No. 21-3494

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATES OF MISSOURI, ARIZONA, MONTANA, NEBRASKA, ARKANSAS, IOWA, NORTH DAKOTA, SOUTH DAKOTA, ALASKA, NEW HAMPSHIRE, WYOMING, AAI, INC., DOOLITTLE TRAILER MANUFACTURING, INC., CHRISTIAN EMPLOYERS ALLIANCE, SIOUX FALLS CATHOLIC SCHOOLS D/B/A BISHOP O'GORMAN CATHOLIC SCHOOLS, AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION, INC.,
Petitioners,

v.

JOSEPH R. BIDEN, JR., *et al*.,
Respondents.

MOTION FOR STAY OF EMERGENCY TEMPORARY STANDARD PENDING JUDICIAL REVIEW AND FOR TEMPORARY ADMINISTRATIVE STAY

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INTRODUCTION

Petitioners challenge OSHA's "Emergency Temporary Standard" that imposes a vaccine mandate on two-thirds of the U.S. workforce at a single stroke. OSHA lacks statutory authority to issue this mandate, and its decision to do so is unconstitutional. And OSHA studiously disregarded critical aspects of the problem. If not stayed, this ETS will cause economic pain and disruption to millions of working families. The Court should stay this unlawful action.

FACTUAL BACKGROUND

On September 9, 2021, President Biden announced his *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, *at* https://www.whitehouse.gov/covidplan/ (the "Plan"). The Plan states that "[t]he President's plan will reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace." *Id.* The Plan announced that "[t]he Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this

requirement." *Id.*

The decision to implement this standard came from the White House, and OSHA had little prior notice. On September 10, 2021, the New York Times reported that OSHA "only learned about plans for the standard during roughly the past week, so current OSHA officials did not have a chance to prepare extensively before Mr. Biden's announcement." Michael D. Shear and Noam Scheiber, *Biden Tests Limits of Presidential Power in Pushing Vaccinations*, N.Y. TIMES (Sept. 10, 2021), *at* https://www.nytimes.com/2021/09/10/us/politics/biden-vaccines.html. "'The White House is asking OSHA how fast they can do it, and OSHA said, "Who the hell knows?"' said Jordan Barab, a deputy director of the agency under Mr. Obama. 'They only had a week's notice.'" *Id.*

Two months later, on November 5, 2021, OSHA published an "emergency temporary standard" (ETS). 86 Fed. Reg. 61,402 *et seq.* (Attachment A to the Petition for Review). The ETS adopts the same policy that the President dictated to OSHA in advance: it requires employers with 100 or more employees to require vaccination, or else require unvaccinated workers to undergo intrusive weekly testing (at their own expense). *See id.*

On November 5, 2021, the undersigned coalition of States and private employers ("Petitioners") filed their Petition for Judicial Review in this Court, challenging the validity of OSHA's ETS. The same day, Petitioners filed this motion

for stay of the standard pending judicial review. 29 U.S.C. § 655(f).

STANDARD OF REVIEW

Section 655(f) provides that "a stay of the [emergency temporary] standard" may be "ordered by the court." 29 U.S.C. 655(f). In considering whether to stay an ETS, courts consider: "(1) a substantial likelihood of success on the merits; (2) danger of irreparable harm if the court denies interim relief; (3) that other parties will not be harmed substantially if the court grants interim relief; and (4) that interim relief will not harm the public interest." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 418 & n.4 (5th Cir. 1984).

The Court may grant a temporary administrative stay "to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal." *Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011); *see also Taylor Diving*, 537 F.2d at 820 n.4. The Court should grant one here.

ARGUMENT

Section 655(f) provides that "[a]ny person who may be adversely affected by a standard issued under this section may … file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard." 29 U.S.C. § 655(f).

