The summary is submitted through the OSHA Form 300A, the "Annual Summary Form." *See* 29 C.F.R. § 1904.32(b); *see generally* OSHA, Injury & Illness

Recordkeeping Forms - 300, 300A, 301, https://www.osha.gov/recordkeeping/RKforms.html (providing links to the three forms and instructions for their use).

Before 2016, OSHA received injury and illness data on an *ad hoc* basis through onsite inspections. In addition, from 1996 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 certain high-hazard industries. 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 establishments to provide the agency with injury and illness data from the OSHA forms.

On May 12, 2016, OSHA issued the Electronic Reporting Rule, effective January 1, 2017, to require the electronic submission of workplace injury and illness records. *See* 81 Fed. Reg. at 29623, 29624. The Rule requires certain establishments to submit annually to OSHA the three forms they are required to maintain under part 1904 (Forms 300, 301, and 300A). *Id.* at 29668; *see* 29 C.F.R. § 1904.41. 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 29629. OSHA further noted that "the electronic submission of recordkeeping data will help OSHA encourage employers to prevent worker injuries and illnesses by greatly expanding OSHA's access to the establishment-specific information employers are already required to record under part 1904." *Id.* "This information will help OSHA use its enforcement and compliance assistance resources more effectively by enabling OSHA to identify the workplaces where workers are at greatest risk." *Id.* at 29629–30.

The Rule mandates phased-in submission deadlines for certain establishments with 250 or more employees and select establishments in high-risk industries with 20 or more employees (collectively, covered establishments) to electronically submit their injury and illness records to OSHA. *See* 29 C.F.R. § 1904.41(c). For 2016 injury and illness records, the Rule required covered establishments to submit electronically their 2016 summary Form 300As to OSHA by July 1, 2017. *See* 29 C.F.R. § 1904.41(c)(1) (2017). For 2017 injury and illness records, the Rule required covered establishments to submit electronically to OSHA information from OSHA forms 300, 301, and 300A by July 1, 2018. *See* 29 C.F.R. § 1904.41(c)(1) (2018). Beginning in 2019 and every year thereafter, the Rule requires covered establishments to submit the information on all three OSHA forms by March 2. *Id.* § 1904.41(c)(2). After considering alternative approaches, OSHA concluded that these phased-in deadlines would "provide sufficient time to ensure comprehensive outreach and compliance assistance in advance of implementation." 81 Fed. Reg. at 29640.

When issuing the Rule, OSHA stated in the preamble that "OSHA intends to post the establishment-specific injury and illness data it collects under this final rule on its public Web site at www.osha.gov." 81 Fed. Reg. at 29625. OSHA explained that it would make publicly available all of the fields collected in OSHA Forms 300 and 300A, as well as all fields on OSHA Form 301 that did not include personally identifying information. *Id.* at 29632.

On June 28, 2017, OSHA issued a notice of proposed rulemaking to delay the 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. 29261. OSHA noted that it intended to issue a separate proposal to reconsider, revise, or remove other provisions of the Electronic Reporting Rule, but that the

proposed rule addressed only the July 1, 2017, deadline for submission of Form 300A data. *See id.* at 29261–62. On November 24, 2017, the agency issued a final rule delaying the deadline for the submission of 2016 Form 300A data to December 15, 2017. *See* 82 Fed. Reg. 55761 (Nov. 24, 2017). The rule did not alter any other deadlines.

II. OSHA's indefinite suspension of the July 1, 2018, deadline for submitting OSHA Forms 300 and 301

In or around May 2018, OSHA announced the suspension of the July 1, 2018, deadline for the electronic submission of 2017 OSHA Forms 300 and 301. OSHA did not publish a notice of the suspension of the deadline in the Federal Register and did not solicit public comment on it. Instead, OSHA announced the suspension on its website:

> 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.** OSHA announced that it will issue a notice of proposed rulemaking (NPRM) to reconsider, revise, or remove provisions of the "Improve Tracking of Workplace Injuries and Illnesses" final rule, including the collection of the Forms 300/301 data. The Agency is currently drafting that NPRM and will seek comment on those provisions.

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") (last visited Aug. 27, 2018).

