No. 21A____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021

EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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The petitioners below includes the applicant here: Betten Chevrolet, Inc. Other petitioners below include: AAI, Inc.; Aaron Abadi; Aaron Janz; AFT Pennsylvania; American Bankers Association; American Family Association, Inc.; American Federation of Labor-Congress of Industrial Organizations; American Road and Transportation Builders Association; American Trucking Associations, Inc.; Answers in Genesis, Inc.; Asbury Theological Seminary; Associated Builders and Con-tractors of Alabama, Inc.; Associated General Contractors of America, Inc.; Bentkey Services, LLC, d/b/a Daily Wire; Beta Engineering, LLC; Brad Miller; Brick Industry Association; BST Holdings, LLC; Burnett Specialists; Cam-bridge Christian School, Inc.; Choice Staffing, LLC; Christian Employers Alliance ; Christopher L. Jones; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho Senate; Corey Hager; Cox Operating, LLC; David John Loschen; Denver Newspaper Guild, Communications Workers of America, Local 37074, AFL-CIO; Dis-Tran Steel, LLC; Dis-Tran Packaged Substations, LLC; Doolittle Trailer Manufacturing, Inc.; Doyle Equipment Manufacturing Company; DTN Staffing, Inc.; Fabarc Steel Supply, Inc.; FMI – The Food Industry Association; Georgia Highway Contractors Association; Georgia Motor Trucking Association; Greg Abbott, Governor of Texas; Gulf Coast Restaurant Group, Inc.; Guy Chemical Company, LLC; Heritage Foundation; Home School Legal Defense Association, Inc.; HT Staffing, Ltd.; Independent Bankers Association; Independent Electrical Contractors – FWCC, Inc.; International Foodservice Distributors Association; International Warehouse and Logistics

Association; Jamie Fleck; Jasand Gamble; Job Creators Network; Julio Hernandez Ortiz; Kentucky Petroleum Marketers Association; Kentucky Trucking Association; King's Academy; Kip Stovall; Lawrence Transportation Company; Leadingedge Personnel Services, Ltd.; Louisiana Motor Transport Association; Massachusetts Building Trades Council; Media Guild of the West, the News Guild-Communications Workers of America, AFL-CIO, Local 39213; MFA, Inc.; MFA Enterprises, Inc.; MFA Oil Company; Michigan Association of Convenience Stores; Michigan Petroleum Association; Michigan Retailers Association; Michigan Trucking As-sociation; Miller Insulation Company, Inc.; Mississippi Trucking Association; Missouri Farm Bureau Services, Inc.; Missouri Fam Bureau Insurance Brokerage, Inc.; National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO; National Association of Convenience Stores; National Association of Home Builders; National Association of Wholesaler-Distributors; National Federation of Independent Business; Natural Products Association; National Propane Gas Association; National Retail Federation; North America's Building Trades Unions; Oberg Industries, LLC; Ohio Grocers Association; Ohio Trucking Association; Opti-mal Field Services, LLC; Pan-o-Gold Banking Company; Phillips Manufacturing & Tower Company; Plastic Corporation; Rabine Group of Companies; Republican National Committee; Riverview Manufacturing, Inc.; Robinson Paving Co.; RV Trosclair, LLC; Ryan Dailey; Sadie Haws; Samuel Albert Reyna; Scotch Plywood Company, Inc.; Scott Bedke, in his official capacity as Speaker of the Idaho House of Representatives; Service

Employees International Union Local 32BJ; Sheriff Sharma; Signatory Wall and Ceiling Contractors Alliance; Sioux Falls Catholic Schools, d/b/a Bishop O'Gorman Catholic Schools; Sixarp, LLC; Sixty-Sixth Idaho Legislature; Southern Baptist Theological Seminary; Staff Force, Inc.; Tankcraft Corporation; Tennessee Chamber of Commerce and Industry; Tennessee Grocers and Convenience Store Association; Tennessee Manufacturing Association; Tennessee Trucking Association; Terri Mitchell; Texas Trucking Association; Tony Pugh; Tore Says LLC; Trosclair Airline, LLC; Trosclair Almonaster, LLC; Trosclair and Sons, LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton, LLC; Trosclair Claiborne, LLC; Trosclair Donaldsonville, LLC; Trosclair Houma, LLC; Trosclair Judge Perez, LLC; Trosclair Lake Forest, LLC; Trosclair Morrison, LLC; Trosclair Paris, LLC; Trosclair Terry, LLC; Trosclair Williams, LLC; Union of American Physicians and Dentists; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; United Food and Commercial Workers International Union, AFL/CIO-CLC; Waterblastings, LLC; Wendi Johnston; Word of God Fellowship, Inc. d/b/a Daystar Television Network; and the States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.

The respondents, who were also the respondents below, are the Occupational Safety and Health Administration; the Department of Labor; Douglas L. Parker, in his official capacity as Assistant Secretary of Labor of Occupational Safety and Health; James Frederick, in his official capacity as Deputy Assistant Secretary of Labor of the Occupational Safety and Health Administration; Martin J. Walsh, in his official capacity as the Secretary of Labor; Joseph R. Biden, President of the United States; and the United States of America.

The following parties were proposed intervenors below: Chuck Winder, in his official capacity as President Pro Tempore of the Idaho State Senate; Scott Bedke, in his official capacity as Speaker of the House of Representatives of the State of Idaho; Jose A. Perez; and Nancy C. Perez.

TO THE HONORABLE BRETT KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT-

The Government envisions an America unrecognizable by the Framers of our Constitution in issuing the *COVID-19 Vaccination and Testing; Emergency Temporary Standard* ("**ETS**"), 86 Fed. Reg. 61402 (Nov. 5, 2021). It sees an America where a non-elected federal agency can use the commerce clause to usurp quintessential state police powers, like the authority to regulate health and safety, simply because the President disagrees with how the states are using that authority. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, courts have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). Otherwise, the nation must ask itself, "[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Sometimes "the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent" for the Government's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 505 (2010) (internal quotation marks omitted). According to the Government's logic, the Commerce Clause allows forced medical treatment in order to hold a job under the guise of activities that substantially affect interstate commerce. This type of general

regulation of public health is well beyond the scope of interstate commerce and is unsupported by historical precedent.

Because the petitioners will likely prevail on the merits, and because they have satisfied the remaining stay pending review factors, this Court should stay the ETS. See App. A-39–A-57 (Larsen, J., dissenting); App. B-6–B-32 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*)); App. B-33–B-42 (Bush, J., dissenting from the denial of initial hearing *en banc*). The Court should also enter an administrative stay immediately, allowing it time to review the filings in this emergency posture. Absent a stay, the ETS will take full effect on January 4, 2022. In addition, and in the alternative, the Court should treat this application as a petition for certiorari before judgment and grant immediate review of the ETS's legality.

OPINIONS BELOW

The Fifth Circuit stayed the ETS pending review. Its decision is published at *BST Holdings, LLC v. Occupational Safety & Health Admin.,* No. 21-60845, 2021 WL 5279381, 17 F.4th 604 (5th Cir. Nov. 12, 2021). The Sixth Circuit denied initial *en banc* hearing on December 15, 2021. Its order, and several opinions respecting the order, are not yet published in the Federal Reporter. *See* Appendix B. The Sixth Circuit dissolved the stay on December 17, 2021. Its opinion is not yet published. *See* Appendix A.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. §§1331 and 2101(f). It has authority to grant certiorari before judgment under 28 U.S.C. § 1254(1).

STATEMENT

On September 9, 2021, President Biden announced his intent to impose a nationwide vaccination mandate.[1] After previously refusing to mandate vaccinations, the Occupational Safety and Health Administration ("**OSHA**"), on November 5, 2021, issued the President's requested vaccination mandate in the form of an emergency temporary standard. 86 Fed. Reg. 61,402.

The ETS mandated that all employers with 100 or more employees "develop, implement, and enforce a mandatory COVID-19 vaccination policy" and required such employers to force workers who refuse to provide proof of vaccination to "undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination." 86 Fed. Reg. 61,402, 61,520.

Each employer must: "determine the vaccination status of each employee"; "require each vaccinated employee to provide acceptable proof of vaccination status"; "maintain a record of each employee's vaccination status"; and "preserve acceptable proof of vaccination." *Id.* at 61552. Employees who refuse to vaccinate must obtain an

[1] *E.g.*, Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates that Could Cover 100 Million Americans*, CNN (Sept. 9, 2021), *available at* https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html.

approved test once every seven days a test that employers may require employees to pay for. *Id.* at 61530, 61532. Employers must "keep" unvaccinated employees who do not produce test results "removed from the workplace." *Id.* at 61532. And employers must maintain a record of test results. *Id.* Unvaccinated employees must be required to wear masks at work, except in extraordinarily limited circumstances. *Id.* at 61553. The ETS gave employers until December 6 to comply with most of the standard's requirements. *Id.* at 61554. Employers have until January 4 to comply with weekly testing requirements for not-fully-vaccinated employees. *Id.*

In implementing the ETS, OSHA effectively deputized America's larger employers to become the nation's vaccine police, whether they want to or not. Any employer that refuses to comply could face monetary penalties that OSHA describes as "high enough to motivate the very large employers who are unlikely to be deterred by penalty assessments of tens of thousands of dollars[.]" *Id.* at 61, 444.

In the week following November 5, 2021, several petitioners filed Petitions for Review in various courts of appeals pursuant to 29 U.S.C. § 655(f). The Fifth Circuit, on November 6, 2021, stayed the ETS "pending adequate judicial review of the petitioners' underlying motions for a permanent injunction," and ordered that "OSHA take no steps to implement or enforce the [Standard] until further court order." *BST Holdings, LLC v. Occupational Safety & Health Admin.,* No.21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021) (per curiam). Less than a week later, the Fifth Circuit issued a written opinion, reaffirming the initial stay after "having conducted ... [an]

expedited review." *BST Holdings, LLC v. Occupational Safety & Health Admin.,* No. 21-60845, 2021 WL 5279381, at *9, 17 F.4th 604 (5th Cir. Nov. 12, 2021).

On November 16, pursuant to 28 U.S.C. § 2112 (a), the Judicial Panel on Multidistrict Litigation consolidated and transferred the pending petitions to the Sixth Circuit. On November 23, OSHA moved the Sixth Circuit to dissolve the stay. *See Respondents' Emergency Motion to Dissolve Stay,* No. 21-7000, Doc. 69 (6th Cir.). On December 17, 2021, after the Sixth Circuit denied petitions for an initial *en banc* hearing, *see* App. B, a divided Sixth Circuit panel granted OSHA's motion and dissolved the stay. App. A. Judge Larsen dissented. App.A-39–A-57 (Larsen, J., dissenting).

Petitioner, Betten Chevrolet, Inc. ("**Betten**") is a General Motors automobile dealership incorporated under the laws of Michigan with a principal place of business in Michigan. Betten started operations in 1961 and now employs over 100 employees, making it subject to the OSHA ETS. Betten will be adversely affected by the ETS because, *inter alia*, it faces a shortage of full-time employees, and many current and prospective employees do not want to be forced to receive the COVID-19 vaccine or be subject to and pay for weekly testing and forced to wear a mask.

Critically, there are at least twelve other competitors in the immediate vicinity of Betten's principal place of business that all employ fewer than 100 employees and, as such, are not subject to the ETS. Therefore, those dealerships will be able to hire the employees that leave Betten because they do not require their employees to be vaccinated or to pay for and be subjected to regular testing and wear masks. Even

though testing and masking is offered as an alternative to vaccination, the testing and masking requirement still creates an incentive for employees to leave Betten and move to a position that does not require the financial or intrusive burden of testing and masking.

Not only will Betten lose long-standing and highly trained employees, but Betten will be forced to use up existing staff resources, including potentially hiring new staff, to implement the administrative requirements pursuant to the OSHA ETS, which places a financial and administrative burden on Betten.

Additionally, Betten will likely bear the cost of worker's compensation premium increases for employee injuries caused by the COVID-19 vaccine mandated as a condition of employment. Thus, the ETS makes it more difficult to hire new employees and retain current employees in an already tight labor market.

REASONS TO GRANT THE APPLICATION

The OSHA ETS is an unconstitutional exercise of legislative power vested in Congress and should be set aside pursuant to the Administrative Procedures Act ("**APA**") and the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("**the OSH Act**"). The ETS unlawfully regulates public health under the guise of workplace safety by carving out a federal police power traditionally reserved to the States (*infra* § I(A)(1)). The use of the OSH Act, passed pursuant to the Commerce Clause power, is limited to activities that substantially affect interstate commerce

(*infra* § I(A)(1)). The regulation of public health, a quintessential state function, is well beyond the scope of interstate commerce.

The ETS's goal of protecting workplace safety is also undermined by, *inter alia*, the CDC Director's admission that COVID-19 vaccines do not prevent transmission of the virus (*infra* § I(D)(1)), the fact that the ETS fails to account for workers with natural immunity (*infra* § I(D)(3)), and the lack of legal resource for those who suffer adverse events (*infra* § I(D)(2)). As such, the ETS is the product of an unconstitutional exercise of legislative power by an executive agency, and the Court should stay enforcement of the ETS pending final judgment. In addition, the Court should grant certiorari before judgment and resolve this case on an expedited basis.

I. THE COURT SHOULD STAY THE VACCINE MANDATE'S ENFORCEMENT PENDING REVIEW

Courts consider the following four factors in determining whether a stay of an agency rule is warranted: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The first two factors "are the most critical." *Id.* at 434. Each factor favors a stay.

A. PETITIONER IS LIKELY TO PREVAIL ON THE MERITS

1. PUBLIC HEALTH AND SAFETY IS LEFT TO THE STATES AND OSHA'S ETS EXCEEDS CONGRESS' AUTHORITY

The ETS is a gross intrusion into the States' police powers and unconstitutionally extends the Commerce Clause beyond recognition. The Tenth Amendment states that any powers not delegated by the Constitution to the federal government are reserved to the States or the people. Historically the police powers, including the power to regulate public health, safety and welfare, are an archetypal part of those powers that the Framers reserved to the States. *See Velasquez-Rios v. Wilkinson,* 988 F.3d 1081, 1088 (9th Cir. 2021); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561 (1906). *See also Smith v. Turner*, 48 U.S. 283 (1849) (the States may pass quarantine and health laws in the exercise of police powers and that such laws are not regulations of commerce); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (the States' authority is distinctly recognized to enact quarantine and "health laws of every description.").

Congress passed the OSH Act pursuant to its Commerce Clause power. Therefore, the OSH Act is limited to activities that substantially affect interstate commerce.

Nevertheless, in a September 9, 2021, speech,[2] President Biden revealed the true intent of the ETS, stating: "I'm announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health." This type of general regulation of public health is well beyond the scope of interstate commerce. 29 U.S.C. §§ 651 *et seq.* On more than one occasion, the Supreme Court has reigned in similar attempts by the federal government to expand the Commerce Clause into a general police power, because that police power is reserved to the States. *See United States v. Lopez*, 514 U.S. 549, 567 (1995); *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 536 (2012) ("people, for reasons of their own, often fail to do things that would be good for them or good for society" but the Government may not use the Commerce Clause to compel citizens to buy vegetables).

The idea that the Government intended to use the ETS as a means to trample on the traditional police powers of the state is not merely theoretical. The ETS makes this goal explicit. In describing the events leading up to OSHA issuing the ETS, the agency specifically noted with alarm that, "an increasing number of states have promulgated Executive Orders or statutes that prohibit workplace vaccination policies that require vaccination or proof of vaccination status[.]" 86 Fed. Reg. 61,402-01, 61,432. It also noted that certain states have banned mask mandates in workplaces. *Id.* OSHA made clear that the ETS was intended to halt this trend of

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[2] *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28pm EDT), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

states enforcing their traditional police powers in the area of vaccinations as they see fit. *Id.* at 61,506 (stating that it was "OSHA's intent to preempt all inconsistent State and local requirements that relate to the issues addressed by this ETS"), 61,508 (describing how state restrictions on vaccine mandates "serve as a barrier to OSHA's implementation of this ETS" and are therefore preempted).

Not only is the ETS an unconstitutional power grab under the guise of workplace safety, but on November 9, 2021, the White House openly defied the Fifth Circuit's temporary injunction preventing implementation of the ETS. *See BST Holdings, L.L.C. v Occupational Safety and Health Admin.*, No. 21-60845, 2021 WL 5279381, at *9, 17 F.4th 604 (5th Cir. Nov. 12, 2021) ("*BST*") (reaffirming injunction). At a press gathering that day, Principal Deputy Press Secretary Karine Jean-Pierre explicitly stated they "continue to advocate" to "push businesses to move forward with their policies now."[3] Ms. Jean-Pierre made this statement even though the Fifth Circuit's order directed that the government "take no steps to implement or enforce the Mandate until further court order." *BST*, 2021 WL 5279381 at * 9.

2. THE ETS EXCEEDS THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

OSHA has never been permitted to issue an emergency temporary standard this broad, and it may not do so now. If no enumerated power authorizes Congress

[3] *Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo*, The White House Briefing Room (November 9, 2021, 1:15pm EDT), https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/09/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo/.

to pass a certain law, that law may not be enacted. *Sebelius*, 567 U.S. at 535. The ETS goes well beyond the Commerce Clause's interest in workplace safety, the sole domain that would be appropriate for an ETS, and instead tramples upon the police powers reserved to the States in an unlawful attempt to regulate public health. *BST*, 2021 WL 5279381 at *3 (stating that the Commerce Clause and nondelegation doctrine would not permit OSHA to take over the traditional public health role of the states).

OSHA's "authority to establish emergency standards pursuant to 29 U.S.C. § 655 (c) is an 'extraordinary power' that is to be 'delicately exercised' in only certain 'limited situations.'" *In re Intern. Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (quoting *Public Citizen Health Research Group v. Auchter,* 702 F.2d 1150, 1155 (D.C. Cir.1983)). With this in mind, emergency standards are viewed as "an 'unusual response' to 'exceptional circumstances.'" *Id.* (quoting *Auchter,* 702 F.2d at 1155). Reflecting this extraordinary nature, in total over the last fifty years, OSHA has issued just ten emergency temporary standards. *BST*, 2021 WL 5279381 at *1. Prior to the present pandemic, OSHA last invoked its emergency temporary standard authority to lower workers' exposure to asbestos in 1983, which the Fifth Circuit struck down because OSHA failed to demonstrate a grave risk over the six-month period necessary to promulgate regulations. *See Asbestos Info. Ass'n/North Am. v. OSHA*, 727 F.2d 415, 417 (5th Cir. 1984). In fact, employers have successfully challenged emergency standards on five occasions involving pesticides, carcinogens, diving operations, benzene and asbestos. *See Fla. Peach Growers Ass'n v. Dep't of*

Labor, 489 F.2d 120, 122 (5th Cir. 1974) (pesticides); *Dry Color Mfrs' Ass'n v. Dep't of Labor,* 486 F.2d 98 (3d Cir. 1973) (carcinogens); *Taylor Diving & Salvage Co. v. Dep't of Labor,* 599 F.2d 622 (5th Cir. 1979) (diving operations); *API v. OSHA,* 581 F.2d 493 (5th Cir. 1978) (benzene); *Asbestos Info.,* 727 F.2d 415 (asbestos).

The instant ETS is unique. No other OSHA permanent standard or emergency temporary standard has been promulgated with the claimed goal of protecting workers across all job types and industries from exposure to a virus they are equally exposed to outside the workplace. This fact warrants even further increased scrutiny from the Court when examining the constitutionality of the ETS.

3. OSHA FAILED TO SATISFY THE REQUIREMENTS FOR AN EMERGENCY TEMPORARY STANDARD

Given the extraordinary nature of an emergency temporary standard, Congress required OSHA to satisfy a very high bar before adopting such a standard. *BST*, 2021 WL 5279381 at *4 ("the precision of this standard makes it a difficult one to meet"). In fact, OSHA itself frequently denies requests for emergency temporary standards because of what it views as "'the extremely stringent judicial and statutory criteria for issuing' an emergency standard[.]" *Pub. Citizen Health Research Group v Chao*, 314 F.3d 143, 147 (3d Cir. 2002) (quoting a letter from OSHA explaining its reasons for refusing to issue an emergency standard); *see also In re AFLCIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (discussing OSHA's denial of a request for an emergency standard). Those stringent statutory criteria require that the emergency temporary standard must: "(1) address 'substances or agents determined to be toxic or physically harmful' – or 'new hazards'– in the workplace; (2)

show that workers are exposed to such 'substances,' 'agents,' or 'new hazards' in the workplace; (3) show that said exposure places workers in 'grave danger'; and (4) be 'necessary' to alleviate employees' exposure to gravely dangerous hazards in the workplace." *BST*, 2021 WL 5279381 at *4 (quoting 29 U.S.C. § 655(c)(1)); *In re AFLCIO*, 2020 WL 3125324, at *1 ("The agency is authorized to issue an ETS if it determines that 'employees are exposed to grave danger' from a new hazard in the workplace, and an ETS is 'necessary' to protect them from that danger.") Here, the instant ETS does not meet these requirements.

i. THE VIRUS IS NOT A TOXIC OR PHYSICALLY HARMFUL SUBSTANCE

To date, OSHA has successfully enforced just one standard relating to vaccination – its Bloodborne Pathogens standard, which was a broader set of regulations to create policies to protect certain employees who are specifically at risk of infection due to their work. *See* 29 C.F.R. § 1910.1030(c)(1)(ii). In contrast to the current ETS, the Bloodborne Pathogens standard applies to a narrow subset of healthcare workers, offers workers the right to refuse, and was issued only after notice and comment rulemaking. *See* 29 C.F.R. § 1910.1030(f)(2)(iv). However, even the Bloodborne Pathogens standard was found to be partially unlawful because it initially applied to sites not controlled by the employer or entity that was subject to the rule. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 830 (7th Cir. 1993).