Petitioners here are adversely affected by the ETS. Petitioners include States and private employers that employ more than 100 employees. The private employers are "adversely affected" by the ETS. *See* Exs. H-L. The States face sovereign and pocketbook injuries from the ETS, and each State sues as *parens patriae* on behalf of the "substantial segment of its population" that is adversely affected by the ETS. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607-08 (1982). *See* Exs. A-G. In addition, several Petitioners are "State plan States" that are directly affected under the OSH Act, *see* https://www.osha.gov/stateplans/. *See* Exs. D, E, G.

I. The ETS Is Not Supported by Substantial Evidence in the Record.

Section 655(c) authorizes OSHA to issue an ETS only if it "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 such emergency standard is *necessary* to protect employees from such danger." 29 U.S.C. § 655(c)(1) (emphases added). "The key to the issuance of an emergency standard is the necessity to protect employees from a grave danger." *Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Labor*, 489 F.2d 120, 124 (5th Cir. 1974).

The Court reviews OSHA's determinations to see if they are "supported by substantial evidence in the record considered as a whole." 29 U.S.C § 655(f). The "substantial evidence" standard is more "rigorous" than the APA's arbitrary-and-

capricious standard. *Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Labor*, 489 F.2d 120, 127 (5th Cir. 1974). In reviewing an ETS, the Court "must take a 'harder look' at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 421 (5th Cir. 1984).

Courts have subjected OSHA's emergency temporary standards to particularly close scrutiny, because "[e]xtraordinary power is delivered to the Secretary under the emergency provisions of the Occupational Safety and Health Act. That power should be delicately exercised…." *Florida Peach Growers*, 489 F.2d at 129–30; *see also Asbestos Information Ass'n*, 727 F.2d at 422. Here, OSHA's exercise of that power was unlawful.

A. The ETS is a blatant *post hoc* rationalization for a standard dictated to the agency in advance.

First, the ETS is unlawful because OSHA did not first identify a "grave danger" to employees and then devise a standard "necessary" to protect them, as the statute requires. 29 U.S.C. § 655(c)(1). Instead, the White House dictated the standard to OSHA in advance, and then OSHA reverse-engineered an elaborate justification for that standard. The entire ETS is thus a quintessential "*post hoc* rationalization"—a justification invented afterward for a predetermined conclusion.

Here, "*post hoc* rationalizations cannot be accepted as basis for our review." *Asbestos Information*, 727 F.2d at 422; *Dry Color Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d at 104 n.8 (same); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907, 1909 (2020) (holding that it is a "foundational principle of administrative law" to reject an agency's "impermissible *post hoc* rationalizations"). An ETS is inherently suspect if "[n]o new data or discovery leads OSHA to invoke its extraordinary ETS powers." *Asbestos Information*, 727 F.2d at 418. Where pretextual considerations motivate the agency's action, the regulation cannot stand. *Florida Peach Growers*, 489 F.2d at 125-26; *Asbestos Information*, 727 F.2d at 426.

"OSHA should, of course, offer some explanation of its timing in promulgating an ETS, especially when, as here … it has known of the serious health risk the regulated substance poses," yet took no action until the President's order. *Asbestos Information*, 727 F.2d at 423. Indeed, OSHA's attempt to provide such an explanation, *see* 86 Fed. Reg. 61,429-61,432, somehow fails to mention the President's order as an "Event[] Leading to the ETS." *Id.* OSHA's justification is a "*post hoc* rationalization" in its entirety. *Asbestos Information*, 727 F.2d at 422.

B. The ETS overlooks obvious distinctions and fails to consider important aspects of the problem.

In addition, the ETS fails overlooks "obvious distinctions … that make certain regulations that are appropriate in one category of cases entirely unnecessary in another," *Dry Color*, 486 F.2d at 105, and because it "fail[s] to consider important

aspects of the problem." *Regents of the Univ. of Calif.*, 140 S. Ct. at 1910 (quoting *Motor Vehicle Manufacturers' Assn.*, 463 U.S. at 43).

1. No substantial evidence supports the ETS's finding of "grave danger" to workers with natural immunity from prior COVID-19 infection.

