No. 21A243

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402.

JOB CREATORS NETWORK, INDEPENDENT BAKERS ASSOCIATION, LAWRENCE TRANSPORTATION COMPANY, GUY CHEMICAL COMPANY, RABINE GROUP OF COMPANIES, PAN-O-GOLD BAKING COMPANY, TERRI MITCHELL, WATERBLASTING, LLC,

Applicants,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, MARTIN J. WALSH, Secretary of Labor, DOUGLAS L. PARKER, Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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TABLE OF CONTENTS

INTRODUCTION

Thirteen circuit judges have now weighed in—and eleven of them have concluded the OSHA Mandate is illegal and should be stayed immediately. The majority opinion issued below by the remaining two judges—and defended here by the government—is not persuasive and ignores this Court's precedent in *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), which controls the core issues in this case.

In the context of a regular OSHA standard (not an ETS like the Mandate, which receives even *stricter* judicial review), this Court held in *API*:

- *The major-questions doctrine applies to and limits OSHA standards:* "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view." *Id.* at 645 (plurality).
- *ETSs must be narrowly circumscribed:* "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." *Id.* at 651 (emphasis added).
- *Any broader interpretation would violate the non-delegation doctrine:* if OSHA's view prevailed, "the statute would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in" its nondelegation cases. *Id.* at 646.

- *OSHA cannot issue a one-size-fits-all standard for administrative convenience*: the Court criticized OSHA for "decid[ing] to apply the same limit to all [industries], largely as a matter of administrative convenience." *Id.* at 650.

Shockingly, the majority opinion below failed to address *any* of these holdings, even though Applicants and the dissent raised them. *In re MCP No. 165*, No. 21-4027, ___ F.4th ___, 2021 WL 5989357, at *22 (6th Cir. Dec. 17, 2021) (Larsen, J., dissenting). The majority opinion even claimed the major-questions doctrine is inapplicable altogether to broad OSHA standards, even though this Court (per the first bullet point above) holds the opposite. *Id.* at *7 (Stranch, J.).

In its 87-page response, the government follows the Sixth Circuit majority opinion's tactic of largely ignoring this Court's adverse precedent. This refusal to grapple with precedent confirms that there is no viable argument that the Mandate is within OSHA's statutory power. The Court should promptly stay the Mandate.[1]

ARGUMENT

I. Applicants Are Likely to Succeed on the Merits.

A. The Mandate violates the major-questions doctrine.

The majority opinion below refused to apply the major-questions doctrine, referring to it as a "seldom-used … canon of statutory interpretation" that is

[1] The government insists that Applicants are seeking "an injunction," not "a stay." OSHA Resp. Br. 16 n.3. The statute providing for circuit court review uses "stay." 28 U.S.C. § 2112(a)(4). Moreover, § 705 of the APA authorizes this Court to "issue … process" to stay the effective date of agency action and—contrary to the government's assertion (which relies on the All Writs Act, *see* OSHA Resp. Br. 16)—does not require any kind of heightened showing of success on the merits. 5 U.S.C. § 705.

"inapplicable here … because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority." *In re MCP No. 165*, 2021 WL 5989357, at *7 (Stranch, J.). In its response to this Court, the government adopts that view, claiming that the OSH Act "unambiguously" grants OSHA the power to issue standards that "have large economic or political significance." OSHA Resp. Br. 5. The government claims this power comes clearly from the OSH Act's preamble, which says the Act should "'assure as far as possible *every* working man and woman in the Nation safe and healthful working conditions.'" *Id.* (emphasis in original) (quoting 29 U.S.C. § 651(b)).

This Court's precedent forecloses the Sixth Circuit majority opinion's conclusion and OSHA's argument to this Court, which are entirely unpersuasive in any event.

As noted above in the Introduction, this Court's decision in *API* applied the major-questions doctrine to an OSHA standard that sought to regulate wide swaths of the national economy—and found the OSH Act wanting: "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view." 448 U.S. at 645 (plurality). And, for good measure, the Court held that "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." *Id.* at 651 (emphasis added). To be sure, the opinion did not

expressly label this "the major-questions doctrine," but *API* announced exactly the same rule: absent a clear statement from Congress, OSHA lacks authority to regulate the nation's industry and economy through expansive standards, and that rule is applied especially strictly in the context of ETSs. The Sixth Circuit majority opinion therefore erred by claiming no clear statement of authority was required.