On July 25, 2018, plaintiffs filed this suit challenging OSHA's partial suspension of the Electronic Reporting Rule. The next day, OSHA issued a trade release announcing that it would issue a notice proposing to remove the requirements that covered establishments submit OSHA Form 300 and 301 data. *See* OSHA Trade Release, The Department of Labor Plans to Propose Rule to Better Protect Personally Identifiable Information (July 26, 2018), https://www.osha.gov/news/newsreleases/trade/07262018. OSHA claimed that it was proposing to remove the requirements in order to protect workers from having their personally identifiable

information disclosed under the Freedom of Information Act (FOIA). *See id.* On July 30, 2018, OSHA's notice of proposed rulemaking was published in the Federal Register. *See* Proposed Rule, *Tracking of Workplace Injuries and Illnesses*, 83 Fed. Reg. 36494 (July 30, 2018). In the proposed rule, OSHA reiterated that it intended to end collection of OSHA Forms 300 and 301, purportedly to eliminate the risks posed to worker privacy from the public disclosure of those records under FOIA. *See id.* at 36497. The public comment period on the proposal ends on September 28, 2018. *See id.* at 36494.

III. The harm to plaintiffs' programs from OSHA's partial suspension of the Electronic Reporting Rule

Plaintiffs are public health organizations that rely on the type of data required to be reported and made publicly available under the Rule and FOIA to effectively track, investigate, and work to prevent work-related injury and disease in the United States. *See* Carome Decl. ¶¶ 3–4; Harrison Decl. ¶ 5; Benjamin Decl. ¶ 3. Each of the plaintiffs submitted comments in support of the Rule. *See* Carome Decl. ¶ 5; Harrison Decl. ¶ 6; Benjamin Decl. ¶ 5. If the requirements for electronic submission and public disclosure of OSHA Form 300 and 301 data in the Rule remain suspended, plaintiffs and their members will lose access to an important source of timely injury and illness information, which will make it more difficult for each of them and their members to analyze the causes of workplace injuries and illnesses and work toward preventing them. *See* Carome Decl. ¶ 4; Harrison Decl. ¶ 7; Benjamin Decl. ¶ 4.

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. *See* Carome Decl. ¶¶ 1–3. 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. *See id.* HRG has

often used information reported to government agencies and made available to the public to analyze threats to human health. *See id*. For example, HRG has relied on publicly available OSHA data to issue reports on OSHA enforcement, to comment on workplace beryllium exposures, and to petition OSHA for a regulation on occupational heat stress. *See id*. ¶ 3. In addition, HRG has extensive experience utilizing publicly available data from other federal agencies, such as the Food and Drug Administration's pharmaceutical Adverse Event Reporting System and the Health Resources and Services Administration's National Practitioner Data Bank. *See id*.

American Public Health Association (APHA) champions the health of people and communities and strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public health policies grounded in research. *See* Benjamin Decl. ¶ 2. APHA has an Occupational Health and Safety Section that advocates for the health, safety and well-being of workers, families, communities, and the environment. *See id.* The Section's members represent a multitude of disciplines from medicine, nursing and industrial hygiene to epidemiology, environmental health, statistics, community organizing, teaching, history, law, and journalism. *See id.* APHA members often use information reported to government agencies and made available to the public to analyze threats to human health. For example, APHA members collaborate with community-based organizations that educate workers about on-the-job safety. *See id.* ¶ 3.

The Council of State and Territorial Epidemiologists (CSTE) is an organization of member states and territories representing public health epidemiologists. *See* Harrison Decl. ¶ 4. CSTE provides technical advice and assistance to partner organizations and to the federal Centers for Disease Control and Prevention (CDC). *See id.* CSTE members work closely with the CDC to track work-related injuries, relying on multiple sources of data, including reports by employers to

regulatory agencies. *See id.* CSTE and their members rely on the type of data required to be reported electronically and made publicly available under the Rule in order to effectively track, investigate and prevent work-related injury and disease in the United States. *See id.* ¶ 5. CSTE epidemiologists have relied on reports from employers to identify serious and immediate threats to workplace health, including sudden death from methylene chloride in paint strippers used by trades workers; the inhalation of solvent vapors during gauging of tanks by oil and gas workers; serious and disabling injuries from repetitive work in poultry and meatpacking plants; and back injuries in nurses due to patient lifting and transferring. *See id.* CSTE epidemiologists have used both state and national data to track the incidence of these work-related injuries and diseases, have performed public health investigations to understand the underlying risk factors that exist in the workplace, and have used this information to implement public health recommendations and inform regulatory action that has led to the prevention of these serious and disabling conditions. *See id.*