OSHA estimates that its mandate applies to 31.7 million unvaccinated workers. 86 Fed. Reg. 61,435. But it also estimates that at least 45 million Americans have natural immunity to COVID-19 from prior infection. *Id.* at 61,409. Thus, millions of employees subject to OSHA's mandate already have natural immunity to COVID-19. But the ETS does not exempt them; instead, OSHA finds a "grave danger" to unvaccinated workers with natural immunity—*i.e.*, those "previously infected with SARS-CoV-2." *See* 86 Fed. Reg. 61,421.

OSHA's finding of grave danger is insupportable by its own terms, because OSHA only finds (and only cites evidence) that the "previously infected" have a risk of "exposure to, and reinfection from, SARS-CoV-2," and only determines that previously infected are at higher risk in the aggregate than the vaccinated. *Id.* In its discussion, OSHA never finds that the previously infected on the whole face any "grave danger" of *severe health outcomes* from reinfection. *See id.* at 61,421-61,424. This contrasts sharply with its finding of "grave danger" to the unvaccinated without natural immunity, where OSHA openly states that "[t]his finding of grave

danger is based on the *severe health consequences* associated with exposure…" *Id.* at 61,403 (emphasis added).

OSHA's failure to find a grave danger of "severe health consequences," *id.*, to those with natural immunity is unsurprising, because "[b]oth vaccine-mediated immunity and natural immunity after recovery from COVID infection provide extensive protection against severe disease from subsequent SARS-CoV-2 infection." Ex. M, Bhattacharya Decl. ¶ 8. "Multiple extensive, peer-reviewed studies comparing natural and vaccine immunity … overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna)." *Id.* ¶ 11. Though OSHA cites evidence of exposure and reinfection among the previously infected (which the vaccinated also experience, as OSHA concedes), *see* 86 Fed. Reg. 61,421-61,424, OSHA cites no substantial evidence of any "grave risk" of *severe health outcomes* to those with natural immunity. *Dry Color*, 486 F.2d at 104 (holding that "some possibility" of a severe health outcome is not a "grave danger"). Thus, no "substantial evidence in the record considered as a whole," 28 U.S.C. § 655(f), supports OSHA's determination, and its analysis overlooks an "obvious distinction" that underlies the entire ETS.

2. OSHA fails to give meaningful consideration to the threat of mass resignations and layoffs across all sectors of the American economy.

Another "important aspect of the problem," *Regents*, 140 S. Ct. at 1910—indeed, the elephant in the room—is the prospect of mass resignations and layoffs across all sectors of the American economy as a result of this mandate. OSHA estimates that its mandate affects "two-thirds of the nation's private-sector workforce," 86 Fed. Reg. 61.512, including 31.7 million unvaccinated workers, *id.* at 61,435. Just last week, the Kaiser Family Foundation published a wide-scale survey of workers in which 37 percent of unvaccinated employees said that they would leave their jobs rather than complying with a mandate that required vaccination or weekly testing (*i.e.*, OSHA's mandate). Chris Isidore, et al., *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN.com (Oct. 28, 2021), https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html. If those numbers hold, that means OSHA's mandate would result in *11.28 million* American workers losing their jobs.

This number is staggering, and it foreshadows enormous pain and dislocation for millions of working families, widespread staffing shortages, small businesses in crisis, economic disruption, supply-chain chaos, and other problems. Yet OSHA's ETS gives scant consideration, at best, to these glaring risks of economic turmoil. Instead, OSHA paints a rosy picture for employers subject to the mandate, arguing that employers will "enjoy advantages" from the mandate—especially if they take the harsher option of mandating vaccines for all unvaccinated workers. 86 Fed. Reg.

61,437. But, under that harsher option, the Kaiser Family survey projects that 72 percent of unvaccinated workers would lose their jobs—which would result in *22.8 million* people losing their jobs, inflicting even more economic turmoil and hardship on working families. Isidore, *supra*. Suffice to say, the real-world anticipation of actual employers contrasts sharply with OSHA's sunny optimism[1] on this point. *See, e.g.,* Exs. H-L.