API proceeded to reject the government's view (raised again here) that the OSH Act actually does provide the necessary clear statement. In *API*, the Court acknowledged § 651's language about providing safe working conditions for "every working man and woman" and also acknowledged § 655(b)(5)'s language that a standard should "assure[] … that no employee will suffer material impairment of health or functional capacity." 448 U.S. at 611, 641. The government argued that these clauses provided clear authority for OSHA "to impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries." *Id.* at 641. The Court emphatically rejected that view, holding that "we think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces" even when it is "technologically feasible to do so." *Id.*

In short: the major-questions doctrine applies to OSHA standards and ETSs, and the OSH Act fails to satisfy the test. Indeed, if *API* had adopted the argument that the government now makes to this Court, the benzene standard in *API* would have been upheld as a valid OSHA standard. But it was not.

The majority opinion below never addressed either of these holdings from *API*. Nor does the government's 87-page brief in this Court address *API*'s holding that "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." 448 U.S. at 651 (emphasis added).

The persistent refusal of the Mandate's supporters to address this Court's precedent is telling. There is no plausible argument that the Mandate does not trigger *API*'s clear-statement rule. Even in OSHA's rose-colored view, the Mandate imposes vaccine-or-testing requirements for 84 million Americans, requiring forcible vaccination or testing of over 31 million of those Americans, 22.7 million of whom will be vaccinated against their wishes, and imposes these requirements on every single industry in the country, amounting to over 264,000 businesses. 86 Fed. Reg. at 61,471–61,472, 61,475. Just like the standard in *API*, the Mandate "give[s] the Secretary … unprecedented power over American industry." 448 U.S. at 645. Yet there is no clear statutory statement authorizing such power—and thus the Mandate exceeds OSHA's statutory authority. This alone is a sufficient basis to find that Applicants are likely to prevail on the merits.

Even if *API* did not settle the matter, the majority opinion below is entirely unpersuasive. *First*, the majority's opening salvo that the major-questions doctrine is "seldom-used" makes little sense. In the same breath, the opinion cites no fewer than three instances where this Court has relied on the doctrine in recent years. *See*

In re MCP No. 165, 2021 WL 5989357, at *7 (Stranch, J.) (citing *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). And that does not even include this Court's opinion just a few months ago in *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), which applied the major-questions doctrine to the CDC's eviction moratorium. It is especially ironic for the majority opinion below to claim the doctrine is "seldom-used" when OSHA is the one asserting unprecedented powers. If the major-questions doctrine is considered "seldom-used," it is only because of the historical rarity—until recently—of a federal agency seeking to regulate the citizenry writ large, as OSHA does here.

Second, it beggars belief to claim that "OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority." *In re MCP No. 165*, 2021 WL 5989357, at *7 (Stranch, J.). The Mandate represents an unprecedented assertion of power by OSHA, regulating far more than any prior ETS in OSHA's 50 years: 84 million Americans (32 million unvaccinated), in every industry in the country, representing almost 2/3 of all workers across the entire nation. Its dictates are also unprecedented: OSHA is press-ganging private companies into being vaccination police who forcibly inject or test their employees—or fire them. For the first time in history, OSHA seeks to regulate the citizenry itself. Not only is this an unprecedented assertion of power by OSHA, but it is one of the most aggressive power grabs by *any* agency in decades.

Seeking to downplay the effects of the Mandate, the government and the majority opinion below engage in a through-the-looking-glass interpretation of the Mandate's requirements. The opinion below claims the Mandate "allows covered employers … to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces," an argument the government repeats to this Court. *See* OSHA Resp. Br. 33–34 (asserting the Mandate "leav[es] leeway for employers to determine the most appropriate option for their respective workplaces"). This assertion is baffling given that the Mandate imposes strict requirements subject to fines of over $100,000 per willful violation. *In re MCP NO. 165*, 2021 WL 5989357, at *2 (Stranch, J.).

The majority opinion below and the government also claim that the Mandate "does not require anyone to be vaccinated" *Id.*; OSHA Resp. Br. 55. At one point, however, in an apparent Freudian slip, the government refers to "the portion of the ETS concerning a vaccination requirement." OSHA Resp. Br. 83. This slip reflects reality. The Mandate openly and repeatedly insists that it wants to force (euphemistically described as "strongly encourage") as many people as possible to get vaccinated by making the masking-and-testing alternative as painful and onerous as possible. 86 Fed. Reg. at 61,433, 61,434, 61,435, 61,436, 61,437, 61,439, 61,525, 61,532.

As Chief Judge Sutton noted, the Mandate insists that employees are "'strongly encouraged'—emphasis on strongly—to undertake a medical procedure (a vaccination) that cannot be undone at the end of the workday." *In re MCP No. 165*,

20 F.4th 264, 2021 WL 5914024, at *7 (Sutton, C.J., dissenting). That is no choice at all. It clearly does not allow Applicants "to determine for themselves" what to do. And it in no way undercuts the reality that the Mandate represents a massive, unprecedented expansion of OSHA's regulatory authority—precisely the scenario for the major-questions doctrine.