Prior to the instant ETS, OSHA had never declared an airborne virus to be a "substance[] or agent[] determined to be toxic or physically harmful" or a "new hazard" within the meaning of 29 U.S.C. § 655 (c)(1). That is not surprising because nothing

in the language of that section indicates that a virus would fall within the section's ambit. The language of the statute suggests it applies to toxic or poisonous substances, but not to an airborne virus widely present throughout society at large, and not particular to any workplace. *BST*, 2021 WL 5279381 at *5. Nor can COVID-19 be considered a "new hazard[;]" it has been spreading widely throughout the world for nearly two years. *Id.* Instead, it seems more like OSHA is attempting to force and stretch the statutory definition to fit COVID-19, but the two do not truly match up. As it is not a "new hazard," there is no need for any emergency temporary standard.

ii. OSHA HAS FAILED TO SHOW EVIDENCE OF GRAVE DANGER

Next, OSHA must show that it is addressing a "grave danger." 29 U.S.C. § 655 (c)(1); *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., UAW v. Donovan,* 590 F. Supp. 747, 749-50 (D.D.C. 1984), adopted, 756 F.2d 162 (D.C. Cir. 1985). OSHA has not shown that COVID-19 is a grave danger that requires an emergency remedy now, or one that cannot wait for the normal notice and comment procedure. The grave danger requirement is a higher bar than the significant risk requirement applicable to promulgating a normal standard. *Donovan,* 590 F. Supp. at 755-56; *see also Indus. Union Dep't, AFL-CIO*, 448 U.S. 607, 640 n.45 (1980) (noting the distinction between the standard for risk findings in permanent standards and ETSs).

OSHA previously determined "in June 2020 that an emergency temporary standard … was 'not necessary' to 'protect working people from occupational exposure to infectious disease, including COVID-19.'" *BST*, 2021 WL 5279381 at *1 (quoting

In re AFLCIO, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)). Thereafter, in June 2021, OSHA revised its conclusion stating that COVID-19 only posed a grave danger to workplaces providing healthcare services. *See* 86 Fed. Reg. 32,376 (June 21, 2021). However, in November 2021 it reversed itself entirely, declaring that COVID-19 actually posed a grave danger to all unvaccinated workers in all indoor workplaces. 86 Fed. Reg. 61,402 (III)(A). The major difference between June and November 2021 is that during the intervening time the President directed OSHA to declare that a grave danger existed for all workplaces with 100 or more employees.

Furthermore, a "grave danger" only necessitates an emergency temporary standard if there is need for new regulations addressing that danger "to take immediate effect." 29 U.S.C. § 655 (c)(1). Here, the White House itself established that there is no need for immediate action. First, as noted, President Biden declared the need for these requirements on September 9, 2021, but then it took over two months for OSHA to release the ETS. Furthermore, the White House has delayed the requirement for federal contractors to be vaccinated until after the holidays (first pushing off the December 8th implementation deadline until January 4th[4] and then again delaying until January 18th).[5] Likewise, on November 30, 2021, OSHA

[4] Maddie Bender, *White House delays Covid-19 vaccine mandates for contractors,* STAT (Nov. 4, 2021), https://www.statnews.com/2021/11/04/white-house-delays-covid-19-vaccine-mandates-for-federal-employees-contractors/.

[5] *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors,* Safer Federal Workforce Task Force (Updated November 10, 2021), *available at* https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.

"extended the comment period for the" ETS "to Jan. 19, 2022."[6] Presumably, it took these actions to avoid backlash associated with terminating a large portion of the workforce prior to the gift-giving season. However, if the ETS can wait months to be implemented, then it is hard to see how it requires "immediate" action. Instead, if the rule can wait for months, this appears a more appropriate topic for the, at best, normal rulemaking, not an emergency standard.

iii. OSHA HAS FAILED TO SHOW NECESSITY

In addition to showing that it must immediately address a grave danger, in order to justify an emergency temporary standard OSHA must also show that the standard "is necessary to protect employees from such danger." 29 U.S.C. § 655 (c)(1). Here, OSHA has provided no evidence that vaccination and testing, as required by the ETS, is necessary to protect employees of **all** workplaces, regardless of industry, workplace settings and exposure to non-employees.

To the contrary, President Biden has stated that a combination of testing, masking, adequate ventilation, social distancing and vaccination is adequate for children to be safe from COVID-19 in schools.[7] Likewise, the ETS permits businesses that employ fewer than 100 employees to not require vaccines or even masking. Even

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[6] Press release, *US Department of Labor extends comment period for COVID-19 vaccination and testing emergency temporary standard*, OSHA (Nov. 30, 2021) *available at* https://www.osha.gov/news/newsreleases/national/11302021.

[7] *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28 pm EDT), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

though the Administration apparently believes that these measures could keep school children and workplaces with fewer employees safe, the ETS asserts these same measures are inadequate for workplace safety in larger companies in other industries nationwide. This is illogical at best, there is nothing about a company going from 99 employees to 100 employees that should change the necessity of vaccination, nor is there a substantive distinction between school children in a classroom and employees in a single room in other industries. The ETS, for example, is not limited to workplaces where individuals are tightly clustered; it treats a massive Amazon warehouse, where most employees are spread out over a huge area, the same as a meat packing plant where workers stand cheek to jowl. It simply applies to all companies over 100 employees, largely regardless of their configuration.

In addition, as discussed below, the science shows that vaccination does not prevent transmission of COVID-19. (*Infra* § I(D)(1).) If the whole goal of the ETS is to prevent the spread of the virus, but the vaccine does not prevent that spread, then how is vaccination a necessary measure for a vast swath of the American population.

This disjointed logic reveals the true intent to regulate the public health by unconstitutionally usurping state police powers.

4. THE ETS VIOLATES THE ADMINISTRATIVE PROCEDURES ACT

The Administrative Procedures Act ("APA") requires this Court to set aside the ETS on the grounds that it is arbitrary and capricious, an abuse of discretion, and contrary to constitutional power. 5 U.S.C. § 706. The ETS lacks narrow tailoring by failing to account for industry-specific norms, workplace and employee characteristics,

and exposure to non-employees. Further, as discussed below, OSHA failed to take into consideration that vaccinated individuals are still capable of contracting and spreading COVID-19. (*Infra* § I(D)(1)).

The OSH Act authorizes OSHA to protect employees from exposure *in the workplace*, however this ETS is an abuse of discretion because it is an attempt to protect employees from a virus that they are equally exposed to through participation in society. Moreover, the assumption that all businesses with 100 employees are engaging in interstate commerce lacks justification and is an unlawful extension of its enabling statute and the Commerce Clause. For these reasons, the APA requires this ETS be set aside.

B. BETTEN WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

If the stay is not extended, Betten will suffer irreparable harm. First, the injury of losing a substantial portion of Betten's workforce is quantifiable. *See Betten Chevrolet, Inc. v. Occupational Health and Safety Administration,* No. 21-4114, ECF No. 52 (Nov. 23, 2021) (Declaration of Bryan Betten). Second, the harm will be immediate because data from Bureau of Labor Statistics reflects 4.4 million workers quit their jobs in September 2021 and another 4.1 million quit in October 2021.[8]

[8] *Economic News Release, Quits levels and rates by industry and region, seasonally adjusted,* U.S. Bureau of Labor Statistics (December 8, 2021), *available at* https://www.bls.gov/news.release/jolts.t04.htm.

Additionally, several large employers have experienced consequences of employee walkouts, including Southwest Airlines,[9] General Electric,[10] and the Henry Ford Health System.[11] Newsweek reported that "working class Americans" are refusing the vaccine,[12] and reported that the American Trucking Associations could lose 37 percent of its workforce.[13] Working class Americans is precisely the demographic that Betten employs. The testing and masking option does not alleviate Betten's injury because employees are able to seek employment through one of twelve local competing automotive dealerships that are not governed by the ETS. A finding of irreparable harm is appropriate even when the value of the loss is especially difficult or speculative. This Court recently found a likelihood of irreparable harm when quantifying the "harm with any level of precision would be impossible." *RECO*

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[9] *Southwest Airlines won't fire unvaccinated employees: 'It makes no sense'*, Fox 7 Austin (October 23, 2021), *available at* https://www.fox7austin.com/news/southwest-airlines-wont-fire-unvaccinated-employees-it-makes-no-sense.

[10] Singleton, Mikhaela, *200+ GE employees, union members stage walk-out in Schenectady Friday protesting vaccine mandate*, WIVB, *available at* https://www.wivb.com/news/new-york/albany-capital-region/200-ge-employees-union-members-stage-walk-out-in-schenectady-friday-protesting-vaccine-mandate/.

[11] Wells, Kate, *400 workers out, 1,900 exempt after Henry Ford COVID vaccine mandate*, Michigan Radio (October 5, 2021), *available at* https://www.michiganradio.org/health/2021-10-05/400-workers-out-1-900-exempt-after-henry-ford-covid-vaccine-mandate.

[12] *Id.*

[13] Rouhandeh, Alex J., *Truck Drivers, Facing Shortages, Expect More to Quit Over Biden Vaccine Mandate,* Newsweek (November 4, 2021), *available at* https://www.newsweek.com/truck-drivers-facing-shortages-expect-more-quit-over-biden-vaccine-mandate-1646003.

Equip., Inc. v. Wilson, No. 20-4312, 2021 U.S. App. LEXIS 32413, at *13 (6th Cir. Oct. 28, 2021).

The harm to Betten of losing 20 to 30 percent of his workforce combined with the workforce shortage would be catastrophic to Betten's business, particularly during the holidays. December is a critical month for automotive dealers – Betten will need to clear out 2021 inventory to make room for model year changeovers and December is critical to transitioning the showrooms to highlight new models and meeting year-end sales goals. The harm to Betten of disrupting the status quo constitutes a sufficient showing of a likelihood of irreparable harm.

C. A STAY WILL NOT SUBSTANTIALLY HARM OSHA

Respondents will suffer no harm by an extension of the stay. OSHA will continue its mission unaffected and will remain in the same posture regarding COVID-19 safety. If OSHA had attempted to use notice and comment rulemaking to promulgate a standard in the first place, OSHA would have more time and resources available to focus on workplace safety instead of costly litigation.

D. A STAY IS IN THE PUBLIC INTEREST

1. COVID-19 VACCINES DO NOT PREVENT INFECTION OR TRANSMISSION

OSHA stated in the ETS that it was issuing the new standard "to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination." 86 Fed. Reg. 61,402 (Summary). However, the science has shown that the vaccines do not prevent individuals from contracting COVID-19. Even if every employee in a workplace was

vaccinated, the virus would still be able to infect employees and spread to others. This is because the COVID-19 vaccines do not prevent infection and transmission of the SARS-CoV-2 virus. They only reduce symptoms after infection.

The clinical trials for the COVID-19 vaccines were only designed to measure effectiveness against the symptoms of the infection – not against contracting the virus or transmitting the infection to others.[14] However, after millions of people were vaccinated, the CDC's Director, Dr. Walensky, acknowledged that the COVID-19 vaccines do not "prevent transmission."[15] This is why the CDC recommends that vaccinated individuals wear masks indoors.

The CDC's conclusion that the COVID-19 vaccine does not prevent transmission resulted from, among other things, a study it conducted after an outbreak in Barnstable County, Massachusetts. In that study, the CDC found that 74% of those infected in the outbreak were fully vaccinated for COVID-19, and that vaccinated individuals had on average more virus in their nose than the unvaccinated individuals that were infected.[16]

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[14] Sara E. Oliver, *et al.*, *The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine - United States, December 2020* MMWR Morb Mortal Wkly Rep (December 18, 2020) https://pubmed.ncbi.nlm.nih.gov/33332292/.

[15] The Situation Room, CNN (August 5, 2021) *available at* https://twitter.com/CNNSitRoom/status/1423422301882748929.

[16] Brown CM, *et al.*, *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts*, MMWR Morb Mortal Wkly Rep (August 6, 2021) https://pubmed.ncbi.nlm.nih.gov/34351882/.

Dr. Anthony Fauci has recognized this as failure of the vaccines as well: "Vaccination has also been unable to prevent 'breakthrough' infections, allowing subsequent transmission to other people even when the vaccine prevents severe and fatal disease."[17]

Similarly, COVID-19 vaccines could *not* fully block viral infection and replication in the nose of monkeys upon viral exposure,[18] which was confirmed by nasal, throat, and anal swabs.[19] This finding was again confirmed by an outbreak among 42 patients in a hospital setting where "39 were fully vaccinated," the "index case was a fully vaccinated," and "all transmission between patients and staff occurred between masked and vaccinated individuals, as experienced in an outbreak from Finland." The study concluded that this "outbreak exemplifies the high transmissibility of the SARS-CoV-2 Delta variant among twice vaccinated and masked individuals."[20]

Another study of infections across 36 counties in Wisconsin by the CDC and Wisconsin's Department of Health Services observed high viral load in 68% of the

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[17] Morens, D., Taubenberger, J., and Fauci, A, *Universal Coronavirus Vaccines – An Urgent Need*, The New England Journal of Medicine (December 15, 2021) https://www.nejm.org/doi/full/10.1056/NEJMp2118468.

[18] Kizzmekia S. Corbett, Ph.D, *et al.*, *Evaluation of the mRNA-1273 Vaccine against SARS-CoV-2 in Nonhuman Primates*, N Engl J Med (July 28, 2020) https://pubmed.ncbi.nlm.nih.gov/32722908/.

[19]Wei Deng, *et al.*, *Primary exposure to SARS-CoV-2 protects against reinfection in rhesus macaques*, Science (August 14, 2020) https://pubmed.ncbi.nlm.nih.gov/32616673/.

[20] Pnina Shitrit *et al.*, *Nosocomial outbreak caused by the SARS-CoV-2 Delta variant in a highly vaccinated population, Israel, July 2021*, Eurosuveillance (September 30, 2021) https://pubmed.ncbi.nlm.nih.gov/34596015/.

fully vaccinated individuals and in 63% of the unvaccinated individuals.[21] This reflects that the vaccinated individuals will shed virus and will do so at the same rate as the unvaccinated individuals. This finding was unsurprising as the CDC had long admitted the vaccine does not prevent transmission. But the standout observation was that among those who were asymptomatic (meaning no symptoms but yet infectious), 29% of the unvaccinated subjects had high viral load, while 82% of the fully vaccinated subjects had high viral load.

A paper published in September 2021 further confirms that vaccination does not lower the spread of COVID-19, as can be seen by its title: "Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States."[22] It found that:

> At the country-level, there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases in the last 7 days…. In fact, the trend line suggests a marginally positive association such that countries with higher percentage of population fully vaccinated have **higher COVID-19 cases** per 1 million people. Notably, Israel with over 60% of their population fully vaccinated had the highest COVID-19 cases per 1 million people in the last 7 days.[23] (emphasis added).

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[21] Riemersma, Kasen et al., *Shedding of Infectious SARS-CoV-2 Despite Vaccination,* MedRxiv (August 24, 2021), *available at* https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v4.full.pdf.

[22] S. V. Subramanian and Akhil Kumar, *Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States*, Eur J Epidemiol. (Sept.30, 2021) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/.

[23] *Id.*

The paper had a similar finding for U.S. counties, wherein higher vaccination did not equate to less cases.

These papers establish that OSHA's justification for the ETS, to prevent the spread of the virus, and thereby lessen the risk of employees contracting COVID-19, is not supported by the most recent science. Because the vaccines do not prevent infection and do not prevent transmission, vaccination for COVID-19 is a self-protecting measure, at best, and therefore, the ETS will never achieve its stated goals.

OSHA asserts several times that "unvaccinated workers are being hospitalized with COVID-19 every day and many are dying." OSHA fails to acknowledge let alone explain how the ETS will prevent this as vaccinated individuals are also being hospitalized with COVID-19 every day and many are dying.[24] The ETS will not prevent both groups from being hospitalized and dying. Since COVID-19 vaccines do not stop infection and transmission, there is no, "ensuring employees do not transmit a deadly virus to each other" as OSHA asserts.

2. VACCINE MANUFACTURERS ARE IMMUNE FROM LIABILITY

OSHA's dictate is authoritarian because it is mandating that millions of workers receive vaccines even though the companies that manufactured and sold the

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[24] Lapid, Nancy, *Breakthrough infections raise health, death risk; vaccine passports without testing allow cases to be missed*, Yahoo! News (November 19, 2021), *available at* https://news.yahoo.com/breakthrough-infections-raise-health-death-192154873.html; Syal, M.D., Akshay, *Hospitalizations rising among fully vaccinated in U.S., Fauci says,* ABC News (November 17, 2021), *available at* https://www.nbcnews.com/health/health-news/hospitalizations-rising-fully-vaccinated-us-fauci-says-rcna5907.

vaccines cannot be held liable for injuries. In March 2020, Health and Human Services ("HHS") Secretary Alex Azar invoked the Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6d ("PREP Act"), to grant pharmaceutical companies complete immunity from liability for injuries caused by their COVID-19 vaccine products. Vaccine manufacturers cannot be sued, vaccine administrators cannot be sued, the FDA cannot be sued, and employers cannot be sued for having mandated the vaccine as a condition of employment. 42 U.S.C. § 247d-6d. Thus, if an employee is injured by the vaccine, they have no recourse against any of these entities, but if the employee refuses the vaccine, he can be fired from his job.

Incredibly, the vaccine manufacturers also cannot even be sued for willful misconduct regarding their COVID-19 vaccines unless HHS and the Department of Justice agree to bring such a claim. 42 U.S.C. § 247d-6d(c)(5). However, HHS has been promoting this vaccine widely and the Biden Administration now seeks to mandate that vast swaths of the American population receive the vaccine. Hence, any admission by HHS that willful misconduct occurred would be an admission that HHS failed in its duties, thus creating a moral hazard whereby the only entities that can expose wrongdoing has an incentive to never do so.

It is unconscionable that while the federal government protects vaccine manufacturers from any financial liability for injuries, it seeks to eliminate the right of Americans to earn a living if they refuse to receive this liability-free product that at best only protects them. That should not be.

Compounding the foregoing, the FDA has refused to release the data underlying the licensure of the Pfizer vaccine, despite its repeated promise of "full transparency"[25] with regard to Covid-19 vaccines, including reaffirming "the FDA's commitment to transparency"[26] when licensing Pfizer's Covid-19 vaccine. As part of a recent case brought under the Freedom of Information Act, the FDA admitted "that there are more than 451,000 pages potentially responsive to Plaintiff's FOIA request" seeking the documents used to approve Pfizer's vaccine. *See Public Health and Medical Professionals For Transparency v. FDA*, Case No. 4:21-cv-01058-P (N.D. Tx.) Dkt. No. 20. However, the FDA has proposed to release just 500 pages per month. At that rate will fully release the data submitted to Pfizer to license its COVID-19 vaccine by the year 2096. Meaning the executive branch wants to mandate Pfizer's vaccine on Americans, give Pfizer complete immunity to liability for injuries caused to Americans by its vaccine, but prevent Americans and independent scientists from reviewing the data Pfizer submitted to the FDA during most of their lifetimes.

3. THE ETS FAILS TO ACCOUNT FOR WORKERS WITH NATURAL IMMUNITY

OSHA's ETS makes no mention of or allowances for those previously infected with COVID-19 ("**naturally immune individuals**"). 86 Fed. Reg. 61,402-01, 61,421. This is despite the fact that naturally immune individuals have superior protection

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25 https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-announces-advisory-committee-meeting-discuss-second-covid-19-vaccine.

26 https://www.fda.gov/news-events/press-announcements/fda-authorizes-booster-dose-pfizer-biontech-covid-19-vaccine-certain-populations.

from becoming infected with and transmitting SARS-CoV-2 when compared to individuals who were vaccinated for Covid-19. Due to this superior immunity in those who have already had and recovered from COVID, they should not be required to vaccinate or test pursuant to the ETS.

Every single peer reviewed study has found that naturally immune individuals have far greater than 99% protection from having COVID-19, and this immunity does not wane.[27] In contrast, the COVID-19 vaccine provides, at best, 95% protection and this immunity wanes rapidly.[28] And, while vaccinated individuals readily transmit the virus, that is not the case for naturally immune individuals.[29]

While the U.S. does not publish data on natural immunity, the U.K.'s official government COVID-19 data shows a **probable reinfection rate** of **0.025%** through August 19, 2021 during Delta.[30] In contrast, this same data shows, through

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[27] Horowitz, Daniel, *Horowitz: Israeli government data shows natural immunity from infection much stronger than vaccine-induce immunity / Opinion*, Blaze Media (July 14, 2021), *available at* https://www.theblaze.com/op-ed/horowitz-israeli-government-data-shows-natural-immunity-from-infection-much-stronger-than-vaccine-induced-immunity.

[28] Einav G. Levin, M.D., *et al.*, *Waning Immunity Humoral Response to BNT162b2 Covid-19 Vaccine over 6 months*, The New England Journal of Medicine (October 6, 2021) https://www.nejm.org/doi/full/10.1056/NEJMoa2114583.

[29] Letter from Centers for Disease Control and Prevention to Siri & Glimstad LLP (November 5, 2021) *available at* https://www.sirillp.com/wp-content/uploads/2021/11/21-02152-Final-Response-Letter-Brehm-1.pdf.

[30] *Weekly National Influenza and COVID-19 Surveillance Report,* Public Health England (August 19, 2021), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1012240/Weekly_Flu_and_COVID-19_report_w33.pdf at 17-18.

September 2, 2021, a **vaccine breakthrough rate** for Delta infections of **23%**.[31] This is in line with the director of the CDC, Dr. Walensky's, statement that, "A modest percentage of people who are fully vaccinated will still get Covid-19 if they are exposed to the virus that causes it."[32]

The following studies are consistent with the UK data and confirm that reinfections are exceedingly rare as well as confirm the durability of natural immunity:

1. Cleveland Clinic study of 52,238 health care workers over a five-month period found that none of the previously infected who remained *unvaccinated* contracted SARS-CoV-2 despite a high background rate of COVID-19 in the hospital.[33]

2. Ireland's Health Information & Quality Authority review of 11 cohort studies involving over 600,000 total recovered COVID-19 patients with followed up over 10 months found that that reinfection was "an uncommon event" and that there was "no study reporting an increase in the risk of reinfection over time."[34]

3. WHO and Weill Cornell Medicine-Qatar study analyzed the population-level risk of reinfection based on whole genome sequencing, tracking 43,044 individuals for up to 35 weeks, and found that just 0.02% experienced reinfection (an estimated risk of <1 reinfection (0.66) per

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[31] *Id.*at 21.