3. OSHA finds no "grave danger" to vaccinated workers, so its policy solely protects unvaccinated workers from risks they have voluntarily assumed.

President Biden aptly summarized the purpose of his policy: "The bottom line: We're going to protect ***vaccinated*** workers from unvaccinated co-workers." Joseph

[1] OSHA's only response to these risks is to argue that the survey data overestimates likely employee departures, and to assert (implausibly) that "it is very unlikely that this potential increase in employee turnover will exceed the ranges that industries have experienced over time." 86 Fed. Reg. 61,474. OSHA further asserts, optimistically, that "the number of employees who actually leave an employer is much lower than the number who claimed they might: 1% to 3% or less actually leave, compared to the 48-50% who claimed they would." *Id.* at 61,475. OSHA's analysis on this point, however, is facially unconvincing. First, OSHA never considers the costs to *employees* that are forced to leave their job by the mandate, considering "turnover" as strictly an employer-side problem. But ordinary workers are the ones harmed by this, because they will lose their jobs—workers who are disproportionately poor, and who may be ineligible for unemployment. Second, even from an employer-cost perspective, this is not ordinary employee "turnover" issue because the presence of the OSHA mandate necessarily closes off huge sections of the economy to individual employees who refuse to get the vaccine. Even if this is "only" 1-3% of the workforce—and it is almost certainly much more—that is potentially almost a million workers pushed out of the workforce entirely.

Biden, Remarks at the White House (Sept. 9, 2021)[2] ("Biden Speech") (emphasis added). But this statement makes no sense as a matter of science. "[V]accinated workers," *id.*, face no significant threat of severe health outcomes from COVID-19 infection, because the vaccines provide very robust protection against hospitalization and death. *See, e.g.,* 86 Fed. Reg. 61,409, 61,417. OSHA had no plausible basis to find a "grave danger" to vaccinated workers. *Dry Color*, 486 F.2d at 104.

OSHA, therefore, beat a strategic retreat from the President's stated rationale. OSHA's ETS repeatedly emphasizes that it is *not* finding a "grave danger" from COVID-19 to *vaccinated* workers. *See, e.g.,* 86 Fed. Reg. 61,417, 61,419 ("Fully vaccinated workers are not included in this grave danger finding…."). Instead, OSHA finds a "grave danger" solely to *unvaccinated* workers. *Id.*

This fundamental shift in rationale undermines the entire justification for the ETS. Vaccines have been free and available for many months, yet millions of workers—for reasons of their own—have chosen not to receive them. OSHA's mandate thus seeks to "protect" unvaccinated workers from *their own decision to forego vaccination*. The ETS, therefore, is fundamentally not about workplace safety, because all these unvaccinated workers have voluntarily assumed the risks that OSHA predicts.

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[2] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/

Respecting the personal freedom and voluntary assumption of risks by millions of people is an "important aspect of the problem." *Regents*, 140 S. Ct. 1910. But OSHA fails to give any meaningful consideration to this important issue. Instead, OSHA speaks dismissively of Americans' fundamental preference for freedom and personal responsibility. *See* 86 Fed. Reg. 61,444 (dismissing the fact that many Americans "resist curbs on personal freedoms" as irrational "psychological resistance"). OSHA's federal bureaucrats may view America's love of "personal freedom[]" as mere "psychological resistance," *id.*, but millions of ordinary Americans do not.

4. The ETS gives no consideration to the religious-autonomy doctrine for religious employers.

The ETS includes no exemption for religious employers. This omission demonstrates that OSHA failed to consider less restrictive "alternative kinds of regulations," as it was required to do. *Dry Color*, 486 F.2d at 107. The ETS requires religious employers to remove from the workplace or take adverse action against employees—including ministerial employees—who decline vaccination or weekly testing. *See* Exs. K-L. This violates the religious-autonomy doctrine for religious employers, and it imposes "interference by secular authorities" in their hiring decisions, including of ministers. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (rejecting "secular control and

manipulation" of religious employers). This is another critical aspect of the problem that OSHA was required to consider. *Cf. Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). OSHA did not.