ARGUMENT

To obtain a preliminary injunction under Federal Rule of Civil Procedure 65(a), the moving party must "make a clear showing that four factors, taken together, warrant relief: (1) likely success on the merits, (2) likely irreparable harm in the absence of preliminary relief, (3) a balance of the equities in its favor, and (3) accord with the public interest." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotation marks and citations omitted). "Plaintiffs are not required to prevail on each of these factors. Rather, these factors must be viewed as a continuum, with more of one factor compensating for less of another." *N. Mariana I. v. United States*, 686 F. Supp. 2d 7, 13 (D.D.C. 2009) (citing *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009)). "An injunction may be justified where there is a particularly

strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.* (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (internal quotation marks omitted)); *see also Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011) ("Plaintiff's probability of success on the merits is the most critical of the criteria when considering a motion for preliminary injunction.").

I. Plaintiffs have a very strong likelihood of success on the merits.

A. Defendants failed to follow required notice-and-comment procedures when they partially suspended the Electronic Reporting Rule.

The APA generally requires agencies to give interested individuals notice and the opportunity to comment before promulgating rules, *see* 5 U.S.C. § 553, and empowers courts to hold unlawful and set aside agency actions taken "without observance of procedure required by law," *id.* § 706(2)(D). Here, there is no question that the Electronic Reporting Rule is a substantive rule that required notice-and-comment rulemaking. The Rule mandated that, by July 1, 2018, all covered establishments were required to submit electronically their 2017 OSHA Forms 300, 301, and 300A to OSHA. As required under the APA, OSHA used notice-and-comment rulemaking to promulgate the Rule.

Although "agencies have broad discretion to reconsider a regulation … [t]o do so … they must comply with the [APA], including its requirements for notice and comment." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (citing 5 U.S.C. § 553 and *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015)). Thus, once a rule is finalized, an agency "'may not alter such a rule without notice and comment.'" *Id.* (quoting *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)). And the agency lacks the inherent authority "not to enforce a lawfully issued final rule while it reconsiders it." *Id.* (punctuation omitted). Accordingly, "[s]uspension or delayed implementation of a final regulation

normally constitutes substantive rulemaking" that requires agency compliance with the APA's notice-and-comment procedures. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see Nat. Res. Def. Council (NRDC) v. Nat'l Highway Traffic Safety Admin. (NHTSA)*, 894 F.3d 95, 113 (2d Cir. 2018) (concluding that an agency's announcement of a suspension rule without having first undertaken notice and comment rulemaking violated the APA, noting that "[a] significant body of authority reinforces this proposition," and collecting cases); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1066 (N.D. Cal. 2018) ("EPA violated the [APA] by failing to provide notice and opportunity to comment before delaying the Pesticide Rule's effective date"); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 162–63 (D.D.C. 2017) (explaining that because the agency "did not delay the Rule's implementation through notice and comment," the delay "was lawful only if another source of authority empowered [the agency] to delay the Rule's implementation without notice or comment," and concluding that no such authority existed). "If the effective date were not 'part of an agency statement' such that material alterations in that date would be subject to the rulemaking provisions of the APA, it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *NRDC v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982).

The D.C. Circuit recently applied this well-established principle in *Clean Air Council*, which held unlawful a decision of the Environmental Protection Agency to suspend a rule's compliance deadlines. The court reasoned that such a suspension "is essentially an order delaying the rule's effective date," and "such orders are tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6. Similarly, in *Open Communities Alliance*, the district court entered a preliminary injunction against the Department of Housing and Urban Development's (HUD)

attempt to suspend implementation of a substantive rule for two years through the issuance of a memorandum. 286 F. Supp. 3d at 156–57. The court explained that, because HUD's suspension memorandum had not complied with the APA's procedures and was not based on any other source of lawful authority, plaintiffs had "established likely success on the merits of their notice and comment claim." *Id.* at 173.

The same reasoning applies here. OSHA's partial suspension of the July 1, 2018, deadline of the Electronic Reporting Rule amends or rescinds the Rule indefinitely. It eliminates the requirement that covered establishments submit their 2017 OSHA Form 300 and 301 data. Tellingly, when OSHA delayed the compliance deadline for submitting 2016 OSHA Form 300A data from July 1, 2017, to December 15, 2017, the agency did so through notice-and-comment procedures. *See supra* pp.4–5. In contrast here, OSHA substantively revised the Electronic Reporting Rule without undertaking notice-and-comment procedures—and in so doing, it failed to observe procedures required by law.