[32] *What to Know About Breakthrough Infections and the Delta Variant,* The New York Times, *available at* https://www.nytimes.com/article/covid-breakthrough-delta-variant.html.

[33] Nabin K. Shrestha, *et al.*, *Necessity of COVID-19 vaccination in previously infected individuals*, medRxiv (June 19, 2021) https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v3.

[34] Eamon Murchu, *et al.*, *Quantifying the risk of SARS-CoV-2 reinfection over time*, Reviews of Medical Virology (May 27, 2201) https://pubmed.ncbi.nlm.nih.gov/34043841/.

10,000 person-weeks) with no evidence of waning immunity during the over seven month follow-up period.[35]

On the other hand, the rate of breakthrough cases in vaccinated individuals is multiple times higher than the rate of reinfections. The following studies affirm that natural immunity provides greater protection:

1. Maccabi Healthcare and Tel Aviv University study of 42,000 previously infected and 62,000 fully vaccinated individuals found that the fully vaccinated individuals were 8 times more likely to be hospitalized, 13 times more likely to get infected, and 27 times more likely to have symptoms, concluding that "natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 [Pfizer] two-dose vaccine-induced immunity."[36]

2. Israeli Health Ministry review of 835,792 individuals found that the vaccinated had 6.72 times the rate of infection as compared to the previously infected.[37]

3. A nation-wide study of over 6 million individuals in Israel found that vaccine immunity had an efficacy of 92.8% for documented infection, 94.2% for hospitalization, and 94.4% for severe illness, but that naturally immune individuals had a higher rate of protection in all three of these categories.[38]

Moreover, while the risk of reinfection has not increased over time (see studies cited above), the risk of breakthrough infections is increasing over time. This is

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[35] Laith J. Abu-Raddad, *et al.*, *SARS-CoV-2 antibody-positivity protects against reinfection for at least seven months with 95% efficacy*, EClinical Medicine (April 28, 2021) https://pubmed.ncbi.nlm.nih.gov/33937733/.

[36] *Id.*

[37] Rosenberg, David, *Natural Infection vs Vaccination: Which Gives More Protection?* Israel National News, (July 13, 2021), *available at* https://www.israelnationalnews.com/News/News.aspx/309762.

[38] Yair Goldberg, et al., *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, medRxiv (April 24, 2021) https://www.medrxiv.org/content/10.1101/2021.04.20.21255670v1.

because the protection from natural immunity remains stable whereas vaccine immunity is rapidly waning.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT AND DECIDE THIS CASE ON AN EXPEDITED BASIS

In lieu of granting a stay, the Could should consider this application as a petition for a writ of certiorari before judgment and hear the case on the merits. *See Nken v. Mukasey,* 555 U.S. 1042 (2008). Under this Court's Rule 11, "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

COVID-19 vaccination generally, and mandates in particular, are some of the most hotly addressed issues in America today. Likewise, it is important for this Court to settle whether a federal agency can use the power granted to it by Congress under the Commerce Clause to institute such a sweeping usurpation of state's traditional police powers. Moreover, the ETS effects millions of workers, many of whom will be forced out of their current jobs. Thus, the public importance of the questions raised by this appeal is beyond dispute.

In light of the public importance of the issues involved, and the number of petitioner employers across the United States, the entire case, qualifies for certiorari review before judgment. *See Clinton v. City of N.Y.,* 524 U.S. 417, 455 (1998) (Scalia, A., dissenting). Further, without granting certiorari before judgment, "this Court would not be able to review" the "important dispute" regarding the ETS's legality

"until next Term at the earliest." Petition for Writ of Certiorari Before Judgment, *Dep't of Commerce v. New York*, No. 18-966 at 16, (U.S., Jan. 25, 2019).

III. THE COURT SHOULD ISSUE AN IMMEDIATE ADMINISTRATIVE STAY

Betten respectfully requests an immediate administrative stay to prevent OSHA from enforcing the ETS. A stay will ensure that the Court has adequate time to review filings in this case while simultaneously preventing irreversible harm that would otherwise occur during the interim. The Court should therefore enter an administrative stay to maintain the status quo while the Court determines whether to grant a stay pending review, a writ of certiorari before judgment, or both. Issuing an administrative stay is particularly appropriate here, given that a stay had already been in place for weeks before the panel abruptly lifted it. Requiring businesses to take steps to implement the Mandate now, while many employers are understaffed due to the holidays, and pending this Court's decision would have significant destabilizing effects across the economy.

IV. CONCLUSION

The Court should stay the ETS pending review, grant certiorari before judgment, or both.

Dated: December 20, 2021

Respectfully submitted,

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Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260, and 21A267

IN THE SUPREME COURT OF THE UNITED STATES

JOB CREATORS NETWORK, ET AL. (No. 21A243);
NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL. (No. 21A244);
PHILLIPS MANUFACTURING & TOWER CO., ET AL. (No. 21A245);
THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY, ET AL. (No. 21A246);
OHIO, ET AL. (No. 21A247);
BST HOLDINGS, LLC, ET AL. (No. 21A248);
THE HERITAGE FOUNDATION (No. 21A249);
WORD OF GOD FELLOWSHIP, INC., ET AL. (No. 21A250);
ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL. (No. 21A251);
SCOTT BEDKE, ET AL. (No. 21A252);
REPUBLICAN NATIONAL COMMITTEE (No. 21A258);
BETTEN CHEVROLET, INC. (No. 21A259);
BENTKEY SERVICES, LLC (No. 21A260); and
FABARC STEEL SUPPLY, INC., ET AL. (No. 21A267), APPLICANTS

v.

DEPARTMENT OF LABOR, OSHA, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATIONS FOR A STAY

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IN THE SUPREME COURT OF THE UNITED STATES

Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260, and 21A267

JOB CREATORS NETWORK, ET AL. (No. 21A243);
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v.

DEPARTMENT OF LABOR, OSHA, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATIONS FOR A STAY

The Solicitor General, on behalf of the Occupational Safety and Health Administration (OSHA) and the other federal respondents, respectfully files this response in opposition to the applications for a stay of agency action.

Congress charged OSHA with setting nationwide standards to protect the health and safety of American workers. Confronted with the deadliest pandemic in the Nation's history, which has infected more than 50 million and killed more than 800,000 people in the United States alone, OSHA found that workers are becoming

seriously ill and dying because they are exposed to the virus that causes COVID-19, SARS-CoV-2, on the job -- including in widespread and well-documented workplace clusters and outbreaks. OSHA further determined that effective disease-control measures that have already been implemented by many employers around the country to reduce occupational exposure to SARS-CoV-2 would largely prevent those serious illnesses and deaths, saving thousands of lives and preventing hundreds of thousands of hospitalizations in the next six months alone.

Based on those findings, OSHA issued an emergency temporary standard (ETS or Standard) to address the grave danger posed by the transmission of SARS-CoV-2 in the workplace. 86 Fed. Reg. 61,402 (Nov. 5, 2021). The Standard generally requires employers with 100 or more employees to implement a written policy that requires either (1) all employees to be vaccinated against COVID-19 or (2) employees who are not fully vaccinated to wear masks and supply proof of a negative COVID-19 test at least once every seven days when working with others in indoor settings, with appropriate exceptions (such as for employees entitled under federal law to religious accommodations) under both options. See id. at 61,551-61,553. Either option is permissible under the Standard; covered employers may choose which one to implement. Id. at 61,552. And employees who work exclusively at home, alone, or outdoors (with de minimis use of shared indoor spaces) are exempted from either

requirement. Id. at 61,551. OSHA estimates that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" over the course of "six months." Id. at 61,408.

Applicants and others collectively filed petitions for review of the Standard in every regional court of appeals, see 29 U.S.C. 655(f), which were transferred to and consolidated in the Sixth Circuit, see 28 U.S.C. 2112. Before that transfer and consolidation, a Fifth Circuit panel temporarily stayed enforcement of the Standard pending judicial review. After the Fifth Circuit case was transferred, the Sixth Circuit dissolved that stay. See 28 U.S.C. 2112(a)(4). Applicants now ask this Court to enjoin the government from enforcing the Standard pending review, "which demands a significantly higher justification than" a request to stay a lower-court ruling. Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). That request should be denied because applicants have not demonstrated a likelihood of success on the merits, much less an "indisputably clear" right to relief. Ibid. (citation omitted).

Applicants are unlikely to succeed on the merits of their statutory and constitutional challenges to the Standard -- which they repeatedly mischaracterize as a "vaccine mandate." The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 et seq., provides that OSHA "shall" issue an emergency temporary standard when the agency "determines" that an ETS is

"necessary" to protect employees from a "grave danger" resulting from, among other things, exposure to "physically harmful" "agents" or "new hazards." 29 U.S.C. 655(c)(1). OSHA properly determined that SARS-CoV-2 is both a physically harmful agent and a new hazard; that exposure to that potentially deadly virus in the workplace presents a grave danger to unvaccinated employees who are at greatest risk of contracting and spreading the virus at work and suffering serious health consequences as a result; and that the Standard is necessary to protect those employees from the danger of contracting COVID-19 at work. Applicants' contrary arguments rely on strained readings of the statutory text -- for example, that the serious risk of infection, hospitalization, and death faced by unvaccinated workers does not qualify as a "grave danger"; that the generally applicable Standard is not "necessary" because of the theoretical possibility that some subset of individuals or workplaces might be sufficiently safe from workplace SARS-CoV-2 transmission without the Standard; or that OSHA lacks any authority to issue occupational standards related to SARS-CoV-2 because risks from exposure also exist outside of the workplace.

Perhaps recognizing that the plain text of the OSH Act authorizes the Standard, applicants instead principally argue that the Standard raises a "major question" of economic and political significance, and therefore Congress should be forced to make a "clear statement" authorizing an ETS addressing widespread work-

place exposure to COVID-19 or incorporating vaccination as a method to reduce the risks of exposure. That argument provides no justification for departing from the ordinary meaning of the OSH Act's text. For one thing, Congress was clear in the OSH Act that it wished 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) (emphasis added). As this Court has explained, in charging OSHA with protecting the safety and health of workers in all businesses that affect interstate commerce, Congress already made the judgment that ensuring safe workplaces might require substantial regulations that apply nationwide and carry significant compliance costs. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 519-520 (1981); see 29 U.S.C. 651. No clearer statement is necessary.

Moreover, in the decisions applicants cite, this Court relied on the economic and political significance of agency action to help resolve statutory ambiguities in a way that would avoid conflicts with other statutory provisions. Here, in contrast, the OSH Act unambiguously grants OSHA the authority to promulgate emergency temporary standards without any exception for standards that might have large economic or political significance, and the issuance of the ETS does not conflict with any other statutory provision. Just the opposite: the OSH Act specifically contemplates that "immunization" may be "authorize[d] or require[d]"

under the provisions of the Act, in particular "where such is necessary for the protection of the health or safety of others." 29 U.S.C. 669(a)(5). Congress, moreover, has specifically directed OSHA to use its existing regulatory authorities "to carry out COVID-19 related worker protection activities" and has appropriated funds designated for OSHA to address workplace exposure to COVID-19. American Rescue Plan Act of 2021 (Rescue Plan), Pub. L. No. 117-2, Tit. II, Subtit. B, § 2101(b)(1), 135 Stat. 30.

Applicants are likewise unlikely to succeed on their constitutional challenges. This Court has consistently recognized Congress's authority under the Commerce Clause to regulate employers who have chosen to engage in interstate commerce. And by authorizing the issuance of an ETS only when OSHA finds one "necessary" to protect employees from a "grave danger" resulting from exposure to "physically harmful" "agents" or from "new hazards," 29 U.S.C. 655(c)(1), the Act provides more than sufficient guidance to avoid any nondelegation problem.

Finally, applicants cannot satisfy the other requirements of the extraordinary equitable relief they seek. They assert irreparable harms from compliance costs and potential worker shortages. But those assertions run counter to the detailed economic and empirical analysis that OSHA cited showing only modest costs and worker attrition and do not withstand scrutiny in light of the Standard's mask-and-test option. On the other side of the balance,

the governmental and public interests would be greatly harmed by a delay in the Standard's enforcement, which would cost many worker lives and result in thousands of worker hospitalizations -- all the more so as the pandemic's most recent surge drives case counts to new highs. See Centers for Disease Control and Prevention (CDC), COVID Data Tracker, go.usa.gov/xeFyx.

STATEMENT

1. The OSH Act seeks "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). The Act vests the Secretary of Labor, acting through OSHA, with "broad authority" to establish "standards" for health and safety in the workplace. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 611 (1980) (plurality opinion); see 29 U.S.C. 651(b)(3), 654(a)(2) and (b), and 655.

The OSH Act sets forth the criteria and procedural steps OSHA must follow to establish workplace health and safety standards. OSHA may establish, through notice-and-comment rulemaking, permanent standards that are "reasonably necessary or appropriate" to address a "significant risk" of harm in the workplace. Industrial Union, 448 U.S. at 642-643 (plurality opinion); see 29 U.S.C. 652(8), 655(b). In addition, whenever OSHA "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new

hazards," and (B) that a standard "is necessary to protect employees from such danger," Congress has directed that OSHA "shall" issue an "emergency temporary standard to take immediate effect." 29 U.S.C. 655(c)(1). Such a standard shall be issued "without regard to the requirements of" the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., and shall "serve as a proposed rule" for notice-and-comment rulemaking. 29 U.S.C. 655(c)(1) and (3). Such temporary standards are "effective until superseded" by a permanent standard, which OSHA "shall promulgate" within "six months." 29 U.S.C. 655(c)(2) and (3). The OSH Act provides for judicial review of permanent and temporary standards, and specifies that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. 655(f).

2. The novel virus that causes COVID-19, SARS-CoV-2, is "highly transmissible" and can cause severe illness and death. 86 Fed. Reg. at 61,409. COVID-19 has already killed more than 800,000 people in this country, see COVID Data Tracker, and has caused "serious, long-lasting, and potentially permanent health effects" for millions more, id. at 61,424. Significant exposure and transmission, including many "clusters" and "outbreaks," have occurred "in workplaces" nationwide. Id. at 61,411.

OSHA has continuously monitored the pandemic and previously hoped for "widespread voluntary compliance" with "safety guide-

lines" to protect against that workplace threat. 86 Fed. Reg. at 61,444. The agency determined, however, that in recent months "the risk posed by COVID-19 has changed meaningfully," id. at 61,408, and "nonregulatory" options have proven to be vastly "inadequate," id. at 61,430, 61,444. The agency further found that, as more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" among those workers. Id. at 61,409; see id. at 61,411-61,417. As a result, "[u]nvaccinated workers are being hospitalized with COVID-19 every day, and many are dying." Id. at 61,549.

3. On November 5, 2021, OSHA published an emergency temporary standard to address those "extraordinary and exigent circumstances." 86 Fed. Reg. at 61,434. The ETS requires employers with 100 or more employees to select one of two workplace precautions to mitigate the danger of COVID-19 transmission in places of employment. Employers may "implement a mandatory vaccination policy." Id. at 61,551. Or employers may offer employees the choice to have "regular COVID-19 testing" and "wear a face covering" rather than get vaccinated. Ibid. The Standard establishes staggered compliance deadlines, providing 60 days to implement the testing requirements and 30 days to implement all other requirements. Id. at 61,549. Employees who work exclusively at home, alone, or outdoors (with de minimis use of shared indoor spaces)

are exempted. Id. at 61,419-61,420, 61,515-61,516.

OSHA determined that unvaccinated employees face a "grave danger" from workplace exposure to SARS-CoV-2, which qualifies as "both a physically harmful agent and a new hazard." 86 Fed. Reg. at 61,408. OSHA described myriad studies showing workplace "clusters" and "outbreaks" of COVID-19 and other significant "evidence of workplace transmission" and "exposure." Id. at 61,411. As OSHA explained, "employees can be exposed to the virus in almost any work setting," ibid., because of the "common characteristics of many workplaces," such as "working indoors" and "working with others for extended periods of time," id. at 61,424. And OSHA found that unvaccinated workers specifically "face grave danger from exposure to SARS-CoV-2 in the workplace" because they "are much more likely to contract and transmit COVID-19 in the workplace than vaccinated workers" and "unvaccinated workers remain at much higher risk of severe health outcomes from COVID-19." Id. at 61,403.

OSHA also determined that the Standard was "necessary to protect unvaccinated workers from the risk of contracting COVID-19, including its more contagious variants," in the workplace. 86 Fed. Reg. at 61,429; id. at 61,429-61,447. OSHA described extensive evidence showing that vaccines dramatically reduce the risk of contracting and transmitting COVID-19, as well as the risk of developing serious disease. Id. at 61,417-61,419, 61,434, 61,520,

61,528-61,529. Because "it is the lack of vaccination that results in grave danger," OSHA determined that "vaccination will best allay the grave danger." Id. at 61,434. OSHA further explained that, because unvaccinated workers are far more likely to contract and transmit COVID-19 in the workplace, requiring employees who remain unvaccinated to mask and test will "largely prevent" infected employees "from spreading [COVID-19] to others" by limiting the spread of their "respiratory droplets" and identifying infected employees to be removed from the workplace. Id. at 61,438-61,439. OSHA discussed various alternatives and explained that existing OSHA standards, statutory requirements, and non-binding guidance are insufficient to combat the risk to unvaccinated employees. Id. at 61,440-61,445.

4. In the week following issuance of the Standard, a number of parties, including applicants here, filed petitions for review in every regional court of appeals. See 29 U.S.C. 655(f). Congress has directed that all such petitions be transferred and consolidated in a single court of appeals, to be chosen by lottery. See 28 U.S.C. 2112. Pursuant to that directive, the petitions were transferred to the Sixth Circuit.

Shortly before that transfer and consolidation, the Fifth Circuit entered a stay against enforcement of the Standard pending judicial review in the case before it. NFIB Appl. App. 161-182.[1]

[1] This response will henceforth use "App." to cite the

The Fifth Circuit concluded that OSHA lacked authority under the OSH Act to promulgate the Standard and expressed doubts about the constitutionality of the Standard and the Act. Ibid.

After the transfer, the government moved the Sixth Circuit to dissolve the Fifth Circuit's stay. See C.A. Doc. 69 (Nov. 23, 2021); 28 U.S.C. 2112(a)(4). Several of the petitioners, including many of the applicants here, also moved for initial hearing en banc of the petitions for review. The court of appeals denied initial hearing en banc by an 8-8 vote. App. 186. Judge Moore, joined by four other judges, concurred in the denial of initial hearing en banc. App. 187-188. Chief Judge Sutton, joined by seven other judges, dissented. App. 189-215. Judge Bush also dissented. App. 216-225.

4. The court of appeals granted the government's motion to dissolve the Fifth Circuit's stay. App. 227-283.

a. The court of appeals held that applicants are unlikely to succeed on the merits of their challenges to the ETS. App. 235-262. The court explained that SARS-CoV-2 is a physically harmful agent and poses a grave danger to workers in light of extensive empirical data showing high rates of workplace transmission and the substantial number of deaths and serious illnesses caused by COVID-19. App. 243-251. The court also concluded that

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appendix to the application in No. 21A244, filed by NFIB, et al.

OSHA has authority to address virus transmission in the workplace based on the statutory text and the agency's history of regulating other pathogens. App. 236-240. The court observed, for example, that after the agency issued a proposal to regulate bloodborne pathogens in the workplace, including by encouraging vaccination, Congress subsequently passed a statute directing OSHA to finalize the standard, and later passed another statute directing the agency to strengthen it. App. 238. And the court noted that Congress also recently appropriated funds to OSHA specifically "to carry out COVID-19 related worker protection activities." Ibid. (citation omitted).

The court of appeals further explained that OSHA properly found that the ETS was necessary to address the grave danger of COVID-19 workplace transmission. See App. 251-257. The court rejected applicants' reliance on the "major questions doctrine," App. 240, finding it inapplicable because the OSH Act's text "unambiguously grants OSHA authority for the ETS," App. 242, and because "OSHA's issuance of the ETS is not a transformative expansion of its regulatory power," App. 243.

The court of appeals also rejected applicants' constitutional challenges to the ETS and the Act. See App. 257-262. The court explained that "nearly a century of precedent" from this Court makes clear that "regulating employers is within Congress's reach under the Commerce Clause." App. 258; see App. 257-260. And the

court of appeals rejected applicants' nondelegation challenge, explaining that the statutory criteria in 29 U.S.C. 655(c)(1) to promulgate an ETS provide an "intelligible principle" for regulation that is more specific than other delegations this Court has upheld against nondelegation challenges. App. 260-262.