5. OSHA's long delay in promulgating the ETS undercuts its finding of "grave danger."

In addition, the long delay before imposing OSHA's "emergency" temporary standard undercuts OSHA's findings of "grave danger" and "necessity." As OSHA acknowledges, it refused to impose COVID-19 workplace requirements by ETS for over a year and a half, including during the eight months since vaccines were available. *See* 86 Fed. Reg. 61,429-61,431. OSHA only imposed this policy after it was instructed by the President to do so. And OSHA waited almost two months to issue its standard after the President directed it to do so. OSHA has also delayed implementing the ETS for another two months, until January 4. These repeated delays undercut OSHA's belated claim for extraordinary "emergency" powers here. *See Florida Peach Growers*, 489 F.2d at 125-26.

In sum, "Congress intended a carefully restricted use of the emergency temporary standard." *Florida Peach Growers*, 489 F.3d at 130 n.16. The substantial-evidence test was designed to prevent "arbitrary burdens imposed by a massive federal bureaucracy." *Id.* at 128. That is exactly what has occurred here.

II. The ETS Exceeds OSHA's Statutory Authority and Violates the Constitution and Principles of Federalism.

The Supreme Court has recognized that policies on compulsory vaccination lie within the police powers of the States, and that "[t]hey are matters that do not ordinarily concern the national government." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). The ETS departs radically from this principle by purporting to impose a vaccine mandate on two-thirds of the U.S. workforce. In doing so, it exceeds OSHA's statutory authority, exceeds Congress's enumerated powers, violates the major-questions and non-delegation doctrines, and tramples on the States' traditional powers expressly reserved by the Tenth Amendment. Indeed, the "sheer scope of the … claimed authority … counsel[s] against" OSHA's assertion of statutory authority here. *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

A. Section 655 Does Not Authorize the Vaccine Mandate.

"OSHA's authority is limited to ameliorating conditions that exist in the workplace." *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442 (4th Cir. 1985) (en banc). This limitation is reflected in the OSH Act's plain language, which authorizes regulations only to address workplace-specific risks. Because the ETS seeks to ameliorate harms that are not workplace-related and instead addresses universal risks ubiquitous in society, it exceeds OSHA's authority.

The OSH Act's plain text makes clear that it focuses on hazards arising out of the workplace and on governing workplace conduct. For example, the key

Congressional finding underlying the OSH Act is that "personal injuries and illnesses *arising out of work situations* impose a substantial burden." 29 U.S.C. § 651(a) (emphasis added). Similarly, the Act declares its purpose to be to "assure … safe and healthful *working conditions*." 29 U.S.C. § 651(b) (emphasis added). And, most notably, OSHA is limited to imposing "occupational safety and health standard[s]," which are explicitly confined to regulations that are "reasonably necessary or appropriate to provide *safe or healthful employment and places of employment*." 29 U.S.C. § 652(8) (emphasis added).

Thus, OSHA's statutory authority is limited to ameliorating work-related hazards and must be limited to regulating *bona fide* working conditions. Indeed, "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, 1331-32 (11th Cir. 1983) (emphases added) (holding that "[m]igrant housing may well be unsafe and unhealthy, conditions that we deplore," but lie outside OSHA's authority). OSHA admits that "COVID-19 is not a uniquely work-related hazard," and "not exclusively an occupational disease." 86 Fed. Reg. 61,407, 61,411. Given the virus's ubiquity, these admissions "test[] the limits of understatement." *Gonzales v. Oregon*, 546 U.S. 243, 286 (2006) (Scalia, J., dissenting).

COVID-19 is not uniquely—or even primarily—a work-related risk. Indeed, the virus is ubiquitous and poses risks *throughout society*, including the workplace—like virtually all other places in the U.S. The ETS regulates workers' private medical procedures to address risks encountered largely outside the workplace—or at least equally within and without the workplace. The ETS is not an adoption of "practices, means, methods, operations, or processes" at the workplace. 29 U.S.C. § 652(8).