OSHA's notice proposing to eliminate the requirement that establishments submit Forms 300 and 301 in the future does not excuse the agency's unlawful suspension of the Electronic Reporting Rule's July 1, 2018, deadline without engaging in notice-and-comment rulemaking. "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 at 115; *see NRDC v. EPA*, 683 F.2d at 768 ("[T]he fact that EPA provided notice and comment procedures after the postponement does not cure the failure to provide them before the postponement."). As the D.C. Circuit explained in *Clean Air Council*, while agencies "obviously have broad discretion to reconsider a regulation at any time," to do so, they "must comply with the [APA], including its requirements for notice and

comment." 862 F.3d at 8. Because OSHA has not done so, its action should be set aside. *See* 5 U.S.C. § 706(2)(D).

B. Defendants' suspension of the Electronic Reporting Rule deadline was arbitrary and capricious.

In addition to failing to comply with notice-and-comment procedures, OSHA's indefinite suspension of the July 1, 2018 deadline is also arbitrary and capricious, in violation of the APA

A reviewing court should set aside agency action setting or revising the deadline for a regulatory requirement, like any substantive regulatory provision, if that action is "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 (1983) (internal quotation marks omitted). A reviewing court must set aside an agency action 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." *State Farm*, 463 U.S. at 43; *see Open Cmtys. All.*, 286 F. Supp. 3d at 174 (concluding that HUD's two-year suspension of rule was arbitrary and capricious based on *State Farm* factors). A court cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations omitted); *accord S. Co. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 416 F.3d 39, 47 (D.C. Cir. 2015).

As an initial matter, OSHA's decision was arbitrary and capricious based on what it did *not* consider. OSHA failed to acknowledge the benefits of the requirement that covered establishments submit their 2017 OSHA Forms 300 and 301—that is, the reasons why it thought the Rule appropriate in the first place—let alone explain why it now assigned those interests less weight. Put simply, OSHA "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43.

In addition, when an agency changes position, it must at the very least demonstrate "awareness that it is changing position." *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). 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; *see Air All. Houston v. Envtl. Prot. Agency*, No. 17-1155, 2018 WL 4000490, at *12 (D.C. Cir. Aug. 17, 2018) (rejecting agency change in position on effective and compliance dates as "inadequate under *Fox* and *State Farm*" because "nothing in the Delay Rule explains [the agency's] departure from its stated reasoning in setting the original effective date and compliance dates"); *California v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and 'address [the] prior factual findings' underpinning a prior regulatory regime.").

Here, however, in suspending the Rule's deadline, OSHA did not even acknowledge that it was changing its position. When it promulgated the Electronic Reporting Rule, OSHA considered comments about alternative compliance schedules and ultimately concluded that the

July 1, 2018, deadline was appropriate for submission of Forms 300 and 301. *See* 81 Fed. Reg. at 29633–29640. In suspending the compliance deadline, OSHA "failed to rationally explain its departure from its previous conclusions about appropriate compliance periods that it reached after specifically soliciting and considering comments on the subject." *Air All. Houston*, 2018 WL 4000490, at *13.

Moreover, OSHA's purported basis for suspending the July 1, 2018, deadline cannot sustain its action. OSHA stated that it was suspending the deadline and declining to accept submissions because it anticipated reconsidering the Electronic Reporting Rule's requirement that covered establishments electronically submit OSHA Form 300 and 301 data. As the D.C. Circuit recently held in *Air Alliance Houston*, 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 id.* at *12. There, the court of appeals rejected EPA's argument that delaying the effective date of the Chemical Disaster Rule was necessary to provide the agency additional time to consider revising the rule, holding that the agency had not explained "how the effectiveness of the rule would prevent EPA from undertaking notice and comment or other tasks for reconsideration, why a delay is necessary to EPA's process, or how the Chemical Disaster Rule becoming effective on schedule would otherwise impede its ability to reconsider that rule." *Id.* Similarly, OSHA has provided no connection between a possible revision of the Rule in the future and its suspension of the Rule in the present. OSHA does not explain, for example, why covered establishments' submission of 2017 Form 300 and 301 data in accordance with the Electronic Reporting Rule's July 1, 2018, deadline would have any effect on OSHA's ability to reconsider or revise the Rule. As in *Air Alliance Houston*, the agency's delay is arbitrary and capricious.