The court of appeals also found that applicants did not establish the other requirements to obtain preliminary equitable relief. App. 262-263. The court observed that applicants had asserted "entirely speculative" injuries, such as compliance-cost estimates that "ignore[d] the economic analysis OSHA conducted." App. 262. The court also observed that the other asserted harms -- such as that applicants "will need to fire employees * * * or face employees who quit over the [S]tandard" -- ignore "the accommodations, variances, or the option to mask-and-test that the ETS offers." App. 263. On the other side of the balance, the court explained that the costs to the governmental and public interest "are comparatively high" because "the ETS 'will save over 6,500 worker lives and prevent over 250,000 hospitalizations' in just six months." Ibid. (citation omitted).

b. Judge Gibbons concurred. App. 264. She wrote "to note the limited role of the judiciary in this dispute about pandemic policy," and explained that "[r]easonable minds may disagree on OSHA's approach to the pandemic, but [courts] do not substitute [their] judgment for that of OSHA, which has been tasked by Con-

gress with policymaking responsibilities." Ibid.

c. Judge Larsen dissented. App. 265-283. In her view, the Standard is not "necessary" on the theory that it is insufficiently "tailor[ed]" and thus not "'essential'" to addressing COVID-19 transmission in the workplace. App. 270-271 (citation omitted). Judge Larsen also stated that COVID-19 does not present a "grave danger" to every unvaccinated worker, in part because the risk varies by age. App. 275 (citation omitted). She also stated that because SARS-CoV-2 "is not * * * uniquely a workplace condition," it is beyond OSHA's authority to "regulate an employee's exposure to it." Ibid. And she thought the Standard was unauthorized under what she termed the major questions doctrine because "OSHA has never issued an emergency standard of this scope." App. 278. Finally, Judge Larsen believed that applicants had demonstrated irreparable harm because employees might "reluctantly submit to vaccination" to avoid the "hassles" of testing, and employers will incur "compliance costs and loss of employees." App. 281.[2]

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[2] After the Sixth Circuit dissolved the stay, OSHA announced that it is "exercising enforcement discretion with respect to the compliance dates of the ETS," such that it "will not issue citations for noncompliance with any requirements of the ETS before January 10," and "will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard." OSHA, COVID-19 Vaccination and Testing ETS, osha.gov/coronavirus/ets2. That announcement restored the full compliance periods provided in the original Standard, which had been cut short when the Fifth Circuit stayed all implementation of the Standard seven days after it had been issued -- a step that OSHA viewed as preventing it from providing com-

ARGUMENT

The applications should be denied. Applicants effectively seek an injunction against enforcement of the ETS pending review. To obtain such an injunction, applicants generally must show that their "claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). A similar standard applies to a request for a stay. See Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). But because a request for an injunction seeks judicial intervention withheld by the lower courts, it "'demands a significantly higher justification' than a request for a stay." Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). Such an injunction should be granted "sparingly and only in the most critical and exigent circumstances," Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted), such as when "the legal rights at issue are 'indisputably clear,'" ibid. (citation omitted); see Roman Catholic Diocese, 141 S. Ct. at 66 (granting injunction where "applicants ha[d] clearly established their entitlement to relief").[3]

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pliance assistance to employers.

[3] Although the applications are styled as requests for a stay, the relief they seek is more properly viewed as an injunction, as some applicants recognize (e.g., Phillips Appl. 12). The applications do not ask this Court to "temporarily suspend[]" an "order

Applicants have not satisfied the standard for a stay, much less the higher standard for an injunction pending review. The court of appeals correctly held that applicants' various challenges to the Standard are not likely to succeed on the merits because the Standard falls squarely within OSHA's statutory authority and because their various other arguments lack merit. The court was likewise correct to recognize that the balance of the equities and the public interest tip decisively in favor of allowing the ETS to remain in effect: the Nation is facing an unprecedented pandemic that is sickening and killing thousands of workers around the country, and any further delay in the implementation of the Standard will result in unnecessary illness, hospitalizations, and deaths because of workplace exposure to SARS-CoV-2.

I. APPLICANTS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS, MUCH LESS A CLEAR ENTITLEMENT TO RELIEF

A. OSHA Has Statutory Authority To Promulgate The ETS

Congress has directed that OSHA "shall" issue an "emergency temporary standard" if the agency "determines (A) that employees are exposed to grave danger from exposure to substances or agents

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or judgment" of the lower court, as a stay would do. Nken v. Holder, 556 U.S. 418, 428-429 (2009). Instead, they ask this Court to issue an order prohibiting the government from enforcing the ETS -- that is, to "'grant[] judicial intervention'" in order to "direct[] an actor's conduct." Id. at 429 (citation omitted). Such an order is in the nature of an injunction.

determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. 655(c)(1). The Standard falls squarely within that grant of authority.

SARS-CoV-2 is both a physically harmful agent and a new hazard; indeed, it has killed more than 800,000 individuals and made millions more seriously ill in the United States alone. The virus manifestly poses a grave danger to unvaccinated workers, who face significant risks from workplace exposure because they are substantially more likely to become infected with COVID-19 and to suffer severe health consequences as a result. OSHA found that many of the virus's victims have been infected through workplace clusters and outbreaks, which have arisen throughout the Nation and in virtually every type of work environment. Vaccination or masking and testing are commonplace, proven measures that would greatly reduce the risk of serious illness or death from those workplace exposures. And substantial evidence supports OSHA's determination that those standards are necessary now because other measures would not be sufficient to protect unvaccinated workers from that risk, particularly as new and even more transmissible variants increase the hazard of workplace exposure. Applicants' various contrary arguments largely reduce to attempts to rewrite Section 655(c)(1), either by adopting strained and unnatural readings of Congress's words or by imposing entirely extra-textual

limits.

1. SARS-CoV-2 is both a physically harmful agent and a new hazard

OSHA correctly "determine[d]" that SARS-CoV-2 is both a "physically harmful" "agent[]" and a "new hazard[]." 29 U.S.C. 655(c)(1). Applicants' contrary arguments disregard the statutory text and would upset the settled understanding that OSHA has authority to protect workers from infectious diseases. Those arguments would leave OSHA powerless to respond to the grave workplace dangers posed by existing viruses and other infectious diseases, as well as future pandemics.

a. SARS-CoV-2 readily fits the definition of an "agent," which is "a chemically, physically, or biologically active principle." Merriam-Webster's Collegiate Dictionary 24 (11th ed. 2003); see Webster's New Int'l Dictionary 48 (2d ed. 1958) (Webster's Second) ("an active principle"). Although some applicants suggest (e.g., BST Appl. 25) through a chain of definitions that a virus somehow does not qualify as an "agent," those arguments ignore that "virus" itself is defined as "the causative agent of an infectious disease." Merriam-Webster 1397 (emphasis added); see Webster's Second 2849 ("[t]he infective principle of a disease"). Moreover, longstanding OSHA regulations -- promulgated decades before this pandemic -- have understood viruses to be included within the statute's reach. See 29 C.F.R. 1910.1020(c)(13) (defining "[t]oxic substance or harmful physical

agent" to include a "biological agent (bacteria, virus, fungus, etc.)"); 29 C.F.R. 1910.1030 (bloodborne-pathogens rule issued pursuant to authority to regulate "toxic materials or harmful physical agents"); see also App. 236. Indeed, it would be startling if a statute adopted to ensure "safe and healthful working conditions" and to prevent "illnesses," 29 U.S.C. 651(a) and (b)(1), did not include authority to address infectious diseases in the workplace.

SARS-CoV-2 is also "physically harmful." As the court of appeals observed, "[t]he number of deaths in America [from COVID-19] has now topped 800,000," and even "[a]part from death, COVID-19 can lead to 'serious illness, including long-lasting effects on health,' (now named 'long COVID')." App. 248 (quoting 86 Fed. Reg. at 61,410). Nobody has seriously contended otherwise. E.g., Ohio Appl. 12 (explaining that the "States do not and have not disputed" that SARS-CoV-2 is a "physically harmful" "agent" under the ordinary meaning of those words).

Instead, applicants mistakenly rely on the word "toxic" in 29 U.S.C. 655(c)(1) to artificially narrow the scope of "physically harmful" from what its ordinary meaning otherwise would require. Echoing the Fifth Circuit (App. 169-170), applicants suggest that an airborne virus like SARS-CoV-2 is not "physically harmful" on the theory that "toxic" "connot[es] toxicity and poisonousness," Phillips Appl. 21 (citation omitted), and so "physically harmful"

likewise must describe only things that are "toxic or poisonous," Betten Chevrolet Appl. 25. But applicants' attempt to impose such a limit overlooks the plain statutory text, which is phrased in the disjunctive: an OSHA ETS may address exposure to "agents determined to be toxic or physically harmful." 29 U.S.C. 655(c)(1) (emphasis added). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Applicants' interpretation thus would improperly "ignore the disjunctive 'or' and rob the [phrase 'physically harmful'] of its independent and ordinary significance." Id. at 338-339.

Applicants' reliance on the associated-words canon is misplaced. Cf. Phillips Appl. 21 (invoking the "principle of noscitur a sociis -- a word is known by the company it keeps") (citation omitted); App. 169 (same). That canon applies "[w]hen several nouns or verbs or adjectives or adverbs -- any words -- are associated in a context suggesting that the words have something in common." A. Scalia & B.A. Garner, Reading Law 195 (2012) (emphasis added). But the statute here contains only two disjunctive terms -- "toxic" or "physically harmful" -- and using the former to artificially narrow the scope of the latter would be to blue-pencil "physically harmful" out of the statute. See Graham County Soil and Water Conservation Dist. v. United States, 559 U.S. 280, 288-289 (2010) (declining to apply the noscitur a sociis canon to

a "list of three items," which was "too short to be particularly illuminating").

b. Independently, SARS-CoV-2 constitutes a "new hazard[]." 29 U.S.C. 655(c)(1). A "hazard" is a "source of danger," Merriam-Webster 572; see Webster's Second 1147 ("source of risk"), and SARS-CoV-2 plainly qualifies under any understanding of that phrase. Some applicants suggest that SARS-CoV-2 is not a "hazard," notwithstanding the ordinary meaning of that term, based on the same flawed reliance on "toxic" described above. E.g., BST Appl. 25-26. If anything, using "toxic" to artificially limit the scope of "hazard" is even less justifiable, given both the disjunctive "or" as well as the placement and repetition of "from" in the statutory text: OSHA must determine that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. 655(c)(1) (emphases added). Congress thus contemplated the issuance of an ETS when "employees are exposed to grave danger * * * from new hazards," without any requirement of "exposure to * * * agents determined to be toxic." Ibid.

The virus also is "new," given that it was unknown in the United States until very recently. See 86 Fed. Reg. at 61,408. Other applicants suggest that the virus is not "new" because the global pandemic began in 2020. E.g., Betten Chevrolet Appl. 25 ("[COVID-19] has been spreading widely throughout the world for

nearly two years."); cf. App. 170 ("COVID-19 is a recognized hazard.") (citation omitted). But as OSHA explained, the hazard posed by SARS-CoV-2 and COVID-19 is "new" in two senses directly relevant here. First, OSHA observed that "there were no documented cases of SARS-CoV-2 infections in the United States until January 2020," which makes it newer than any hazard OSHA had ever addressed in a pre-COVID-19 ETS. 86 Fed. Reg. at 61,408. Second, OSHA explained that since June 2021, "the risk posed by COVID-19 has changed meaningfully," given the emergence of the Delta variant "and its increased transmissibility," along with the possibility of further "[v]iral mutations." Id. at 61,408-61,409; see id. at 61,409-61,412, 61,431. Both of those determinations amply support OSHA's conclusion that SARS-CoV-2 presents a "new hazard." Applicants' unduly restrictive view of "new" either would make regulation of emerging but recognized hazards impossible or would create incentives for the agency to rush to regulation lest a hazard become too well-recognized.

2. Exposure to SARS-CoV-2 in the workplace poses a "grave danger"

a. Substantial evidence supports OSHA's determination that exposure to the highly contagious and virulent SARS-CoV-2 presents a "grave danger." As the court of appeals observed, a "grave danger" exists "if workers face 'the danger of incurable, permanent, or fatal consequences, as opposed to easily curable and fleeting effects on their health.'" App. 246 (citation and el-

lipsis omitted). Applicants generally agree. E.g., Ohio Appl. 14 ("very serious; dangerous to life") (citation omitted).

SARS-CoV-2 readily satisfies that definition. OSHA observed that COVID-19 had at the time the ETS was promulgated killed more than 725,000 people in the United States alone, and that COVID-19 can "involve respiratory failure, blood clots, long-term cardiovascular and neurological effects, and organ damage." 86 Fed. Reg. at 61,408; see id. at 61,410 (explaining that "the disease's most common complications" include "pneumonia, respiratory failure, acute respiratory distress syndrome (ARDS), acute kidney injury, sepsis, myocardial injury, arrhythmias, and blood clots"). Those findings make clear that COVID-19 can carry very serious consequences, including the risk of death. The State applicants recycle (Ohio Appl. 14) the misplaced reliance on "toxic" and the associated-words canon to argue that "grave danger" does not carry its ordinary meaning, but for the same reasons given above, that argument cannot be squared with the statutory text.

The State applicants also suggest that COVID-19 does not present a "grave danger" because individuals who contract COVID-19 supposedly face only "a small risk of serious illness" or death. Ohio Appl. 15. The friends and families of the more than 800,000 people in the United States who have died, and the millions more who have been seriously ill -- many of them because of workplace clusters -- might well have a different perspective on the risk.

Moreover, the statute requires a grave danger, not a certainty of harm. As OSHA observed, "working age Americans (18-64 years old) now have a 1 in 14 chance of hospitalization when infected with COVID-19" and "a 1 in 202 chance of dying when they contract the disease." 86 Fed. Reg. at 61,410. OSHA, the expert agency charged with protecting worker health, has properly understood the Act to address risks of that magnitude and immediacy. Cf. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 655 (1980) (plurality opinion) (stating that a "one in a thousand" chance of fatality poses a "significant risk" for purposes of a permanent OSHA standard). And if there were any doubt, OSHA is entitled under the Act "to use conservative assumptions," "risking error on the side of overprotection rather than underprotection." Id. at 656.

b. Abandoning reliance on the ordinary meaning of the statute's text, applicants assert that the danger from COVID-19 must not truly be "grave" because OSHA's actions are supposedly inconsistent with such a determination. Applicants cite as examples OSHA's choice to cover only employers with 100 or more employees, e.g., Ohio Appl. 17, and its having issued an ETS in June 2021 that addressed only healthcare workplaces, not all employers, e.g., BST Appl. 22. Applicants' reliance on those actions is misplaced.[4]

[4] Applicants also fault OSHA for allegedly having "spent

As to the 100-employee threshold, OSHA explained that it was "proceeding in a stepwise fashion" by applying the Standard to "companies that OSHA is confident will have sufficient administrative systems in place to comply quickly," 86 Fed. Reg. at 61,403, while it continued to compile "additional information to determine whether to adjust the scope of the ETS to address smaller employers," id. at 61,403. Far from suggesting doubt about OSHA's finding of a grave danger, that stepwise approach demonstrates OSHA's urgency to address that danger in a feasible manner as soon as it could. Cf. Williams-Yulee v. Florida Bar, 575 U.S. 433, 449 (2015) (explaining that the government "need not address all aspects of a problem in one fell swoop").

As OSHA explained, limited data about smaller employers prevented the agency from quickly satisfying its obligation (cf. 29 U.S.C. 655(b)(5)) to find that the Standard is feasible for those employers. See 86 Fed. Reg. at 61,403, 61,511-61,513 (analyzing the issue). But OSHA explained that "[t]he employees of larger firms should not have to wait for the protections of this standard while OSHA takes the additional time necessary to assess the fea-

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nearly two months" drafting the Standard. E.g., BST Appl. 22 (citation omitted). But applicants provide no basis to conclude that OSHA unduly delayed issuing the Standard -- including the 153-page preamble containing extensive evidence and analysis supporting the agency's determination that COVID-19 presents a grave danger -- much less that any such delay would have been the product of OSHA's disbelief that COVID-19 presents a grave danger.

sibility of the standard for smaller employers." Id. at 61,511; see also id. at 61,512 (citing evidence that "larger employers are more likely to have many employees gathered in the same location" and have "larger" and "longer" outbreaks). Therefore, while simultaneously seeking comment and undertaking further study on smaller employers, OSHA "act[ed] to protect workers now in adopting a standard that will reach two-thirds of all private-sector workers in the nation." Id. at 61,403.

OSHA's decision not to extend the Standard to smaller employers at this time in light of the agency's feasibility analysis does not undermine its considered judgment and supporting analysis concerning the grave danger to employees and the need for the Standard. Indeed, laws frequently include exemptions for small employers, and such provisions do not call into question the important interests being served with respect to larger employers. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., for example, which prohibits certain forms of discrimination in the workplace, originally exempted employers with fewer than 25 employees, see Arbaugh v. Y & H Corp., 546 U.S. 500, 505 n.2 (2006), and currently does not apply to the vast number of employers with fewer than 15 employees, see 42 U.S.C. 2000e(b). But that exemption for small employers does not call into question the extraordinary importance of prohibiting discrimination in the

workplace.[5]

That OSHA issued an ETS addressing only healthcare workplaces in June 2021, see 86 Fed. Reg. 32,376 (June 21, 2021), likewise does not call into doubt the grave danger posed by COVID-19 in all places of employment.[6] As noted, an agency "need not address all aspects of a problem in one fell swoop." Williams-Yulee, 575 U.S. at 449. Dangers can evolve, as can the need for a standard to address them, and OSHA can obtain "new information" or respond to "new awareness." Asbestos Info. Ass'n v. OSHA, 727 F.2d 415, 423 (5th Cir. 1984). That is what happened here, as OSHA explained at length. Earlier in the pandemic, "scientific information about the disease" and "ways to mitigate it were undeveloped." 86 Fed. Reg. at 61,429. OSHA crafted workplace guidance but initially declined to issue an emergency standard "based on the conditions and information available to the agency at that time," including

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[5] Similar examples include the Family and Medical Leave Act of 1993, 29 U.S.C. 2611(4)(A)(i) (employers with 50 or more employees); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, and now governing employers with 20 or more employees); and the Americans With Disabilities Act of 1990, 42 U.S.C. 12111(5)(A) (employers with 15 or more employees).

[6] On December 27, 2021, OSHA announced "that it is withdrawing the non-recordkeeping portions of the healthcare ETS" because it had not promulgated a permanent standard within the six-month period contemplated by 29 U.S.C. 655(c). See OSHA, COVID-19 Healthcare ETS, osha.gov/coronavirus/ets. OSHA explained that it "intends to continue to work expeditiously to issue a final standard" specific to healthcare settings. Ibid.

that "vaccines were not yet available" and that it was unclear if "nonregulatory" options would suffice. Id. at 61,430. And when it issued the Healthcare ETS in June 2021, OSHA observed that "the impact of [COVID-19] has been borne disproportionately by the healthcare and healthcare support workers tasked with caring for those infected by this disease." 86 Fed. Reg. at 32,377. Addressing non-healthcare workplaces was somewhat less urgent because "[i]n June 2021, when the Healthcare ETS was published, COVID-19 transmission rates in the United States were at a low point." 86 Fed. Reg. at 61,431.

That situation changed rapidly in the following months, including because of the Delta variant. 86 Fed. Reg. at 61,431. As more employees returned to workplaces, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." Id. at 61,409-61,412, 61,431. Meanwhile, voluntary safety measures had proved ineffective, including because of "rising 'COVID fatigue.'" Id. at 61,444. By November, "workers [we]re being hospitalized with COVID-19 every day, and many [we]re dying." Id. at 61,549.

At the same time, vaccines are now widely available, 86 Fed. Reg. at 61,450; large-scale studies have further confirmed the "power of vaccines to safely protect individuals," including from the Delta variant, id. at 61,431; the FDA granted approval (rather

than the earlier Emergency Use Authorization) to one vaccine in August 2021, ibid.; and OSHA determined that "the increasing rate of production" of COVID-19 tests will ensure sufficient supply before the "testing compliance date," id. at 61,452. OSHA adequately explained that those material changes in conditions justified issuance of the ETS now to address the grave danger to unvaccinated employees of exposure to SARS-CoV-2 in the workplace.

3. The Standard is "necessary" to protect employees

Substantial evidence supports OSHA's determination that the ETS "is necessary to protect employees from [the] danger" of COVID-19. 29 U.S.C. 655(c)(1).

a. Relying on extensive scientific and empirical studies, OSHA determined that workplaces are prime grounds for COVID-19 transmission. OSHA explained that transmission can occur "when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes)." 86 Fed. Reg. at 61,409. As the court of appeals observed (App. 247), "American workplaces often require employees to work in close proximity -- whether in office cubicles or shoulder-to-shoulder in a meatpacking plant." And as OSHA further explained, "[e]ven in the cases where workers can do most of their work from, for example, a private office within a workplace, they share common areas like hallways, restrooms, lunch rooms and meeting rooms." 86 Fed. Reg. at 61,411. Unsurprisingly, OSHA documented "clusters, out-

breaks, and other occurrences of workplace COVID-19 cases that government agencies, researchers, and journalists have described." Ibid.; see id. at 61,412-61,415 (citing and describing extensive empirical studies by state agencies and researchers).[7] Indeed, one state health department concluded that "[m]ore than three quarters of outbreaks" in that State as of August 2021 "were associated with workplaces." Id. at 61,413. Because "[t]he science of transmission does not vary by industry or by type of workplace," moreover, OSHA determined that transmission would "occur in diverse workplaces all across the country." Id. at 61,411. Substantial evidence thus supports OSHA's conclusion that "most employees who work in the presence of other people (e.g., co-workers, customers, visitors) need to be protected" by an ETS from the grave danger of COVID-19 spread. Id. at 61,412.

The Standard protects against that grave danger. It requires covered employers to adopt a written COVID-19 policy that generally requires employees who work indoors with others either to be vaccinated or to be "regularly tested for COVID-19 and wear a face covering." 86 Fed. Reg. at 61,436.

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[7] Applicants' challenges to the conclusions of those studies, e.g., RNC Appl. 25-28, do not undermine the agency's reliance on them. "It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983); see FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021).

As to the vaccination option, OSHA determined that vaccination is "the most effective and efficient workplace control available." 86 Fed. Reg. at 61,429. Citing extensive evidence, OSHA explained that, for two primary reasons, "vaccination is the single most effective method for protecting workers from the most serious consequences of a COVID-19 infection: Hospitalization and death." Id. at 61,434; see id. at 61,509. First, vaccines reduce the likelihood of employees' becoming infected with the virus and spreading it to other workers. See id. at 61,403, 61,418-61,419, 61,435, 61,438, 61,528-61,529. Second, studies have confirmed the "power of vaccines to safely protect individuals from infection" and "serious disease," including from the Delta variant, even in the case of breakthrough infections. Id. at 61,431; see id. at 61,417-61,418. Substantial evidence thus supports OSHA's conclusion that vaccination "reduce[s] the presence and severity of COVID-19 cases in the workplace" by significantly reducing the risk that workers will become infected, infect other workers, or suffer severe health consequences in the event of an infection. Id. at 61,520.