Though worker vaccination rates may tangentially *affect* working conditions, this does not mean that the Vaccine Mandate qualifies as an "*occupational* safety and health standard" under Section 652(8). *Id.* On such an expansive understanding, OSHA could regulate anything which affects or improves working conditions, no matter how remote from the workplace—such as requiring workers to eat more broccoli, or mandating that vaccinated workers receive a higher minimum wage than the unvaccinated. But that is not the law; OSHA's mandate is more limited. And as courts have recognized, OSHA cannot exceed its mandate even for the ostensible benefit of workers. *See, e.g.*, *Frank Diehl Farms*, 696 F.2d at 1391; *Taylor Diving & Salvage Co. v. U. S. Dep't of Lab.*, 599 F.2d 622, 625 (5th Cir. 1979). Accordingly, even when regulating contagious disease in the past, OSHA has not attempted to mandate vaccination. *See, e.g.*, *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 825 (7th Cir. 1993) (upholding bloodborne pathogens rule, but observing that it did not require vaccination); Occupational Exposure to COVID-19; Emergency

Temporary Standard, 86 Fed. Reg. 32,376 (Jun. 21, 2021) (encouraging, but not requiring, vaccination among healthcare workers).

In the ETS, OSHA repeatedly complains that it would be too "challenging" and "complicated" for OSHA to adopt a "comprehensive and multi-layered standard" that would actually address workplace safety in an industry-specific fashion. *See, e.g.,* 86 Fed. Reg. 61,434; *id.* at 61,437-38. Instead, OSHA opts to regulate two-thirds of the entire U.S. workforce at one stroke. But "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. The statute was not designed to make it convenient for OSHA to dictate economy-wide public health policies; rather it was designed to protect against "arbitrary burdens imposed by a massive federal bureaucracy." *Florida Peach Growers*, 489 F.3d at 128.

"It would be one thing if Congress had specifically authorized the action that [OSHA has] taken. But that has not happened." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

B. If Adopted, OSHA's Expansive Interpretation of Its Own Authority Would Be Unconstitutional on Numerous Grounds.

For similar reasons, if OSHA's sweeping interpretation of its own authority were upheld, the statute would be unconstitutional on numerous grounds. The Court should follow the Supreme Court's clear-statement rules to prevent this outcome.

The phrase "occupational safety and health standard" in 29 U.S.C. § 652(8), fails to provide any clear mandate for OSHA's extraordinary action here.

First, OSHA's interpretation violates the Supreme Court's major-questions doctrine. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). For "a question of deep 'economic and political significance' … had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 576 U.S. 473, 485 (2015). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, ... [courts] typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). So also here. The OSH Act's plain language, focused on workplace safety, does not confer authority on OSHA to federalize public-health policies. The statute is focused on workplace hazards and work conditions. The ETS governs neither. Instead, it advances the President's overarching policy goal to increase the number of vaccinated Americans by whatever form of government compulsion is available. *See* Biden Speech, *supra*.

Second, OSHA's interpretation of its own authority, if upheld, would violate nondelegation requirements. The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. *See Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). Congress must provide

an "intelligible principle to guide the delegee's use of discretion" in the exercise of delegated power. *Id.* at 2123. Courts and scholars have long been concerned that the OSH Act's language, read broadly, raises grave nondelegation concerns. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?* 94 Va. L. Rev. 1407 (2008). A plurality of Justices in the *Benzene* case recognized that a maximalist reading of OSHA's broad mandate could give it "unprecedented power over American industry." *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (Stevens, J.) (plurality op.) ("*Benzene*"). To avoid nondelegation concerns, the *Benzene* Court read OSHA's authority narrowly. *Id.* at 652. Until now, OSHA has largely avoided interpretations of its own authority that would test the limits of this doctrine. No longer: "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Third, on OSHA's interpretation, the statute exceeds Congress's authority under the Commerce Clause. Just as the federal government cannot mandate the purchase of health insurance, it cannot mandate vaccination. *NFIB v. Sebelius*, 567 U.S. 519, 548-559 (2012) (holding that Congress lacked authority under the commerce power to mandate the purchase of health insurance). The personal decision whether to get vaccinated, like "[t]he possession of a gun in a local school zone" is "in no sense an economic activity." *Lopez v. United States*, 514 U.S. 549, 567 (1995). Deeming every American's personal choice whether to vaccinate as

