21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103, -4108, -4112, -4114, -4115, -4117, -4133, -4149, -4152, -4157
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

RESPONDENTS' MOTION TO DISMISS THE PETITIONS AS MOOT

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The federal government respectfully moves to dismiss the petitions challenging the Vaccination and Testing emergency temporary standard (Vaccination and Testing ETS) issued by the Occupational Safety and Health Administration (OSHA) to address the grave danger of COVID-19 in the workplace. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). On January 26, 2022, OSHA will withdraw the Vaccination and Testing ETS. *See* OSHA, *Interim final rule; withdrawal* (attached as Exhibit A, available at https://perma.cc/GU2T-K36Z). In light of that withdrawal, the petitions should be dismissed as moot.

1. Petitions for review of the Vaccination and Testing ETS were filed in every regional court of appeals, *see* 29 U.S.C. § 655(f), and were transferred to and consolidated in this Court, *see* 28 U.S.C. § 2112. Before that transfer and consolidation, a Fifth Circuit panel temporarily stayed enforcement of the Vaccination and Testing ETS pending judicial review. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021). After the Fifth Circuit case was transferred, this Court dissolved that stay. *See In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021); 28 U.S.C. § 2112(a)(4).

2. Several petitioners filed applications in the U.S. Supreme Court seeking to enjoin the government from enforcing the Vaccination and Testing ETS pending review. On January 13, 2022, the U.S. Supreme Court stayed the Vaccination and Testing ETS, finding that challengers were likely to prevail on their claims. *National Fed'n of Indep. Bus. v. Department of Labor*, 142 S. Ct. 661, 664-67 (2022). After evaluating

the Court's decision, OSHA decided to withdraw the Vaccination and Testing ETS as an enforceable emergency temporary standard.[1]

3. A case becomes moot "when it is impossible for a court to grant any effectual relief." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted). "If events occur during the case, including during the appeal, that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party,' the appeal must be dismissed as moot." *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 713 (6th Cir. 2011) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). Just such an event occurred here. Because OSHA's withdrawal of the Vaccination and Testing ETS will become effective when published in the Federal Register tomorrow, this case no longer presents a live case or controversy. The Vaccination and Testing ETS's requirements, which are currently stayed, will no longer be in effect, and petitioners will no longer be subject—or face any risk of being subject—to the challenged requirements from which they sought relief.[2]

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[1] That ETS also served as a "proposed rule" for a "proceeding" to promulgate an occupational safety or health standard. 29 U.S.C. § 655(c)(3). Although OSHA is withdrawing the binding rule, it has left the proposed rule in place as part of a separate, ongoing rulemaking process that imposes no obligations and is not subject to challenge. *See id.* § 655(b) (describing the process for promulgating a permanent standard); *see, e.g.*, *Action on Smoking & Health v. Department of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) (OSHA proposed rulemaking not a final agency action subject to review).

[2] *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong"); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 158-159 (1989) (per curiam) (forms using the term "classifiable" for purposes of an

Respectfully submitted,

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employee nondisclosure agreement that had been invalidated by a lower court and withdrawn by the agency during the case's pendency rendered the controversy moot "[a]s to current employees who have been notified that the term 'classifiable' no longer controls their disclosure of information"); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011) (holding that it is "impossible to grant any prospective relief" for alleged non-enforcement of an agency decision that was superseded, and dismissing as moot claims based on those allegations); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("In its Supplemental Complaint, the Fund claims only that the memo was issued in violation of NEPA. Because the memo has expired, this claim is moot."); *Everett v. United States*, 158 F.3d 1364, 1367 (D.C. Cir. 1998) ("The withdrawal of the Order mooted [appellant's] challenge thereto."); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 414 n.18 (5th Cir. 1999) ("Reconsideration of agency actions by the implementing agency can moot issues otherwise subject to judicial review because the reviewing court can no longer grant effective relief.").

CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 769 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
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