As to masking and testing, OSHA relied on several scientific studies in determining that regular testing of unvaccinated workers "is essential because SARS-CoV-2 infection is often attributable to asymptomatic or pre-symptomatic transmission." 86 Fed. Reg. at 61,438. OSHA acknowledged, however, that testing alone

"will not prevent an unvaccinated worker from exposing others at the workplace if the worker becomes infected and reports to the workplace in between their weekly tests." Id. at 61,438-61,439. OSHA thus properly determined that additionally requiring unvaccinated employees to "wear face coverings in most situations when they are working near others" is necessary to address the grave danger, because it can reduce "exposure to the respiratory droplets of co-workers and others," and "significantly reduce the wearer's ability to spread the virus." Id. at 61,439.[8]

Contrary to applicants' repeated assertions (e.g., Ohio Appl. 1-37; Phillips Appl. 1-40), the Standard is not a "vaccine mandate." OSHA instead exercised its discretion to allow employers to choose whether to require employees to be vaccinated or to require unvaccinated employees to mask and test, because employers are best positioned to determine which approach will "secure employee cooperation and protection." Id. at 61,436. OSHA thus crafted a regulatory approach that protects workers while leaving

[8] OSHA's conclusion that masking and testing of unvaccinated employees is essential to reducing the danger of COVID-19 transmission in workplaces is backed not just by the scientific studies the agency cited, but by common sense and the widespread practice of businesses, governmental bodies, and other organizations across the country. E.g., Scott S. Harris, Clerk of the Court, Dec. 10, 2021 Announcement (explaining that arguing counsel must "take a PCR COVID test on the morning before argument" and generally "wear masks that cover the nose and mouth at all times within the Court building, * * * except when presenting argument").

leeway for employers to determine the most appropriate option for their respective workplaces. And employers also may seek variances if they can demonstrate that the "conditions, practices, means, methods, operations, or processes" used to prevent the spread of COVID-19 in their particular workplaces will provide "places of employment" that "are as safe and healthful" as would exist if the employers complied with the ETS. 29 U.S.C. 655(b)(6), (d).

Substantial evidence supports OSHA's conclusion that these risk-mitigation methods, taken together, are necessary to "reduce the overall prevalence" of SARS-CoV-2 "at workplaces" and to protect workers exposed to the virus at work from the most serious health consequences of a COVID-19 infection. 86 Fed. Reg. at 61,435. The same is true of OSHA's conclusion that other regulatory tools would not "provide for the types of workplace controls that are necessary to combat the grave danger addressed by" the Standard. Id. at 61,441. Indeed, OSHA estimates that the Standard will save thousands of workers' lives and prevent hundreds of thousands of hospitalizations over the course of just six months. Id. at 61,408.

b. Applicants further contend (e.g., Ohio Appl. 21; BST Appl. 23-24) that the Standard is not "necessary" to address the grave danger of COVID-19 infection on the theory that it is insufficiently tailored to variations among individual employees or employers. That contention is incorrect.

As a threshold matter, OSHA tailored the ETS by addressing the particular class of workers most at risk from exposure to COVID-19 -- namely, unvaccinated employees, whom OSHA found face a substantially higher risk of contracting and spreading COVID-19 at work and suffering severe health consequences as a result. Moreover, the Standard does not apply to employees who work exclusively at home, alone, or outdoors (with de minimis use of shared indoor spaces). E.g., 86 Fed. Reg. at 61,419-61,420, 61,515-61,516. Such employees, OSHA explained, "face a much lower risk of exposure to SARS-CoV-2 at work" or "through a work activity." Id. at 61,419. OSHA thus took account of the most important individualized considerations -- vaccination status and indoor proximity to other employees -- and exempted employees who face less risk of COVID-19 exposure in the workplace based on those considerations. See id. at 61,411-61,412.

At the same time, OSHA observed that public-health experts have opined that "fifteen minutes" of exposure is more than sufficient for transmission. 86 Fed. Reg. at 61,409 (citing CDC guidance on "close contacts"). And OSHA incorporated by reference (id. at 61,410 & n.7) its earlier discussion of a study showing that "[i]nfections have been observed with as little as five minutes of exposure in an enclosed room," 86 Fed. Reg. at 32,393. As OSHA explained, "the characteristics of the various affected workplaces -- such as indoor work settings; contacts with co-

workers, clients, or members of the public; and sharing space with others for prolonged periods of time -- indicate that exposures to SARS-CoV-2 are occurring in a wide variety of work settings across all industries." 86 Fed. Reg. at 61,412. And "the severity of COVID-19 does not depend on where an employee is infected; an employee exposed to SARS-CoV-2 might die whether exposed while working at a meat packing facility, a retail establishment, or an office." Ibid. OSHA thus reasonably determined that unvaccinated employees who do not work at home, alone, or outdoors face a grave danger of workplace transmission regardless of the particulars of the workplace.

Applicants cite no statutory text or other authority for the proposition that OSHA standards must operate on a more granular employer-by-employer or employee-by-employee basis. The Act directs OSHA to issue an ETS if OSHA "determines" that "employees are exposed to grave danger" and the standard "is necessary to protect employees from such danger." 29 U.S.C. 655(c)(1). The Act does not require OSHA to determine that each and every employee is exposed to grave danger or is exposed to the same degree or severity of harm. Nor does it require OSHA to determine that the Standard is finely calibrated to impose the minimum requirements necessary to protect each and every employee from such danger -- especially given that employees of different susceptibilities are inevitably intermingled. No rule could operate that way. Work-

places can have people of varied ages and other risk factors that are correlated with severe COVID-19 cases. Moreover, the general range of consequences of contracting COVID-19 could be experienced by any employee in the workplace, even if the risk of particular consequences may vary. That feature of the common threat justifies an approach that encompasses all unvaccinated employees who work indoors with others.

Similarly, workplaces can have a nearly infinite number of layouts, ventilation systems, traffic patterns, and typical employee habits. OSHA would be paralyzed if it were "required to proceed workplace by workplace," American Dental Ass'n v. Martin, 984 F.2d 823, 827 (7th Cir.), cert. denied, 510 U.S. 859 (1993), with definitive proof that COVID-19 is present in "every workplace" and "every industry" to the same degree. App. 170. Such a requirement -- which finds no basis in the statutory text -- would be particularly anomalous in the context of an emergency temporary standard, the whole point of which is to allow the agency to act swiftly. See 29 U.S.C. 655(c); cf. 29 U.S.C. 655(d) (authorizing employer-specific variances based on the particular conditions of particular workplaces).

Applicants' arguments to the contrary are unavailing. For example, some applicants suggest that the Standard is unnecessary with respect to employees who were previously infected with COVID-19 on the theory that they are "naturally immune." E.g., Phillips

Appl. 33-34. But OSHA described studies showing that "[a] considerable number of individuals who were previously infected with SARS-CoV-2 do not appear to have acquired effective immunity to the virus." 86 Fed. Reg. at 61,421; see id. at 61,421-61,424. OSHA acknowledged "some evidence that infection-acquired immunity has the potential to provide a significant level of protection" (though less protection than for those who are vaccinated), id. at 61,422, but explained that "it is difficult to tell, on an individual level, which individuals" have attained that level of protection, id. at 61,421; see id. at 61,423 (existing "tools cannot determine what degree of protection [that] particular individual has"). OSHA further explained that those studies suffered from "selection bias" by generally ignoring "people who had mild COVID-19 infections," which are known to confer far less immunity. Id. at 61,422. And the studies had no "established thresholds to determine full protection from reinfection or even a standardized methodology to determine infection severity or immune response." Id. at 61,422. OSHA was entitled to "exercise its judgment" as to which set of competing studies to credit, State Farm, 463 U.S. at 52, including by "risking error on the side of overprotection rather than underprotection," Industrial Union Dep't, 448 U.S. at 656 (plurality opinion).

Applicants also incorrectly suggest (e.g., BST Appl. 23) that the Standard is not necessary for younger employees, who face a

lower risk of serious illness or death as compared to older employees. But OSHA analyzed danger to employees of all ages. See, e.g., 86 Fed. Reg. at 61,410, 61,424. OSHA cited evidence that unvaccinated adults under 50 face a much higher risk of death or hospitalization than vaccinated adults of the same age, particularly in light of the Delta variant. See, id. at 61,418 ("For unvaccinated 18 to 49 year olds, the risk of hospitalization was 15.2 times greater, and the risk of death was 17.2 times greater, than the risks for vaccinated people in the same age range."). And OSHA incorporated by reference (id. at 61,410 & n.9) its earlier discussion of the hospitalization rate in "people between the ages of 18 and 49," 86 Fed. Reg. at 32,384, and the incidence of COVID-19's causing strokes, "even in young people," id. at 32,385. Employees of all ages also have various comorbidities and other risk factors for severe COVID-19 infections. See, e.g., 86 Fed. Reg. at 61,410.

Applicants cherry-pick CDC data to emphasize that the death rate from COVID-19 for unvaccinated people between 18 and 29 years old is "roughly equivalent" to the death rate for vaccinated people between 50 and 64. E.g., Ohio Appl. 16 (citing App. 275 (Larsen, J., dissenting), in turn citing CDC data). But the same data establish that (1) the death rate for unvaccinated people in the next age bracket (30 to 49 years old) is six times that of vaccinated people between 50 and 64; and (2) the death rate of un-

vaccinated 18-to-29-year-olds is seventeen times that of vaccinated 18-to-29-year-olds. CDC, COVID Data Tracker, go.usa.gov/xt3kf (for the week ending Oct. 30, 2021, death rate per 100,000 by age group was 0.17 for unvaccinated 18-29, 1.20 for unvaccinated 30-49, 0.01 for vaccinated 18-29, and 0.20 for vaccinated 50-64). CDC data also establish that the COVID-19-associated hospitalization rate for younger unvaccinated people is seven times that of older vaccinated people. See CDC, COVID Data Tracker, go.usa.gov/xt3km (for the week ending Nov. 27, 2021, hospitalization rate per 100,000 by age group was 23.4 for unvaccinated 18-49, and only 3.5 for vaccinated 50-64). Applicants provide no basis for the Court to second-guess OSHA's judgment that the Standard is necessary to protect against a grave danger to younger unvaccinated employees.

Moreover, even if, holding all other risk factors constant, a "'28-year-old'" may be "less vulnerable" to severe illness than a "'62-year-old,'" Bentkey Appl. 11 (citation omitted), that overlooks how the Standard operates. OSHA adopted the Standard in significant part to prevent employees from transmitting the virus to other employees -- a risk presented by younger and older transmitters alike. See, e.g., 86 Fed. Reg. at 61,403, 61,418-61,419, 61,435, 61,438; see also, e.g., id. at 61,418 (discussing transmission studies, including one of populations with mean ages of 31 and 44, and another of two populations with median ages of 38); id. at 61,412-61,414 (discussing outbreaks in schools, colleges,

restaurants, nightclubs, fitness centers, and other settings with younger and mixed-age populations). Because "unvaccinated workers are much more likely to contract and transmit COVID-19 in the workplace than vaccinated workers" -- no matter their age -- OSHA reasonably included younger unvaccinated workers as covered employees. Id. at 61,403.

Applicants suggest that some industries and workplaces face lower risks, and the Standard thus should not apply to them. E.g., Ohio Appl. 21. But as OSHA explained, other than employees who work at home, alone, or outdoors, "employees can be exposed to the virus in almost any work setting." 86 Fed. Reg. at 61,411. OSHA analyzed peer-reviewed studies and data collected by health departments and found that "exposures to SARS-CoV-2 happen regularly in a wide variety of different types of workplaces." Id. at 61,411. Those "studies and reports" documented COVID-19 outbreaks in "service industries (e.g., restaurants, grocery and other retail stores, fitness centers, hospitality, casinos, salons), corrections, warehousing, childcare, schools, offices, homeless shelters, transportation, mail/shipping/delivery services, cleaning services, emergency services/response, waste management, construction, agriculture, food packaging/processing, and healthcare." Id. at 61,412. One state health department reported "5,247 outbreaks in approximately 40 different types of non-healthcare work settings." Ibid.; see id. at 61,413 (similar). And OSHA reviewed

studies analyzing "how mortality rates among individuals in various types of workplaces had changed during the pandemic," which concluded that although some industries showed higher spikes than others, significant transmission was seen in a great many types of workplaces. Id. at 61,415. The authors of one study concluded that, among other occupational groups, those with "jobs that are not practical to do from home had particularly elevated mortality rates." Ibid. Given the extensive empirical data showing that SARS-CoV-2 does not discriminate among types of workplaces, OSHA had ample justification for the Standard's scope.

c. Applicants contend that "necessary" in this context means "needed for some purpose or reason; essential," but that the Standard "nowhere says that it is essential or indispensable to (rather than useful for) arresting a workplace danger." Ohio Appl. 20 (citation omitted). That contention is incorrect. OSHA described in detail why it had "determined that an ETS is necessary to protect unvaccinated workers from the risk of contracting COVID-19 at work," 86 Fed. Reg. at 61,403; indeed, multiple sections of the preamble describe at length the "Need for the ETS," id. at 61,429-61,433; why the "ETS Is Necessary To Protect Unvaccinated Employees From Grave Danger," id. at 61,433-61,440, and why "No Other Agency Action is Adequate to Protect Employees Against Grave Danger," id. at 61,440-61,446.

More specifically, OSHA explained the predicate for immediate

action: "[A]t the present time, workers are becoming sick and dying unnecessarily as a result of occupational exposures" to SARS-CoV-2. 86 Fed. Reg. at 61,432. And OSHA described why the Standard's provisions were necessary to protect unvaccinated workers from that risk. The "ETS focuses on encouraging vaccination," OSHA explained, "because it is the most efficient and effective method for addressing the grave danger." Id. at 61,434. OSHA emphasized that "encouraging vaccination is necessary to reduce the overall prevalence of the SARS-CoV-2 virus at workplaces" and "necessary to reduce the likelihood that workers who are infected by SARS-CoV-2 will suffer the worst outcomes of an infection (hospitalization and death)." Id. at 61,435. OSHA also explained why masking and testing requirements are essential if workers remain unvaccinated. OSHA expressly found that "[r]egularly testing unvaccinated workers is essential because SARS-CoV-2 infection is often attributable to asymptomatic or pre-symptomatic transmission." 86 Fed. Reg. at 61,438. OSHA explained that masking, too, is "essential" because "[t]he best available experimental and epidemiological data support consistent use of face coverings by unvaccinated workers in work settings to reduce the spread of COVID-19." Id. at 61,539. Contrary to applicants' assertion (Ohio Appl. 20), therefore, OSHA explained why it had determined that requiring employees either to be vaccinated or to mask and test is necessary to address the grave danger of COVID-19 exposure in the

workplace.[9]

More generally, as the court of appeals explained (App. 252), interpreting "necessary" in an overly strict way as applicants seek to do would be inconsistent with Congress's grant of emergency temporary authority, because "in virtually every emergency situation that would require an ETS, no precaution proposed by OSHA could ever be 100 percent effective at quelling the emergency." App. 252. Accordingly, the "critical question [i]s whether OSHA's current regulations [a]re sufficient to address" the immediate grave danger. Ibid. Here, OSHA determined that they are not, and that the agency had "nothing left at [its] disposal to curb" that danger. Ibid. As the court observed, those findings amply support OSHA's determination that the Standard is thus "necessary." Ibid.

4. Applicants' non-textual arguments lack merit

Applicants assert that OSHA cannot address workplace dangers posed by an airborne virus that exists both inside and outside the workplace, and, relatedly, that an ETS may not encompass vaccination at all. Those assertions lack any basis in the statutory text, which does not contain such exceptions to OSHA's authority.

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[9] For that reason, any suggestion (e.g., Ohio Appl. 20) that the Standard cannot be upheld under SEC v. Chenery Corp., 318 U.S. 80 (1943), lacks merit. Chenery requires only that an agency's exercise of discretion not be upheld on a ground on which the agency did not rely; it does not require the agency to recite particular dictionary definitions of statutory terms or write a legal brief that anticipatorily rebuts every argument a potential plaintiff might make.

a. Applicants assert (e.g., Ohio Appl. 8-14; BST Appl. 15-21) that regardless of whether COVID-19 poses a grave danger to employees, OSHA is powerless to address it in an ETS because COVID-19 is not uniquely a workplace danger or, at a minimum, is not "more likely to occur [in the workplace] than in other places." BST Appl. 19. That asserted limitation on OSHA's authority lacks merit. Everybody agrees that any standard issued by OSHA -- including an ETS -- must address "work-related dangers." Ohio Appl. 9; see 29 U.S.C. 652(8) (authorizing OSHA to establish standards governing "employment and places of employment"). But the Act's text does not carve out exceptions to OSHA's responsibility to protect employees from workplace dangers just because the employees also might face similar dangers elsewhere.

To the contrary, the text requires that employees face a grave danger from (among other things) exposure to a physically harmful agent or from a new hazard in the workplace, 29 U.S.C. 655(c)(1) -- without any exception for cases in which the physically harmful agent or new hazard also exists outside the workplace. As exemplified by famous outbreaks of tuberculosis and smallpox in factories, workplace dangers have long been understood to include the dangers of contracting communicable diseases as a result of being in close proximity to other employees -- even if individuals can also be exposed to those diseases outside of work. See, e.g., Danovaro-Holliday et al., A Large Rubella Outbreak With Spread

From the Workplace to the Community, 284 JAMA 2733, 2739 (Dec. 6, 2000) (documenting rubella spread in meatpacking plants). And Congress itself specifically understood COVID-19 to present the kind of workplace danger that OSHA may address under its existing regulatory authorities when it directed OSHA in the Rescue Plan to use appropriated funds "to carry out COVID-19 related worker protection activities." § 2101(a), 135 Stat. 30.

Other OSH Act provisions further demonstrate that OSHA may permissibly regulate workplace hazards even if those hazards also exist in non-work settings. OSHA may promulgate standards for both "employment and places of employment." 29 U.S.C. 652(8) (emphasis added). When drafting the OSH Act, Congress was focused on ensuring that employees can work in a safe and healthy "environment." H.R. Rep. No. 1291, 91st Cong., 2d Sess. 14 (1970). And Congress recognized that environment includes "the air we breath[e] at work," where "over 80 million workers spend one-third of their day." Ibid.

In line with the plain text of the OSH Act, OSHA has regularly issued standards that address workplace hazards that can also pose a threat outside of work. OSHA has required precautions for bloodborne pathogens, which can be contracted outside the workplace. And OSHA has long imposed workplace rules regarding things like fire and electrical safety, even though such concerns are not unique to the workplace. 86 Fed. Reg. at 61,407-61,408; see, e.g.,

29 C.F.R. 1910.141, 1926.51 (general sanitation rules); 29 C.F.R. 1910.155-1910.165 (general fire prevention); 29 C.F.R. 1910.33-1910.37 (exit routes); 29 C.F.R. 1910.302-1910.305 (electrical safety). Applicants' position would arbitrarily prohibit OSHA from issuing an ETS to address physically harmful agents or new hazards simply because they also exist in larger society, even where, as here, the agents or hazards spread -- and create grave danger -- inside the workplace and can be distinctly addressed there.

In any event, COVID-19 is a particularly acute workplace danger. As OSHA explained at length, extensive empirical data show that COVID-19 is transmitted in the workplace, making it a danger to which employees are exposed at work. See 86 Fed. Reg. at 61,511 (noting "the unique occupational safety and health dangers presented by COVID-19"). The nature of workplaces is that employees come together in one place for extended periods and interact, thus risking workplace transmission of a highly contagious virus that easily spreads through that kind of exposure. Id. at 61,411-61,417. While at work, "workers may have little ability to limit contact with," and possible exposure to SARS-CoV-2 from, "coworkers, clients, members of the public, patients, and others." Id. at 61,408. And OSHA in fact identified many workplace "clusters" and "outbreaks" of COVID-19, and analyzed significant "evidence of workplace transmission" of the virus. Id. at 61,411. The Stand-

ard, in turn, addresses that danger solely insofar as it arises in the workplace: it applies only to employers, and exempts employees who work at home, alone, or outdoors. Applicants thus attack a strawman in suggesting that the court of appeals' decision would permit OSHA to regulate "vandalism" or "obesity." Ohio Appl. 9, 12 (citations omitted).

The State applicants likewise err in seeking to limit OSHA's authority by suggesting (Ohio Appl. 11) that the statute covers only dangers that are "occupational in nature." In the first place, "occupational" simply means related to a person's occupation -- his or her employment or work -- and a danger to an employee's health or safety at the workplace is an occupational risk. OSHA has long regulated things like toilets and water, 29 C.F.R. 1910.141, precisely because a lack of functioning toilets or potable water in the workplace poses an "occupational" health or safety danger, even though toilets and water are not "occupational" in other contexts.