"interstate commerce" would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

Further, "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (citations omitted). "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. Again, no such clear indication exists here.

Fourth, the ETS violates the Tenth Amendment by trampling on the traditional authority of the States to regulate public health within their borders, including on the topic of mandatory vaccines. President Biden vowed that, if States adopt policies favoring personal freedom in this area, he would "get them out of the way." Biden Speech, *supra*. Likewise, OSHA's ETS repeatedly announces that it preempts state and local policies to the contrary. *See* 86 Fed. Reg. 61,437, 61,440, 61,505.

But the Constitution does not allow the President to "get [States] out of the way" whenever he deems them inconvenient. Rather, it "leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 188 (1992) (cleaned up). "[T]he police power of a state" includes, above all, the authority to adopt regulations

seeking to "protect the public health," including the topic of mandatory vaccination. *Jacobson*, 197 U.S. at 24–25; *see also Zucht v. King*, 260 U.S. 174, 176 (1922). The States "did not surrender" these powers "when becoming . . . member[s] of the Union." *Jacobson*, 197 U.S. at 25. "The safety and the health of the people . . . are, in the first instance, for [the States] to guard and protect." *Id.* at 38. These matters "do not ordinarily concern the national government." *Id.*

So also, where (as here) the federal government alters the federal-state framework by displacing the States' traditional authority over public health within their borders, the Court should "insist on a clear indication that Congress meant to reach" such a result "before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 860 (2014); *see also SWANCC*, 531 U.S. at 172 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). OSHA's ETS would require an extremely "clear statement from Congress," *Bond*, 572 U.S. at 857—which the OSH Act does not contain.

Fifth, for all the foregoing reasons, the doctrine of constitutional avoidance requires rejecting OSHA's interpretation. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

III. The Balancing of Harms and the Public Interest Support a Stay.

Given Petitioners' overwhelming likelihood of success on the merits, the other three equitable factors also decisively favor a stay. *See Asbestos Information*, 727 F.2d at 418 & n.4. Here, the "danger of irreparable harm" to Petitioners, *id.*, is clear. The States face immediate intrusions on their sovereignty that impose *per se* irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.). The private employers face a vast array of economic, religious, and other injuries for which the law will provide no remedy. *See* Exs. H-L. And the ETS forces millions into a Hobson's choice between losing their jobs and subjecting themselves to OSHA's unlawful diktat, which constitutes irreparable injury of the first order. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that the loss of similar "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

On the flip side, the Government will suffer no injury from a stay because it has no cognizable interest in maintaining an unlawful mandate. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (holding that the government "has no legitimate interest in enforcing an unconstitutional ordinance"). Likewise, "[t]he public has no interest in enforcing an unconstitutional" policy. *Id.* And the public interest always favors compelling the Government to comply with federal statutes, such as the OSH Act's provisions at issue here. *See Virginian Ry.*

Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) (a duly enacted statute "is in itself a declaration of public interest and policy").

CONCLUSION

This Court should stay OSHA's ETS pending judicial review. The Court should also grant a temporary administrative stay pending consideration of this stay motion, and order expediting briefing on the stay motion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, and that it contains 5,193 words as determined by the word-count feature of Microsoft Word.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, I electronically filed the foregoing, along with the accompanying unsealed appendix, with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system. In addition, I have sent a true and correct electronic copy of the foregoing with all Exhibits to: zzSOL-Covid19-ETS@dol.gov.

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