II. Plaintiffs will suffer irreparable harm without relief.

An organization has 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." *Open Cmtys. All.*, 286 F. Supp. 3d at 177 (quoting *League of Women Voters*, 838 F.3d at 8). Here, the Rule as finalized after notice-and-comment rulemaking would have provided plaintiffs access to workplace injury and illness data from the covered establishments, which they would have analyzed in the course of their work on workplace safety and used to advocate for workplace safety protections. *See* Carome Decl. ¶¶ 3–4; Harrison Decl. ¶¶ 5, 7; Benjamin Decl. ¶¶ 3–4. The partial suspension of the Electronic Reporting Rule impairs plaintiffs' ability to pursue their programs of obtaining and analyzing workplace safety data, in direct conflict with their missions to use that data to advocate for better workplace safety measures. *See id.* Because OSHA has proposed to rescind the requirement that establishments electronically submit their Form 300 and 301 data, *see* 83 Fed. Reg. at 36494, without prompt injunctive relief plaintiffs' loss of access to the data may be irremediable.

More specifically, HRG intended to use the work-related injury and illness data that, absent OSHA's unlawful suspension, would be publicly available, to conduct research on issues of workplace health and safety and advocate for stronger safety standards. *See* Carome Decl. ¶¶ 3–4. The partial suspension of the Electronic Reporting Rule substantially limits the type and amount of information that HRG will be able to use, making it more difficult for HRG to conduct research related to occupational health and advocate for improved safety standards. *See id*. ¶ 4.

Similarly, APHA's members intended to use the work-related injury and illness data submitted to OSHA under the Rule to conduct research on issues of workplace health and safety. *See* Benjamin Decl. ¶ 3. The data that OSHA will receive and make available to the public under

the Rule will assist APHA members in developing training and education programs. *See id.* APHA members will use the data to map the injury incidence experience of workplaces in the localities served by the organizations. *See id.* This information will enhance the safety training curriculum with community-specific and employer-specific data, and facilitate health promotion activities related to workplace safety. *See id.* The partial suspension of the Electronic Reporting Rule substantially limits the type and amount of information that APHA will be able to use to conduct research, making it more difficult for APHA's members to conduct research related to workplace health and safety. *See id.* ¶ 4.

CSTE and its members rely on the type of records that are required to be submitted under the Rule in order to track, investigate and prevent work-related injury and disease in the United States. Harrison Decl. ¶ 5. OSHA's partial suspension of the electronic submission and public disclosure requirements has caused CSTE members to lose access to an important source of timely, establishment-specific injury and illness information, impairing their ability to use the information to implement public health recommendations and inform regulatory action. *See id.* ¶ 7.

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

Finally, in considering whether to grant a preliminary injunction, the Court should "balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief." *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014) (citations omitted). Where an injunction "will not substantially injure other interested parties," the balance of equities tips in plaintiffs' favor. *League of Women Voters*, 838 F.3d at 12 (internal quotation marks and citation omitted). "The defendants, moreover, cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All.*, 286 F. Supp. 3d at 179 (internal quotation marks and citation omitted). Here, as described above,

plaintiffs are being harmed by the suspension of the Rule, which impairs their ability to conduct research and advocate for stronger workplace protections. *Supra* Part II. Moreover, because an injunction will end OSHA's unlawful suspension of the Electronic Reporting Rule, the equities favor plaintiffs.

Further, "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. Here, the strength of plaintiffs' case on the merits strongly weighs in favor of an injunction. And "there is generally no public interest in the perpetuation of unlawful agency action." *Id.* (citations omitted); *Open Cmtys. All.*, 286 F. Supp. 3d at 179. "To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws—such as the APA." *Id.* Indeed, "the public interest is best served by having federal agencies comply with the requirements of federal law." *Patriot, Inc. v. HUD*, 963 F. Supp. 1, 6 (D.D.C. 1997) (citation omitted); *see League of Women Voters*, 838 F.3d at 12. "[W]here the likelihood of success on the merits is so high and the public interest served by an injunction is so great, [plaintiff] ha[s] shown injury serious enough to warrant immediate injunctive relief." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 19 (D.D.C. 2009).

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 7, 2018

Respectfully submitted,

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