To the extent the State applicants rely on the word "occupational" to argue that the OSH Act implicitly excludes some undefined category of health and safety hazards that arise at the workplace, the Act's text does not include any qualifier of the sort that the States posit. Applicants purport to derive it from "[c]ontext," Ohio Appl. 10, or "structure," Phillips Appl. 22, but this Court has long found it improper to "rewrite [a] statute so

that it covers only what [courts] think is necessary to achieve what [they] think Congress really intended," Lewis v. City of Chicago, 560 U.S. 205, 215 (2010). And even if "the principal evil Congress was concerned with," Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998), involved grave dangers in the workplace that are "occupational" in some undefined sense that does not turn on exposure to the danger at work, this Court has recognized that statutes "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws" that govern, ibid. Those principles are particularly applicable here, where OSHA's ETS authority exists to address new or evolving dangers, and "the presumed point of using general words is to produce general coverage -- not to leave room for courts to recognize ad hoc exceptions," Reading Law 101.[10]

b. Relatedly, applicants contend (e.g., Associated Builders Appl. 10-13, 16-17) that "the OSH Act does not grant authority to OSHA to require vaccination." Id. at 10 (capitalization and formatting altered). That contention is incorrect for several reasons. First, it appears to rely on the mistaken characterization of the Standard as a "vaccine mandate"; as explained above, the

[10] Applicants cite several OSHA regulations that are supposedly "work-anchored," Ohio Appl. 11 (citation omitted); see Phillips Appl. 23, but none of those regulations is inconsistent with OSHA's authority to regulate grave dangers in the workplace that arise from viruses transmitted in the workplace.

Standard gives employers the choice to either (1) require that all employees vaccinate (except those entitled to an exemption or accommodation under federal law); or (2) require that unvaccinated employees mask and test. Applicants identify no textual limitation in the OSH Act that would prevent OSHA from "encourag[ing] vaccination," which "is the most efficient and effective control for protecting unvaccinated workers from the grave danger posed by COVID-19." 86 Fed. Reg. at 61,532

Second, applicants' argument overlooks a separate provision of the OSH Act that specifically contemplates that vaccination may be required under the Act. Section 669(a)(5), which authorizes the Secretary of Health and Human Services to develop information regarding physically harmful agents to support OSHA's regulatory responsibilities, includes a religious exemption that states "[n]othing in this or any other provision of [the OSH Act] shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." 29 U.S.C. 669(a)(5) (emphasis added). By establishing a religious exemption from immunization requirements imposed under the OSH Act, Congress expressly recognized that enforcement of the OSH Act might require vaccination under certain circumstances. Applicants' observation (Associated Builders Appl. 11) that the immunization clause is phrased as "a limi-

tation on [OSHA's] authority" misses the point: there would have been no need for Congress to have specified that immunization is not authorized "for those who object thereto on religious grounds," 29 U.S.C. 669(a)(5), if (as applicants claim) immunization is not authorized at all. And even worse than that superfluity, if applicants were correct, the statutory exception to the exemption -- authorizing immunization "where such is necessary for the protection of the health or safety of others," ibid. -- would be rendered a nullity.

Third, applicants' contention overlooks that Congress previously endorsed OSHA's measures to encourage vaccination in the standard governing exposure to bloodborne pathogens. OSHA sought comment on a proposed standard to reduce employee exposure to, among other things, the Hepatitis B virus, including a requirement that vaccination be made available to exposed workers. See 54 Fed. Reg. 23,042, 23,134-23,135 (May 30, 1989). Congress subsequently directed that, if the agency did not promulgate a final standard by a date certain, "the proposed standard on occupational exposure to bloodborne pathogens as published in the Federal Register on May 30, 1989 (54 FR 23042) [would] become effective as if such proposed standard had been promulgated as a final standard by the Secretary of Labor." Department of Labor Appropriations Act, 1992, Pub. L. No. 102-170, Tit. I, § 100(b), 105 Stat. 1113. And Congress stated in the text of that statutory directive that OSHA

would be "acting under the Occupational Safety and Health Act of 1970." § 100(a), 105 Stat. 1113. That legislative action illustrates Congress's understanding that OSHA has authority to issue standards addressing workplace exposure to viruses and potential mitigation by vaccination. See 86 Fed. Reg. at 61,407; see also App. 238 (describing subsequent congressional action related to OSHA's regulation of bloodborne pathogens); Branch v. Smith, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.) (statutes must be understood "in the context of the corpus juris of which they are a part").

Against all that, applicants suggest that vaccination is materially different from other types of mitigation measures OSHA can employ to address workplace hazards. But vaccination cannot be distinguished from other workplace controls on the theory that OSHA lacks authority to "protect the unvaccinated from their own choices." App. 282 (Larsen, J., dissenting). OSHA standards routinely require the use of protective controls even if employees would prefer not to be subject to particular health or safety measures. Nor is vaccination an unusual means of protecting against virus transmission. "[V]accination requirements, like other public-health measures, have been common in this nation" to address the hazards of infectious disease -- including in the workplace. Klaassen v. Trustees of Indiana Univ., 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.) (holding that a state uni-

versity vaccination requirement was among the "normal and proper" conditions of enrollment), stay denied, No. 21A15 (Aug. 12, 2021). This Court upheld the constitutional validity of such requirements and traced their historical roots more than a century ago. See Jacobson v. Massachusetts, 197 U.S. 11, 25-35 (1905) (identifying vaccine requirements in the United States and other Western countries in the early 1800s). Consistent with that history, many States have established requirements for certain categories of workers to be vaccinated against COVID-19. See 86 Fed. Reg. at 61,435, 61,438. And many private employers have instituted vaccine mandates for their workforces to protect against workplace transmission of COVID-19 before OSHA issued the ETS. See Determination of the Acting OMB Director, 86 Fed. Reg. 63,418, 63,422 (Nov. 16, 2021) (observing that 99.7% of United Airlines' workforce complied with a vaccination requirement). No sound basis exists to conclude that the OSH Act disables OSHA from encouraging vaccination -- a traditional, common, and highly effective mechanism -- to address the grave risk of exposure to SARS-CoV-2 in the workplace. Cf. 29 U.S.C. 652(8) (authorizing an OSHA standard to include the "use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8).

c. The State applicants contend (e.g., Ohio Appl. 23-25) that the ETS should be enjoined on the theory that it "is not a

'temporary' response to an 'emergency.'" Id. at 23. That contention is unsound. Congress described an ETS as an "emergency" standard to enable OSHA to determine that the need for a particular standard is sufficiently pressing that it should "take immediate effect upon publication in the Federal Register," 29 U.S.C. 655(c)(1) -- not to impose a freestanding statutory requirement that the agency find the existence of an "emergency" in some further or broader sense. In any event, OSHA explained at length (86 Fed. Reg. at 61,409-61,412, 61,431, 61,444) that the recent confluence of several factors -- including the widespread return to workplaces, the rapid spread of the Delta variant, and rising COVID fatigue -- demanded an urgent response now. See id. at 61,434 (referring to the "extraordinary and exigent circumstances" necessitating the ETS at this moment).

As for the State applicants' suggestion that the Standard is not "temporary" because "[t]hose who vaccinate will be vaccinated for good," Ohio Appl. 24, that mistakes the temporal duration of the Standard -- which "shall be effective until superseded by a standard promulgated" after notice-and-comment rulemaking within six months, 29 U.S.C. 655(c)(2) -- with that of a vaccination. Moreover, nothing in the OSH Act disables the agency from employing the most effective control measure to protect workers from a grave danger in the workplace simply because it also happens to provide protection when the worker leaves. And in any event, the Standard

does not require vaccination, but instead permits employers to opt for a policy under which employees could choose to mask-and-test, which is unquestionably temporary even under applicants' misguided view. Cf. App. 189 (Sutton, J., dissenting from denial of initial hearing en banc) (acknowledging that masking is temporary).

B. The Assertion That This Case Involves A "Major Question" Does Not Justify Departing From The Ordinary Meaning Of The Statutory Text

Applicants contend (e.g., NFIB Appl. 16-25; Ohio Appl. 25-27) that even if the Standard is a lawful exercise of OSHA's statutory authority under the ordinary and straightforward meaning of the Act's text, its enforcement should be enjoined because Congress did not include a "clear statement" that OSHA could promulgate a Standard addressing a matter "of vast economic and political significance," Ohio Appl. 26 (citation omitted), that applies to "84 million Americans," "in every industry, representing almost 2/3 of all workers," Job Creators Appl. 13. That contention lacks merit.

1. As an initial matter, Congress did speak clearly by authorizing OSHA to issue an emergency temporary standard whenever it makes the requisite determinations -- here, that SARS-CoV-2 is a physically harmful agent, exposure to it in the workplace presents a grave danger to employees, and the Standard is necessary to protect employees from that danger. See 29 U.S.C. 655(c)(1). "Congress could have limited [OSHA's] discretion in any number of

ways, but it chose not to do so." Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020). To the contrary, as specifically relevant here, Congress expressly contemplated that OSHA's exercise of that broad authority could include requiring "immunization." 29 U.S.C. 669(a)(5). Courts may not "impos[e] limits on an agency's discretion that are not supported by the text," Little Sisters, 140 S. Ct. at 2381 -- much less a limit that affirmatively contradicts the statute Congress enacted.

Congress has also specifically confirmed through subsequent legislation that OSHA has both the authority and the duty to promulgate standards addressing COVID-19. Earlier this year, Congress appropriated $100 million to OSHA "to carry out COVID-19 related worker protection activities," including "not less than" $5 million "for enforcement activities related to COVID-19 at high risk workplaces." Rescue Plan, § 2101(b)(1), 135 Stat. 30. OSHA may undertake "enforcement activities" only if an employer violates either a standard, 29 U.S.C. 655, or the Act's general-duty clause, which requires employers to ensure that their workplaces are "free from recognized hazards that are causing or are likely to cause death or serious physical harm," 29 U.S.C. 654(a)(1). That appropriation thus makes clear Congress's understanding that addressing the spread of COVID-19 in workplaces is within OSHA's pre-existing statutory authority, even if mitigation measures --

whether vaccination, testing, or masking -- carry economic and political significance.

Nor did Congress limit OSHA's authority to issue standards based on the number of workplaces or employees covered, or the cost of compliance. To the contrary, OSHA is authorized "to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce." Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 96 (1992) (plurality opinion) (emphasis added). Congress specified that the authority granted to OSHA was intended 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) (emphasis added). In line with that authority, OSHA standards routinely apply throughout the Nation in all workplaces subject to the Act, such as standards for toilets and potable water. 29 C.F.R. 1910.141. In short, Congress gave OSHA the tools to address workplace risks to safety and health wherever they may arise in such workplaces -- with no indication that OSHA is specially precluded from addressing the most widespread work hazards because of their prevalence.

In addition, "Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment." American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 519-520 (1981). That a federal regulation would have nationwide effect

and require compliance costs is unremarkable; it certainly would not justify departing from the ordinary meaning of a statute otherwise authorizing such a regulation. Congress expressly passed the OSH Act based on its finding "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce." 29 U.S.C. 651(a). If accepted, applicants' position would lead to the perverse result that the greater the incidence of injuries and illnesses from a hazard -- and the greater the resulting burden upon interstate commerce -- the less authority OSHA has to address it.

2. Applicants' reliance on Alabama Association of Realtors v. Department of Health & Human Services, 141 S. Ct. 2485 (2021) (per curiam), is misplaced. There, the Court stated that an eviction moratorium imposed by the CDC likely exceeded the agency's authority to "prevent the [interstate] introduction, transmission, or spread of communicable diseases," 42 U.S.C. 264(a). Reading that language in context, the Court held that its scope was informed by the next sentence "illustrating the kinds of measures that could be necessary," such as "fumigation" or "pest extermination." Alabama Ass'n, 141 S. Ct. at 2488. Those measures "directly relate to preventing the interstate spread of disease," whereas the eviction moratorium "relate[d] to interstate infection" only "indirectly," through the "downstream connection between eviction" and possible spread of COVID-19 by evicted indi-

viduals who choose to move "from one State to another." Ibid. Here, in contrast, no analogous statutory language suggests that the Standard is incompatible with the nature of the regulatory authority that Congress granted the agency. And even more to the point, the connection between the Standard and employee health and safety is clear and direct: employers must adopt a policy that will substantially reduce the risk of SARS-CoV-2 transmission in their workplaces, thereby minimizing the risk that employees will contract a potentially deadly disease at work.

More broadly, applicants have fundamentally misunderstood what they call the "major questions doctrine," which they attempt to ground in Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). In those cases, as in Alabama Association, the Court declined to interpret ambiguous statutes to grant agencies the sweeping powers that they had asserted, observing that the Court expects Congress to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" Utility Air, 573 U.S. at 324 (quoting Brown & Williamson, 529 U.S. at 160).

Critically, in each case, the Court began with the statutory text and made clear that considerations of "'economic and political significance'" are relevant only "if the text [is] ambiguous." Alabama Ass'n, 141 S. Ct. at 2489. In both Utility Air and Brown

& Williamson, for example, this Court reasoned that adopting the agency's position would have conflicted with other provisions of the very statute that the agency was interpreting. See Utility Air, 573 U.S. at 321 (explaining that the agency's position was "inconsistent with -- in fact, would overthrow -- the Act's structure and design"); Brown & Williamson, 529 U.S. at 141, 156 (explaining that the agency's interpretation was "incompatible with" other aspects of the statute). In no case, however, has the Court suggested that courts should disregard the statute's plain text simply because it authorizes agency actions that might have vast economic or political significance. As explained above, the Standard here fits comfortably within the OSH Act's plain text setting forth the requirements for emergency temporary standards. See 29 U.S.C. 655(c)(1). That is all that is required.

Nor has OSHA "claim[ed] to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" Utility Air, 573 U.S. at 324 (citation omitted). This Court has long recognized that Congress granted OSHA the power to regulate workplaces on a nationwide basis, as hazards emerge and evolve over time, including in ways that impose substantial costs. American Textile, 452 U.S. at 519-520; see Gade, 505 U.S. at 96 (plurality opinion). OSHA's power to issue a Standard that covers a substantial fraction of the American workforce is thus neither recently "discover[ed]" nor "unheralded."

Utility Air, 573 U.S. at 324. And even if the ETS were "a novel use of [OSHA's] emergency authority," NFIB Appl. 18; see, e.g., Ohio Appl. 26, that would not foreclose OSHA from acting. As this Court has long recognized, that a federal "power ha[s] 'not heretofore been exercised'" is irrelevant "because 'the non-use[] of a power does not disprove its existence.'" PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2261 (2021) (quoting Kohl v. United States, 91 U.S. (1 Otto) 367, 373 (1876)). That principle carries particular force here, where OSHA was confronted with the deadliest pandemic in the Nation's (and the agency's) history and had to take action to address a grave danger to worker health and safety of unprecedented scope. See App. 241 ("The ETS is not a novel expansion of OSHA's power; it is an existing application of authority to a novel and dangerous worldwide pandemic.").

Finally, applicants seriously err in attempting to cabin OSHA's statutory authority based on the current political salience of COVID-19 and debates about how best to respond to the pandemic. E.g., NFIB Appl. 22; RNC Appl. 33-34. This Court has never suggested that the emergence of political controversy about a particular agency action triggers a clear-statement requirement. Cf. Little Sisters, 140 S. Ct. at 2380 (analyzing whether HHS's contraceptive-mandate rule -- which generated considerable political controversy -- complied with the statutory text without any heightened-clarity requirement). The meaning of a statute does not

change with the shifting winds of politics or public opinion, and opponents of an agency's policy cannot succeed in limiting the agency's authority merely by vocally opposing it. See App. 240 ("To suggest otherwise would mean that Congress had to have anticipated both the unprecedented COVID-19 pandemic and the unprecedented politicization of the disease to regulate vaccination against it.") (citation omitted).

C. Applicants' Arguments Under The APA Lack Merit

Applicants advance an assortment of arguments under the APA. None is likely to succeed.

1. Some applicants contend (e.g., Bentkey Appl. 14) that the court of appeals applied an "[u]nduly [d]eferential" standard of review. But the court expressly invoked and applied the "substantial evidence" standard set forth in 29 U.S.C. 655(f), see App. 244; determined that the ETS here satisfied the "harder look" that applicants endorse, App. 244 (citation omitted); and upheld the Standard because of OSHA's "clear reliance on 'a body of reputable scientific thought,'" Bentkey Appl. 16 (citation omitted). That more than suffices under the APA.[11]

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[11] Some applicants suggest (e.g., NFIB Appl. 13-15) that the Standard violates the APA's notice-and-comment provisions. But the OSH Act expressly requires an ETS "to take immediate effect" "without regard to the requirements of [the APA]." 29 U.S.C. 655(c)(1). Accordingly, as long as the statutory criteria have been satisfied -- as they have here, see pp. 17-55, supra -- an ETS does not violate any notice-and-comment rulemaking requirement.

Other applicants assert that the Standard is "arbitrary and capricious" on the theory that OSHA changed its position regarding the need for an ETS -- as supposedly evidenced by the lack of an ETS during the early stages of the pandemic and the June 2021 healthcare ETS -- without offering a reasoned explanation for the change. E.g., RNC Appl. 30; Associated Builders Appl. 20-22. But as explained above, OSHA acknowledged its change in approach and offered a detailed explanation of how circumstances have evolved over the course of the pandemic, prompting OSHA's evolving regulatory response. 86 Fed. Reg. at 61,429-61,433. Applicants also err in contending that the Standard is arbitrary and capricious because it extends only to employers with more than 100 employees. E.g., RNC Appl. 31-32. For the same reasons that OSHA's "stepwise" approach does not undermine a finding of grave danger, see pp. 25-27, supra, it does not render the Standard arbitrary and capricious.

2. Several applicants suggest that OSHA's rationale for the Standard was pretextual. See, e.g., Ohio Appl. 17; RNC Appl. 1. But judicial review is based on an agency's contemporaneous explanation in light of the existing administrative record, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978), not on cherry-picked public statements outside that record such as a White House official's "retweet" of a reporter's tweet, Ohio Appl. 17.

Moreover, the President's discussion of the broader response to COVID-19 and expression of significant concern about the ongoing pandemic, including low vaccination rates, see, e.g., Heritage Appl. 4, Phillips Appl. 7-8, do not in any way undermine the agency's action based on the record before it and the statutory framework. Just the opposite: they reinforce the agency's conclusion that COVID-19 poses a grave danger to unvaccinated employees who gather with others in workplaces. Being concerned about COVID-19 generally and urging vaccination to address that danger is entirely consistent with concluding that COVID-19 poses a grave danger in the workplace and that vaccines are the most effective way to address that danger in the workplace. And there is nothing pretextual about an agency whose mission is to protect the health and safety of workers taking critical steps to establish a workplace health standard that requires either vaccination or masking and testing just because those steps are also consistent with a broader effort to combat a pandemic that affects individuals outside the workplace.

D. Applicants' Constitutional Challenges Lack Merit

The court of appeals correctly determined that applicants' constitutional arguments are unlikely to succeed. App. 257-262. Among other things, applicants' claims of unconstitutionality are almost uniformly based on the erroneous premise that OSHA has imposed a "vaccine mandate." See, e.g., Ohio Appl. 1-37; Phillips

Appl. 1-40. The Standard imposes only a temporary regulation on employers that may be fully satisfied by the adoption of a mask-and-test option. Applicants cannot demonstrate that the Standard violates the Commerce Clause, the Tenth Amendment (or principles of federalism), or the nondelegation doctrine, and their meritless constitutional arguments provide no basis "to rewrite" the Act's unambiguous grant of authority to address dangers to employees in the workplace. Salinas v. United States, 522 U.S. 52, 59-60 (1997) (citation omitted).

1. The Standard does not exceed the federal government's power under the Commerce Clause

The Standard represents a lawful exercise of the federal government's authority to regulate interstate commerce because it imposes requirements on employers regarding the maintenance of safe and healthful working conditions. It is well established that laws that impose requirements on employers are "within Congress's reach under the Commerce Clause" because employers are indisputably "engaged in commercial activity that Congress has the power to regulate when hiring employees, producing, selling and buying goods," and engaging in other similar economic activities. App. 258. Accordingly, Congress has long regulated employment conditions, including to ensure the safety of workplaces, and this Court has long upheld such regulations as within Congress's commerce power. Ibid.

For example, in United States v. Darby, 312 U.S. 100, 123-

125 (1941), this Court upheld the Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq., as a valid exercise of Congress's commerce power, Darby, 312 U.S. at 123-125, repudiating earlier precedent rejecting reliance on the commerce power to regulate child labor, id. at 115-116. Other cases have likewise upheld Congress's Commerce Clause authority to impose a bar on employment discrimination under Title VII, 42 U.S.C. 2000e, et seq., see United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 206 n.6 (1979), and to regulate collective bargaining under the National Labor Relations Act, 29 U.S.C. 151, et seq., see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). Those precedents reflect the basic principle that "Congress may legislate under the Commerce Clause to ensure the safety of commerce" and to prevent the economic "'paralysis'" that may arise from disruptions in the labor force. App. 259 (quoting Jones & Laughlin, 301 U.S. at 41) (brackets omitted).

The OSH Act and the Standard are fully consistent with that principle. The Act permits OSHA to issue "standards applicable to businesses affecting interstate commerce," 29 U.S.C. 651(b)(3), 652(3) and (5), in order "to assure * * * safe and healthful working conditions" for the Nation's workers, 29 U.S.C. 651(b). The Standard satisfies those statutory criteria and rests on congressional findings that "illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, inter-

state commerce." 29 U.S.C. 651(a); see also 86 Fed. Reg. at 61,473-61,474 (discussing cost of absenteeism to employers). There can be no dispute that COVID-19 has had precisely the "paralyzing effect on commerce" that Congress anticipated when it enacted the statute. App. 259.

Applicants contend (e.g., Ohio Appl. 27-30) that the Standard is nonetheless unconstitutional under this Court's most recent Commerce Clause precedents in NFIB v. Sebelius, 567 U.S. 519 (2012); United States v. Morrison, 529 U.S. 598 (2000); and United States v. Lopez, 514 U.S. 549 (1995), and they fault (e.g., BST Appl. 29) the court of appeals for relying on Darby and similar "pre-1980 case law" upholding Congress's authority to regulate employment conditions. Applicants overlook, however, that all of those recent precedents have cited Darby with approval. See NFIB, 567 U.S. at 549; Morrison, 529 U.S. at 609; Lopez, 514 U.S. at 555. Moreover, those precedents consistently reiterate Congress's authority to "regulate" activities that have "a substantial relation to interstate commerce." Morrison, 529 U.S. at 609 (citation omitted); see Lopez, 514 U.S. at 558. The Standard fits comfortably within those recognized powers because it regulates the employment relationship and activities of employers and employees having a substantial effect on interstate commerce and because it protects the employees engaged in economic activity from contracting the potentially deadly virus at work.

Applicants contend that the Standard is nevertheless unconstitutional under NFIB because -- in their view -- NFIB stands for the proposition that Congress lacks authority to regulate "private inactivity," and the Standard regulates "private inactivity" with respect to vaccination. Ohio Appl. 29; see, e.g., Heritage Appl. 15; Phillips Appl. 36. Setting aside that the Standard permits employers to choose a mask-and-test policy rather than vaccination, NFIB concluded that the Affordable Care Act's imposition of an individual mandate to buy health insurance was incompatible with the Commerce Clause because it represented an attempt to regulate individuals who were not engaged in the commercial activity at issue by "compel[ling] [them] to become active in commerce" by purchasing insurance. 567 U.S. at 552; see id. at 550-551. Here, in contrast, the OSH Act and the Standard expressly regulate existing commercial activity by requiring employers (who are already engaged in activity in or substantially related to commerce) to protect the health and safety in the workplace of the individuals who have chosen to work for those employers -- a form of regulation the Court has long held constitutional. See Darby, 312 U.S. at 123-125. Indeed, as the court of appeals recognized, NFIB itself reflects the important distinction between regulating individuals and employers because, while five Members of the Court determined that the Affordable Care Act's individual mandate was incompatible with the Commerce Clause, "no Justice doubted" that

Congress could constitutionally require "employers to provide health insurance to their employees." App. 259.

Applicants suggest that the Standard has only a tenuous link to the workplace, such that upholding the constitutionality of the Standard will leave the commerce power without any "limiting principle." BST Appl. 31; see, e.g., Ohio Appl. 29-30. But, as explained above, the Standard directly regulates the working conditions of employees who produce goods or furnish services to entities whose activities unquestionably affect interstate commerce. See 29 U.S.C. 651(a).

2. The Standard does not infringe federalism or States' authority under the Tenth Amendment

Relatedly, some applicants contend that the federal government lacks the authority to implement the Standard because "regulating public health and safety is part of the police power" that belongs exclusively to the States under principles of federalism and the Tenth Amendment. Ohio Appl. 29, see id. at 27-28; see also, e.g., BST Appl. 30; Southern Baptist Appl. 23. That assertion, however, is directly contrary to Gade, supra, which recognized that in passing the OSH Act, Congress deliberately "brought the Federal Government into a field that traditionally had been occupied by the States," 505 U.S. at 96 (plurality op.), and that the Act necessarily "pre-empts all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promul-

gated,'" id. at 105 (majority op.) (citation omitted). More broadly, the contention that the Tenth Amendment reserved the power to regulate public health exclusively to the States -- even where health and safety concerns affect matters within the authority of the federal government -- cannot be squared with the long history of federal statutes and regulations addressing pharmaceuticals, healthcare, and countless other health- and safety-related topics.

Applicants fare no better with their contention (e.g., Ohio Appl. 29; Heritage Appl. 16-17; Phillips Appl. 36) that, under Jacobson v. Massachusetts, supra, the power to mandate vaccination is exclusively within the "police power of a State." 197 U.S. at 38. As even some who find fault with the Standard in other respects acknowledge, Congress has long played a role in regulating vaccines. E.g., App. 222-223 (Bush, J., dissenting from denial of en banc) (describing examples of federal vaccine laws dating from 1813). The Standard's encouragement of vaccination to address workplace exposure to SARS-CoV-2 therefore fits within a tradition of federal involvement in vaccinations in instances where public health crises implicate federal interests. In any event, as the court of appeals explained (App. 260), Jacobson upheld the States' power to mandate vaccination; the Court did not suggest that the federal government lacks a similar authority when acting within the scope of its enumerated powers. And this Court long ago rejected the proposition that "federal and state regulatory powers

over economic activity are mutually exclusive." Ibid. (citing Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 251-252 (1829)).

3. Section 655(c) is not an unconstitutional delegation of legislative power

Applicants' nondelegation challenges lack merit. "Only twice in this country's history" has this Court "found a delegation excessive -- in each case because 'Congress had failed to articulate any policy or standard' to confine discretion." Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (citation omitted). Statutory grants of authority are valid so long as they provide an "intelligible principle," id. at 2123, and Section 655(c)(1) easily exceeds that threshold.

Section 655(c) provides several clear guidelines that cabin OSHA's authority. It permits only time-limited standards "necessary" to protect employees from the "grave danger" of new hazards or toxic or physically harmful substances or agents. 29 U.S.C. 655(c)(1). Contrary to applicants' contentions (e.g., Ohio Appl. 30-31; BST Appl. 34-36), those terms have a readily discernible meaning that courts have had no trouble applying in evaluating the lawfulness of prior emergency standards. See, e.g., Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98, 107 (3d Cir. 1973) (vacating standard with respect to two of fourteen carcinogens). Moreover, this Court has previously upheld much broader delegations against constitutional challenges, including authorities "to

regulate in the 'public interest,'" "to set 'fair and equitable' prices," and "to issue whatever air quality standards are 'requisite to protect the public health.'" Gundy, 139 S. Ct. at 2129.

In arguing to the contrary, applicants cite (e.g., Phillips Appl. 37-38) then-Justice Rehnquist's concurring opinion in Industrial Union, supra, in which he stated that he would have invalidated a different provision of the OSH Act under nondelegation principles, 448 U.S. at 671-688. But Justice Rehnquist specifically observed that his "ruling would not have any effect upon * * * the Secretary's authority to promulgate emergency temporary standards under [Section 655(c)]," id. at 688 n.8, likely because the terms of Section 655(c) are more definite than those of the provision he found problematic, and because emergency provisions like Section 655(c) more obviously implicate the principle that Congress may paint with a broader brush "where it would be 'unreasonable and impracticable to compel Congress to prescribe detailed rules' regarding a particular policy or situation," id. at 684-685 (internal citation omitted). In any event, the plurality opinion rejected Justice Rehnquist's nondelegation concerns by finding that the OSH Act provision in question permitted OSHA to regulate only in the face of "significant risks," id. at 642, a standard that provides a sufficiently clear guideline for regulation just as the "grave danger" standard in Section 655(c) does.

4. The constitutional-avoidance canon is inapplicable

In addition to their constitutional challenges, applicants suggest that, at a minimum, the Court should adopt a construction of the statute that invalidates the Standard in order to avoid constitutional concerns. E.g., Ohio Appl. 27-28; Southern Baptist Appl. 17-18. This Court, however, has made clear that the canon of constitutional avoidance applies only in the face of "statutory ambiguity," and only where there are at least "grave doubts" regarding the statute's constitutionality. United States v. Palomar-Santiago, 141 S. Ct. 1615, 1622 (2021) (citation omitted). As explained, neither circumstance is present here.

E. Applicants' As-Applied Religious Objections Lack Merit

Some applicants raise as-applied religious objections to the Standard under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb, et seq., and the First Amendment. Those claims lack merit and certainly do not bear on the facial validity of the Standard, which recognizes the availability of individualized exemptions, including for religious reasons.[12]

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[12] Some applicants also suggest that the OSH Act itself categorically excludes religious nonprofit employers from its scope, because the Act "defines an 'employer' as 'a person engaged in a business affecting commerce who has employees,'" and "[t]he term 'business' -- when used in a commercial context -- refers to for-profit businesses." Southern Baptist Appl. 15 (citation omitted). But a "nonprofit business" is a familiar concept, and OSHA has long regulated nonprofit entities. See 29 C.F.R. 1975.3(d), 1975.4(b)(4). Applicants provide no sound basis for artificially narrowing the scope of "business" from its ordinary meaning.

1. Three sets of applicants assert that the Standard violates RFRA or the First Amendment's Free Exercise Clause. See Word of God Appl. 9; Southern Baptist Appl. 29-31; FabArc Appl. 14-20. "Under RFRA, a law that substantially burdens the exercise of religion must serve 'a compelling governmental interest' and be 'the least restrictive means of furthering that compelling governmental interest.'" Little Sisters, 140 S. Ct. at 2376. But applicants have not identified any religious exercise that the Standard substantially burdens. All three claim a religious objection to requiring employees to be vaccinated (Word of God Appl. 4-5; Southern Baptist Appl. 29; FabArc Appl. 2, 5, 8), but the Standard permits those employers to choose the mask-and-test option instead, thereby obviating that potential burden; any requirement to vaccinate rather than mask and test is attributable to the choice of the employer, not a dictate from OSHA.

Word of God applicants do not raise any religious objection to testing, but assert that "the mask requirement for unvaccinated employees" would "forcibly identify those who are unvaccinated and cause division within their organizations," contrary to their "Biblical duty to promote unity within their organizations." Word of God Appl. 10. But nothing in the Standard prohibits employers from adopting a COVID-19 policy that requires all employees (including vaccinated ones) to wear face coverings at work, which would fully address that concern. Cf. 86 Fed. Reg. at 61,553.

Southern Baptist and FabArc applicants express no religious objection to either masking or testing, but instead claim only that the costs of weekly testing will be a burden. Southern Baptist Appl. 30-31; FabArc Appl. 8-9. But that is not a burden on religion. Applicants mistakenly rely (Southern Baptist Appl. 30; FabArc Appl. 14-16) on this Court's decision in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), which held that a requirement for employer health plans to provide contraceptive coverage -- on pain of large fines -- substantially burdened the religious beliefs of closely held companies that refused to provide such coverage. Id. at 726. But the religious objection there was to providing the contraceptive coverage; that is why the large fine for acting on that belief created a substantial burden on the religious exercise itself. Ibid. Here, applicants pointedly do not assert any religious objection to testing; they object only to the cost of it.[13]

In any event, even if a particular applicant could establish a substantial burden on its religious exercise, the Standard satisfies RFRA's narrow-tailoring requirement. Little Sisters, 140

[13] That vaccination happens to be less costly is irrelevant. If the mask-and-test option, standing alone, would not violate RFRA, the fact that the agency has offered employers an additional, cheaper alternative cannot change that conclusion. Cf. Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.").

S. Ct. at 2376. Protecting employees from the risk of contracting COVID-19 in the workplace surely is a compelling governmental interest. And applicants err in asserting (e.g., Word of God Appl. 12) that the government cannot have a compelling interest in the application of a rule merely because it exempts small employers. Title VII contains such an exemption, see p. 27, supra, but nobody disputes that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race." Hobby Lobby, 573 U.S. at 733.

As for the least-restrictive-means element, as noted above, OSHA cited extensive scientific studies and empirical data showing that regular testing and masking of unvaccinated workers was essential to address the grave danger of COVID-19 transmission across a broad spectrum of American workplaces. Applicants' arguments (Southern Baptist Appl. 32-33; Word of God Appl. 14) that OSHA could have employed less restrictive means echo the arguments that the Standard is overinclusive and thus unnecessary to address a grave danger, see pp. 24-29, supra, and fail for the same reasons. And to the extent applicants suggest overinclusivity with respect to their particular circumstances, the OSH Act expressly provides procedures by which employers may seek variances from the ETS if they have adequate alternative means to protect workers. 29 U.S.C. 655(d). To the extent applicants believe that their respective workplaces would merit a variance, they should present those claims

to the agency before seeking judicial intervention, especially the extraordinary injunctive relief they seek here.

2. Applicants briefly suggest (Southern Baptist Appl. 26-28; Word of God Appl. 15) that the Standard violates the First Amendment's "ministerial exception." See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012). Under that exception, courts may not "intervene in employment disputes" regarding "the selection and supervision" of ministerial employees. Our Lady of Guadalupe, 140 S. Ct. at 2055. But nothing in the Standard addresses the "selection and supervision" of ministerial employees, and in any event this is not an "employment dispute[]." Ibid. And nothing in this Court's precedents suggests that the ministerial exception applies to all regulations of any sort -- including health and safety laws -- that might apply to ministerial employees. Cf. Hosanna-Tabor, 565 U.S. at 196. The ministerial exception is thus inapposite.

II. THE REMAINING EQUITABLE FACTORS WEIGH HEAVILY AGAINST INJUNCTIVE RELIEF

A. Applicants' request to enjoin the Standard should be rejected for the additional reason that they have not demonstrated irreparable harm. To satisfy that requirement, applicants must do more than "simply show[] some 'possibility of irreparable injury.'" Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted); see Winter v. NRDC, Inc., 555 U.S. 7, 22 (2008). They have

not done so here.

For example, the trade group and business applicants assert that they will be irreparably harmed by a labor shortage if the Standard goes into effect because many employees "will quit if they are required to be vaccinated." Associated Builders Appl. 28; see, e.g., NFIB Appl. 30-34; Job Creators Appl. 22; BST Appl. 10. Even if that speculation could be credited here, applicants' hypothesized outcome is avoidable because the Standard permits employers to adopt a mask-and-test policy instead of requiring vaccination. Moreover, OSHA addressed the potential for employee attrition and cited empirical data showing that "the number of employees" who ultimately refuse to comply with these kinds of required COVID-19 precautions has been "much lower than the number who claimed they might," 86 Fed. Reg. at 61,475; see id. at 63,422 (observing that workers have complied with private-company vaccine mandates, including 99.7% of employees at United Airlines and 96% at Tyson Foods). In any event, employers' speculative concerns about potential employee attrition are offset by the benefits they are likely to experience from the reduction in workplace COVID-19 outbreaks, which can force shutdowns and cause significant losses. See id. at 61,466. Even individual cases can be costly and disruptive, and the Standard will result in "reduced absenteeism due to fewer COVID-19 illnesses and quarantines." Id. at 61,475.

Many applicants also object to the costs of complying with

the Standard. E.g., NFIB Appl. 25; Bentkey Appl. 32; Job Creators 22; BST Appl. 12; Phillips Appl. 14-15. Those assertions disregard the detailed "economic analysis OSHA conducted that demonstrates the feasibility of implementing" the Standard, which the court of appeals appropriately credited. App. 262. Based on several conservative assumptions, see 86 Fed. Reg. at 61,460, OSHA estimated a modest total cost to employers of about $35 per covered employee, or $94 per covered unvaccinated employee, id. at 61,472, 61,493. Although this Court has sometimes suggested that "significant" compliance costs may establish irreparable harm, Alabama Ass'n, 141 S. Ct. at 2489, treating routine costs as irreparable injury would be "inconsistent with [the] characterization of [equitable] relief as an extraordinary remedy." Winter, 555 U.S. at 22.

NFIB hypothesizes that despite OSHA's detailed economic analysis, the agency might have "drastically underestimated compliance costs." NFIB Appl. 27 (citation omitted). But NFIB offers no data to substantiate that claim, instead relying only on unsupported, boilerplate allegations in member declarations. Ibid. (citing App. 310, 328, 369). Regardless, as the court of appeals observed, if an employer does somehow face "true impossibility of implementation, it can assert that as an affirmative defense to a citation," or seek a variance setting forth alternative measures to keep its employees safe. App. 262 (citing 29 C.F.R. 2200.34(b)(3) and 29 U.S.C. 655(d)).

For similar reasons, the employee applicants cannot establish irreparable harm by alleging that they will be forced "to receive the COVID-19 vaccine." BST Appl. 8. Their employers may adopt a mask-and-test policy rather than a mandatory vaccination requirement, making their asserted harm wholly speculative. Further, regardless of the compliance option an employer chooses, employees may seek individual accommodations where available under federal law. See 86 Fed. Reg. 61,459, 61,552.

Many applicants also allege that the Standard infringes their constitutional rights, an injury that they assert is always sufficient to establish irreparable harm. E.g., BST Appl. 12; Southern Baptist Appl. 34; Word of God Appl. 16; FabArc Appl. 8-9. That assertion relies on lower-court holdings suggesting only that the violation of certain types of First Amendment freedoms may be sufficient to establish irreparable harm. E.g., Siegel v. LePore, 234 F.3d 1163, 1177-1178 (11th Cir. 2000) (en banc). But as explained, applicants have not plausibly established the violation of any First Amendment rights. See pp. 73-77, supra. And applicants cite no authority for the proposition that alleged violations of the Commerce Clause, Tenth Amendment, or nondelegation doctrine, standing alone, could constitute irreparable harm and thereby entitle them to "an extraordinary remedy." Winter, 555 U.S. at 22.

Relatedly, the State applicants assert that the Standard will

"intrud[e] on their sovereign authority to enact and enforce" contrary policies. Ohio Appl. 31.[14] Even assuming that abstract interest could give rise to a cognizable Article III injury, the federal government has a weighty countervailing sovereign interest in enforcing the Standard -- and "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); cf. United States v. California, 921 F.3d 865, 893 (9th Cir. 2019) (describing the manifest interest in "preventing a violation of the Supremacy Clause"), cert. denied, 141 S. Ct. 124 (2020). The State applicants therefore must identify concrete, non-speculative harms, not abstract notions of sovereignty, to justify the extraordinary relief they seek. They have not done so.

Finally, some of the applicants improperly attempt to assert harms to third parties. E.g., Ohio Appl. 32; Heritage Appl. 19-20. To obtain equitable relief, a party must establish "that he

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[14] There is a significant question whether the State applicants can invoke the court of appeals' jurisdiction under 29 U.S.C. 655(f). That provision authorizes "[a]ny person" to seek judicial review of an ETS, ibid., but the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons," 29 U.S.C. 652(4) -- not a State. That significant "question as to jurisdiction" makes these applicants' likelihood of success on the merits "more unlikely." Munaf v. Geren, 553 U.S. 674, 690 (2008). Some private applicants have raised the same merits arguments as the States, but the serious question of jurisdiction suggests that any irreparable harms alleged only by the States should be discounted.

is likely to suffer irreparable harm," Winter, 555 U.S. at 374 (emphasis added), and a party generally cannot establish even the injury necessary for Article III standing unless he can demonstrate "actual harm" to his own rights and interests, rather than those of some third party, Lewis v. Casey, 518 U.S. 343, 349 (1996). For example, the Heritage Foundation cannot meet its burden by alleging general harms to "employers and employees." Heritage Appl. 19. Nor may the States rely on injuries to "employees and private employers," because "[a] State does not have standing as parens patriae to bring an action against the Federal Government." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n. 16 (1982).

B. Applicants also have not demonstrated any injury that outweighs the injuries to the government and the public interest -- which merge here, see Nken, 556 U.S. at 435. Most fundamentally, the harms to the government and the public that would result from enjoining enforcement of the Standard would be enormous. As the court of appeals observed (App. 263), "the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs." COVID-19 also has caused "serious, long-lasting, and potentially permanent health effects" for millions more. 86 Fed.

Reg. at 61,424. And there is extensive evidence of "workplace transmission." Id. at 61,411. With the reopening of workplaces, the emergence of highly transmissible variants (both Delta and Omicron), and the rise of COVID fatigue, the danger to workers is not just grave, but worsening. See id. at 61,411-61,415.

The Standard responds to those "extraordinary and exigent circumstances," 86 Fed. Reg. at 61,434, and staying its enforcement thus would likely cause significant harm. OSHA estimated that the Standard will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" over a six-month duration. Id. at 61,408. Those estimates, moreover, do not include the long-lasting and serious health effects avoided. Delaying enforcement of the Standard thus would likely cost many lives per day, in addition to large numbers of hospitalizations and other serious health effects. That is a confluence of harms of the highest order, as lower courts have recognized in other contexts. Cf. Swain v. Junior, 961 F.3d 1276, 1293 (11th Cir. 2020); Does 1-6 v. Mills, 16 F.4th 20, 32 (1st Cir. 2021).

C. Even if this Court were inclined to grant some interim relief, it should limit that relief to temporarily staying or enjoining only the portion of the ETS concerning a vaccination requirement. That limited relief would leave in place during the pendency of litigation the ETS's requirement that employers implement a policy that requires unvaccinated employees to mask and

test. Although vaccination is the most effective means of mitigating the grave danger of COVID-19 in the workplace, OSHA specifically found that masking and testing is "essential" for employees who remain unvaccinated to "reduce the risk" of employees' "transmit[ting]" the virus to other employees at work. 86 Fed. Reg. at 61,438-61,439.

In this preliminary posture, "[t]he purpose" of "interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward" and to "'mold [any] decree to meet the exigencies of the particular case.'" Trump v. IRAP, 137 S. Ct. 2080, 2087 (2017) (per curiam) (citation omitted); see Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("[T]he traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims.") (citation omitted). If the Court were inclined to grant some relief, those principles should guide the Court's "discretion and judgment." IRAP, 137 S. Ct. at 2087.

As discussed above, applicants' arguments focus heavily -- some almost exclusively -- on vaccination, to the point where many of them inaccurately refer to the ETS as a "vaccine mandate." And many of the merits arguments are applicable only to vaccination, not to masking and testing. In light of applicants' near-exclusive focus on vaccination, the extraordinary and ongoing threat to employee safety and health in the workplace, and the proven ability

of masking and testing to mitigate that threat, even if the Court were inclined to grant some relief, it should limit relief in the manner described above.

III. CERTIORARI BEFORE JUDGMENT IS UNWARRANTED

In the alternative, most of the applicants (e.g., NFIB Appl. 36; Ohio Appl. 35-36) ask the Court to treat their applications as petitions for writs of certiorari before judgment to address the petitions for review of the Standard in the first instance. But there is a serious question whether this Court would have jurisdiction to proceed in that manner. Except for a few narrow categories of cases in this Court's original jurisdiction, the Court may exercise only appellate jurisdiction. See U.S. Const. Art. III, § 2, Cl. 2. Although Congress has wide latitude to define this Court's appellate jurisdiction, see Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513 (1868), the jurisdiction exercised must be appellate in nature, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-176 (1803). In the ordinary civil or criminal case, certiorari before judgment under 28 U.S.C. 1254(1) is an exercise of this Court's appellate jurisdiction because the district court has entered an order amenable to appeal. Here, however, no court has rendered a ruling on the petitions for review of the ETS; instead, the court of appeals is exercising original jurisdiction to address those petitions in the first instance. See 28 U.S.C. 2112; 29 U.S.C. 655(f).

Accordingly, there is a serious question whether "certiorari before judgment" to review those petitions could properly be viewed as an exercise of this Court's appellate jurisdiction, given the absence of any judicial order or judgment disposing of the petitions for review of the Standard that could in turn be reviewed by this Court. Cf. Ortiz v. United States, 138 S. Ct. 2165, 2180 (2018). At a minimum, the Court would have to address that question about its jurisdiction at the threshold, see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998), which would complicate this Court's review.

CONCLUSION

The applications should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2021

No. 21A259

In the United States Supreme Court

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021

BETTEN CHEVROLET, INC.'S REPLY IN SUPPORT OF ITS EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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I. HISTORY, THE OSH ACT AND LIMITED FEDERAL POWERS ALL AFFIRM THAT OSHA DOES NOT HAVE THE AUTHORITY TO ADOPT THE ETS

The Government envisions a world in which an omnipotent federal overlord has the power and authority to regulate the smallest details of everyday American life, wielding a virtually unlimited general police power, all premised on the economic activity of employment –something that, for the vast majority of Americans, is a prerequisite of providing the necessities of life for themselves and their families.

To accept the Government's arguments in this case, as explained below, is to permit the federal government to regulate American's diets, their medications, and their medical procedures – at least if they want to be gainfully employed.

The Government offers nothing in the way of a limiting principle in terms of the scope of federal power in its Response in Opposition ("RIO") to the various Applications for Stay. Instead, it begins by giving an expansive reading to the language contained in 29 U.S.C. § 655(C)(1). That language provides that for an emergency temporary standard to be issued there must be: "(A) … employees … exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "(B) that [the] emergency standard is necessary to protect employees from such danger."

The Government reads "grave danger" to mean *anything* that potentially injures workers, no matter whether the same danger exists outside the workplace and without respect to the degree of risk; it reads "substances or agents" to include virtually *anything*; it reads "physically harmful" as being virtually *anything* that

could have any potential effect on a person, and it reads "new" to mean (at least) several years. (*See*, *e.g.* RIO). According to the Government, the term "employees" creates no great limiting principle either: if what OSHA considers a grave danger exists at all, and can in any manner be connected to work, that is sufficient to warrant a nationwide ETS under the Government's proposed standard. The Government creates this incredibly broad standard in a quest to shoehorn into the OSH Act a federal mandate to, as the Government puts it, "encourage" employees to receive a medical procedure that the Government believes pushes forward its public policy goals. (RIO at 53.)

The Government claims that its proposed expansive reading of the OSH Act would not lead to OSHA's ability to regulate a physically harmful substance, like fat or sugar in foods, in an attempt to curb the grave danger of obesity or heart disease in the workplace, going so far as to call the very proposition a "strawman." However, again the Government offers no limiting principle to its expansive reading of the ETS standard that would prohibit such a regulation. (RIO at 48). To the contrary, the interpretation of its powers it asks this Court to adopt would clearly give OSHA the authority to enact such a regulation. It is well established, for instance, that heart disease is the number one killer of Americans yearly, beating out COVID-19.[1] Likewise, studies have shown that obesity, excess body fat and excess sugar intake

[1] https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm?s_cid=mm7014e1_w (last visited 12/30/2021).

have a proven and direct correlation to heart disease.[2] Under the Government's theory, workers during lunch breaks frequently consume fatty foods or perhaps grab a soda, which are (i) substances or agents, (ii) that workers are exposed to on the job, (iii) which are physically harmful in that they are linked to increase incidence of (iv) the grave danger of heart disease. Based on this, the Government could issue an OSH ETS that might: (i) demand caloric intake regulations for American workers, enforced through their employers; (ii) place dietary restrictions on American workers, enforced through their employers; (iii) prohibit soda intake, again enforced through their employers. Contrary to the Government's claims, this is no strawman: such a regulation fit comfortably within its expansive reading of the ETS standard. The federal government has indeed had an ongoing campaign to limit sugary drink intake, explaining that "drinking sugar-sweetened beverages is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis."[3] Therefore, if the Government can justify the current ETS targeted at COVID-19, why could it not justify the foregoing limiting sugary drink intake by employees as a means to deter heart disease, which for years has been the number one killer of Americans, including Americans in the workforce, and killed two times as many people in 2020 as did COVID-19?[4]

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[2] https://my.clevelandclinic.org/health/articles/17308-obesity--heart-disease (last visited 12/30/2021); https://www.health.harvard.edu/heart-health/the-sweet-danger-of-sugar (last visited 12/30/2021).

[3] https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html.

[4] https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm?s_cid=mm7014e1_w (last visited 1/1/2022).

The Government's current desire to expand the ETS standard is nothing new, as it has tried to do so before. The current attempt is simply an example of the maxim oft attributed to Niccolò Machiavelli: "never waste an opportunity offered by a good crisis." When faced with past attempts to expand the ETS Standard, this Court, in interpreting the OSH Act, has never held that it has the scope or breadth that the Government suggests. Instead, this Court has enforced a limit on OSHA's power (one the Government here appears unwilling to acknowledge). Specifically:

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating **any standard**, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day -- such as driving a car or even breathing city air -- that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 642 (1980). Further, in interpreting the OSH Act, this Court observed that it was appropriate to avoid interpretations that "would in turn justify pervasive regulation limited only by the constraint of feasibility." *Id.* at 645. Likewise, the Court also observed that providing the expansive view that the Government offers here of the OSH Act, "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 [(1935)], and *Panama Refining Co. v. Ryan*, 293 U.S. 388 [(1935)]." *Id.*

at 646. Thus, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

In the RIO, the Government makes analogies that also are not appropriate, arguing that its unprecedented mandate here is akin to mandating safe toilets or safe water on the jobsite. (RIO at 48). But these things, like the other analogies it draws to fire suppressants, electrical safety, ingress and egress, etc. (RIO at 46-47) are all distinguishable. They all deal with the physical plant and improvements at the worksite – things the employer can physically do or improve on the job site, to make conditions safer for employees. They do not deal with decisions made by individual employees outside of the workplace; such as whether an employee has undertaken a medical procedure (almost certainly off the job) to prevent an illness that is everywhere in society, or if the employee declined to eat at the local fast-food restaurant to reduce the chances of heart disease. Making such decisions a condition of continued employment is little more than an end run around limitations placed on the Federal government by the structure of our federal system.

The Government claims that the "OSHA standards routinely require the use of protective controls even if employees would prefer not to be subject to particular health or safety measures." (RIO at 52.) But the Government never cites an example where OSHA required an employee to obtain a medical procedure irrespective of whether the employee consents. Nor has the Government cited an example of where OSHA required employees to undertake a medical procedure that could have serious side effects as a condition of employment. Nor has it cited an example where OSHA

required an employee to take, in this case injected with, a product whose manufacturer could not be sued for harm. (85 FR 15198.) There is simply no comparison between the other safety measures that OSHA has implemented over the years and its current attempt to require an invasive medical procedure that has known serious risks, and who's manufacturer is immune from liability.

Once before, under the guise of a national emergency, the executive branch claimed it needed to control the country's steel mills as a "necessary" measure "to avert a national catastrophe." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). There, as here, this Court held that the executive cannot be permitted to act alone without a clear mandate from Congress to do so. *Id.* at 588-89. Here, Congress has chosen not to act. With a two-year-old pandemic and vaccine available for more than a year, Congress has not created a national vaccine mandate (assuming it could even do so, which it likely could not), and now the Executive cannot usurp for itself the authority to create such a mandate by twisting the ETS standard into something it was never intended to be.

The Government attempts to sidestep this issue by claiming that vaccination requirements are common, but all the authority it cites to is derived from state power, not the powers of the National Government. For example, the Government's citation to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) is not helpful. That case involved a vaccination mandate on individuals from the legal authority of the States, not the National Government. Similarly, the Government cites Judge Easterbrook in *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) for the

proposition that vaccine mandates "have been common in this nation." (RIO at 52.) But, the *Klaassen* decision addressed a *state* university mandate, not a federal mandate. The fact that some private employers have chosen to enact vaccine requirements cannot help the Government either, as this Court has never held that just because an employer can regulate its employees' behavior so too can the government.

The OSH Act and its narrow exception for emergency rulemaking both apply only to dangers arising out of "work or work-related activities," *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449, 239 U.S. App. D.C. 222 (D.C. Cir. 1984), and not all hazards working people may face in their daily lives. That explains why the D.C. Circuit found another medical procedure – the sterilization of women who otherwise would encounter chemicals at work dangerous to the unborn – to be beyond the Act's scope. *Id.*; *see also Steel Joist Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1167, 351 U.S. App. D.C. 162 (D.C. Cir. 2002) (noting that "the Act authorizes OSHA to regulate only the employer's conduct at the worksite"). "[F]or coverage under the Act to be properly extended to a particular area," seconds the Eleventh Circuit, "the conditions to be regulated must fairly be considered working conditions, the safety and health hazards to be remedied occupational, and the injuries to be avoided work-related." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

The Government claims that regulating infectious diseases through vaccines is not as unusual as the applicants maintain, pointing to a bloodborne pathogen

regulation from 1991. See 29 C.F.R. § 1910.1030. However, that regulation is readily distinguishable. As opposed to a vaccine mandate (or a vaccine "encouragement" as the Government prefers to call its mandate), the 1991 regulation only required employers to make the hepatitis B vaccine "available" to employees "who have occupational exposure" to bloodborne pathogens at no cost to the employee and at a reasonable time and place. *Id.* § 1910.1030(f)(1)(i)-(ii). That mandate narrowly targeted "health care workers" with regard to certain "viruses, particularly those causing Hepatitis B and AIDS, that can be transmitted in the blood of patients." *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 824 (7th Cir. 1993). Unlike the situation here, the bloodborne pathogen regulation did not regulate all American businesses, no matter the nature of the industry, product, or service, so long as 100 employees or more work there. It was "[p]romulgated after a protracted notice-and-comment rulemaking proceeding." *Id.* It did not sidestep that process. And it appreciated the personal nature of the decision whether to get a vaccine—that a truly voluntary program, in OSHA's words, would "foster greater employee cooperation and trust in the system." 56 Fed. Reg. 64,004, 64,155 (Dec. 6, 1991). It did not penalize, pressure or coerce unvaccinated employees by imposing significant costs and burdens on them alone, including masking and testing. Thus, instead of helping the Government's cause, a comparison between the 1991 rule and the 2021 rule undermines it.

The Government also points to a statute applicable to the Secretary of Health and Human Services to suggest that Congress contemplated immunization when delegating its authority to the Secretary of Labor. In a section on "Research and

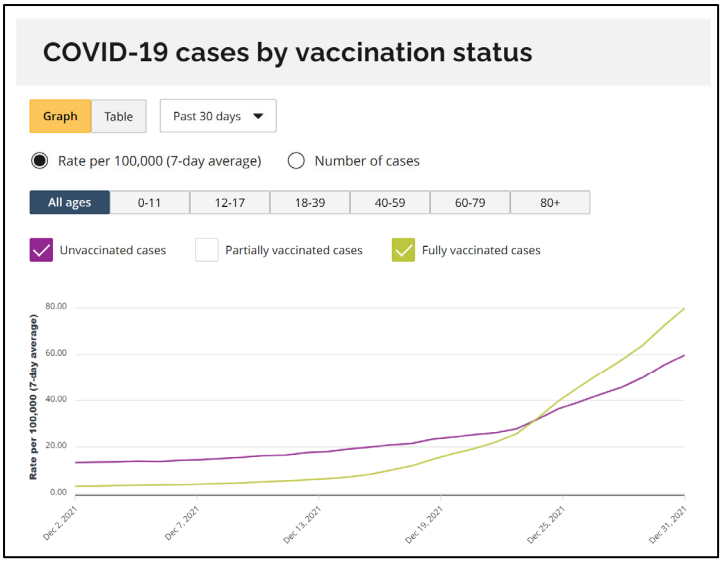
Related Activities," Congress gives the Secretary of Health and Human Services authority to establish programs to examine and test the workplace to "determin[e] the incidence of occupational illnesses." 29 U.S.C. § 669(a)(5). The authorization comes with a caveat: "Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." *Id.* But this language, and its context, hardly supports the Government's position. It involves a single reference to immunizations, one that explains when they are prohibited. It comes from a different part of the statute and concerns the Secretary of Health and Human Services, not OSHA and not the Secretary of Labor. This is plainly not a "clear statement" of congressional authority that OSHA may impose a vaccinate-or-test mandate on the American workforce as it is at best silent with regard to OSHA's authority, and if anything reflects a lack of authority since OSHA's mandate does not even include the extremely limited authority given to the Secretary of HHS with regard to immunizations.

II. GOVERNMENT STATEMENTS AND UNASSAILABLE DATA REFUTE THE PURPORTED BENEFITS OF THE ETS, AND OSHA HAS TAKEN DELIBERATE ACTIONS TO SUPPRESS DOWNSIDES OF THE ETS

Beyond these problems with the lack of authority for the current ETS, the Government's argument in support of the ETS rests on another fundamental flaw: the idea that vaccines will reduce transmission of the COVID-19 virus. The Government's hyperbolic opening concludes by stating that "OSHA issued an … ETS

… to address the grave danger posed by the transmission of SARS-CoV-2 in the workplace." (RIO at 2.) Claiming that a vaccination mandate is intended to address "transmission of SARS-CoV-2 in the workplace" ignores the fact that the current vaccines do not prevent transmission. As the Director of the Centers for Disease Control and Prevention ("CDC") made crystal clear, with the rise of Delta and other variants "what they [vaccines] can't do anymore is prevent transmission." (Betten Petitioner's Emergency Application for an Administrative Stay pp. 31-35, "Betten Brief"). That is confirmed by every single large cohort study looking at this issue and cited in the Betten Petitioner's opening brief, none of which the Government addressed in its RIO. (*Id.*)

Further bringing this fact into sharp focus is the most recent official government data from Canada, which now shows that vaccinated individuals are *more likely* to be infected with the COVID-19 virus than unvaccinated individuals. The CDC has not published recent data on infection rates between vaccinated and unvaccinated individuals, and hence the need to rely on our neighbor to the north. For example, the official government data from Ontario, Canada, establishes that as of December 31, 2021, there were 80 Covid infections per 100,000 fully vaccinated individuals versus only 60 Covid infections per 100,000 unvaccinated individuals:



https://covid-19.ontario.ca/data. Similarly, in British Columbia, Canada, as of December 29, 2021, there are now 58 Covid infections per 100,000 double-vaccinated individuals versus only 40 Covid infections per 100,000 unvaccinated individuals.[5] The fact that the vaccinated spread the virus alone undercuts the premise of the ETS but if the vaccinated, as reflected by this data, are the primary drivers of the virus, it renders the ETS completely illogical.

Moreover, since vaccinated individuals can transmit the virus, and are more likely to be asymptomatic – since according to the government, vaccines reduce symptoms – wouldn't there be a *greater* need for the government to impose a mask and test mandate on the vaccinated? This simple question belies that the ETS is about a federal policy of raising the overall national vaccination rate rather than, as claimed in the ETS, a workplace safety driven measure.

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[5] *See* https://public.tableau.com/app/profile/bccdc/viz/BCCDCCOVID-19SurveillanceDashboard/Introduction (last visited 01/02/2022).

If the ETS was about workplace safety and not a "vaccinate everyone" policy objective, and taking the government at its word that masking and testing reduce the spread, then OSHA would require vaccinated individuals, who are undisputedly a driver (if not the current primary driver) in spreading the virus to also wear masks and test weekly. As the Government insists, "'fifteen minutes' of exposure is more than sufficient for transmission," "employees who do not work at home, alone or outdoors face a grave danger of workplace transmission regardless of the particulars of the workplace," and the CDC has made clear that vaccination reduces symptoms but does not prevent transmission. (Betten Brief pp. 31-35). But instead of enacting mitigation measures on the vaccinated, measures like the ETS lead those individuals to believe they cannot spread the virus. This may explain why, according to the Canadian data, the vaccinated, who believe they cannot spread the virus, are now the primary drivers for spreading the virus.

As for natural immunity, the Government concedes, as it must, that such immunity provides protection, but it claims that not all those who were previously infected may be immune because "'it is difficult to tell, on an individual level, which individuals' have attained that level of protection." (p.38 (quoting 86 Fed. Reg. at 61,421).) First, cohort studies of millions of individuals consistently find that previously infected individuals have a reinfection rate that is effectively negligible (Betten Brief pp. 39-40), while breakthrough cases after vaccination are common

(Betten Brief pp. 33, 40).[6] However, even putting that aside and taking the government's argument at face value, when it comes to people who are vaccinated, *it is also unknown which vaccinated individuals will have a breakthrough infection*. Hence, the Government's logic behind its decision to force naturally immune individuals to mask and test, but not vaccinated individuals, makes no sense and supports the conclusion that the current ETS is about achieving its vaccination coverage policy goal (*i.e.*, full vaccination of the entire population, under the threat of loss of employment for millions of Americans), not about addressing a grave danger posed by a new hazard in the workplace.

The data on death rates throughout the Government's brief is also not accurate. (*E.g.,* RIO at 39-40.) There is always a degree of uncertainty as to whether someone died with or from COVID-19, just as there is uncertainty as to the cause of death when someone dies shortly after COVID-19 vaccination.[7] There is, however, a death figure that is not subject to this uncertainty and that is the all-cause-mortality figure: the total number of deaths irrespective of cause. As most adults in the United States became fully vaccinated, the all-cause mortality rate should have declined if the Government's claims about vaccination in the RIO are correct. But that is not what has happened. The all-cause mortality figure in the United States reveals that

[6] It is also noteworthy that in a formal petition exchange between the CDC and a non-profit group that advocates for informed consent, the CDC was not able to provide any study which refuted the over 50 studies finding that infection-induced immunity was more durable, robust, and effective than vaccine-induced immunity. *See* https://www.icandecide.org/wp-content/uploads/2021/12/Reply-to-CDC-Re-Natural-Immunity-v-Vaccine-Immunity.pdf (last visited 01/02/2022).

[7] *See* https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e2.htm#contribAff ("Among 378,048 death certificates listing U07.1 [the ICD-10 code for COVID-19], a total of 357,133 (94.5%) had at least one other ICD-10 code") (last visited 01/02/2022).

once a significant percentage of the American adult population was fully vaccinated, the total deaths in the United States have not declined. The following table provides the CDC's weekly total deaths in the United States for 2019, 2020, and 2021, starting on week 30 when at least 60% of American adults were fully vaccinated; it reflects that despite this high and increasing level of vaccination, total deaths per week did not return to the levels seen before the pandemic in 2019:

	Week 43	Week 42	Week 41	Week 40	Week 39	Week 38	Week 37	Week 36	Week 35	Week 34	Week 33	Week 32	Week 31	Week 30
2019 - Deaths	54,049	54,338	53,090	52,564	52,757	51,757	51,633	51,836	51,162	51,022	51,023	51,747	51,410	51,662
2020 - Deaths	62,068	60,480	61,649	59,685	60,486	59,619	59,529	60,110	60,964	62,423	63,496	63,559	64,109	64,112
2021 - Deaths	63,312	64,243	64,738	66,668	69,213	70,557	71,802	72,113	72,136	70,854	68,887	65,942	62,682	59,828
%18+ Fully Vaccinated	69.5%	68.9%	68.4%	67.8%	67.1%	66.4%	65.7%	64.8%	64.0%	63.1%	62.3%	61.6%	61.0%	60.4%

See https://www.cdc.gov/flu/weekly/weeklyarchives2021-2022/data/NCHSData50.csv and https://data.cdc.gov/Vaccinations/COVID-19-Vaccinations-in-the-United-States-Jurisdi/unsk-b7fc (data more recent than Week 43 of 2021 are incomplete). Hence, according to CDC data, even after over 60% of adults were fully vaccinated in the United States in 2021, the overall mortality did not return to the level seen in 2019 (nor even below the level seen in 2020 when the pandemic was ongoing and there were no vaccines).

The data in the Government's brief regarding COVID cases as between the vaccinated and unvaccinated are also unreliable because those figures can be skewed by the availability of testing, the accuracy of test results, and by increasing requirements on the unvaccinated to be tested.

OSHA additionally walked back guidance that would have required employers to report adverse events from the COVID-19 vaccines in the OSHA recordkeeping log.

On April 20, 2021, OSHA issued new guidance that required employers who mandate COVID-19 vaccines to report an employee's adverse reaction in the OSHA recordkeeping log if the adverse reaction met certain criteria. But just one month later, on May 21, 2021, OSHA retracted this guidance and no longer requires employers to report adverse reactions from the COVID-19 vaccine, even when an employer requires the vaccine as a condition of employment.[8] This requirement would have provided necessary transparency, either to confirm or dispel fears of adverse events, but, as OSHA indicated, they did not want to "discourage" or "disincentivize" employees from receiving a vaccine based on fully informed consent, including adverse event data. This same action also has the effect of leaving OSHA unable to fully assess the benefits and disadvantages of its current ETS, because it has deliberately turned its head the other way when it comes to disadvantages and costs.

CONCLUSION

The Court should stay the ETS pending review, grant certiorari before judgment, or both.

Dated: January 3, 2022

[8] https://www.osha.gov/coronavirus/safework (last visited 1/2/2022) (at #9: "Note on recording adverse reactions to vaccines: OSHA, like many other federal agencies, is working diligently to encourage COVID-19 vaccinations. OSHA does not want to give any suggestion of discouraging workers from receiving COVID-19 vaccination or to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR part 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination at least through May 2022. OSHA will reevaluate the agency's position at that time to determine the best course of action moving forward. Individuals may choose to submit adverse reactions to the federal Vaccine Adverse Event Reporting System.").

Respectfully submitted,

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