Further, the government finds no support in its invocation of stray references to "immunization" or vaccines for bloodborne pathogens. OSHA Resp. Br. 50–51. Neither of the provisions the government cites provides any authority for mandating vaccines—quite the opposite, in fact. Section 669(a)(5), which applies only to the Secretary of Health and Human Services, specifically *prohibits* "immunization" against religious wishes, and the bloodborne pathogen measure the government cites required only that a Hepatitis B vaccine "be made available," not included as part of a mandate (let alone a mandate where the "alternative" of testing is no alternative at all, as discussed below). OSHA Resp. Br. 51.

In its brief to this Court, the government insists that OSHA's ETS power contains no meaningful limitations or exceptions beyond the initial requirement to identify *some* harm that *might* be dangerous for *some* people who work *somewhere* in the country. *See* OSHA Resp. Br. 34–45, 57. Once OSHA identifies that harm, it has *carte blanche* to issue "pervasive regulation limited only by the constraint of feasibility," *API*, 448 U.S. at 607, and even then OSHA is not limited by any "cost of compliance," OSHA Resp. Br. 57. In short, the government asks this Court to implicitly overrule *API* and hold that Congress *unambiguously* gave OSHA the

power to regulate the nation's industry. If OSHA prevails, it could—and undoubtedly *would*—mandate vaccines for every single employee in the country, regardless of where they work, how old they are, how big their company is, or the costs imposed. No exceptions, no limitations. The government's argument demands nothing less than this all-encompassing power. If the thin reed of § 655 is found to grant such powers unambiguously, there will be nothing left of statutory interpretation canons, nor of agencies limited to the power clearly authorized by Congress.

B. The Mandate violates the federalism clear-statement doctrine.

This Court has similarly held that it expects Congress to use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n*, 141 S. Ct. at 2489.

As Chief Judge Sutton demonstrated in a separate dissent below (joined by seven of his colleagues), this Court's own precedent establishes that "'the safety and the health of the people of a state are, in the first instance, for that state to guard and protect' and 'are matters that do not ordinarily concern the national government.'" *In re MCP No. 165*, 20 F.4th 264, 2021 WL 5914024, at *6 (6th Cir. 2021) (Sutton, C.J., dissenting, joined by Kethledge, Thapar, Bush, Larsen, Nalbandian, Readler, and Murphy, JJ.) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)) (internal brackets omitted).

But again, the majority decision below concluded this clear-statement doctrine is simply inapplicable: "the same federalism concerns are not at issue here: although public health issues have traditionally been a primary concern of state

and local officials, Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health." *In re MCP No. 165*, 2021 WL 5989357, at *8 (Stranch, J.) (internal quotation marks and alterations omitted). The theory that the OSH Act somehow effected a sea change in federalism is—again—contradicted by *API*, which made clear that the OSH Act does *not* give OSHA the "unprecedented power over American industry that would result from the Government's view," meaning the States remain the presumptive primary regulators of general public health. 448 U.S. at 645. Moreover, even on the Sixth Circuit majority opinion's own terms, the Mandate fails. Like the benzene standard in *API*, the Mandate is so expansive that it crosses the line between regulating "occupational health," 2021 WL 5989357, at *8, and becomes regulation of the citizenry writ large. There is no plausible claim that the OSH Act wrested the *latter* power from States and gave it to OSHA.

Finally, as Chief Judge Sutton and seven of his colleagues argued below, "[i]t's worth remembering that the power of a federal agency to regulate is the power to preempt—to nullify the sovereign power of the States in the area," meaning that if the government's view is adopted, OSHA could next issue an ETS *prohibiting* vaccines and testing, despite contrary state laws. *In re MCP No. 165*, 20 F.4th 264, 2021 WL 5914024, at *6 (Sutton, C.J., dissenting). The government fails to acknowledge this unintended consequence of OSHA's unprecedented assertion of power.

Because there is no clear authority in the OSH Act for the Mandate, it fails for this additional reason.

C. The Mandate violates the nondelegation doctrine.

Applicants argued in their opening brief that if OSHA truly does have such broad statutory authority to issue the Mandate, then § 655 violates the nondelegation doctrine.

The majority opinion below concluded there "is little possibility of success under the non-delegation doctrine" because this Court has only twice found any statute to exceed Congress's delegation powers, *In re MCP No. 165*, 2021 WL 5989357, at *18 (Stranch, J.), and the government makes the same argument, *see* OSHA Resp. Br. 71.

Again, the opinion below and the government have failed to acknowledge this Court's holding in *API*, which stated that the OSH Act's standard-setting provisions put it perilously close to being the *third* statute held to violate the non-delegation doctrine: if OSHA were correct that § 655 permits regulation of wide swaths of national industry, then "the statute would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in" its nondelegation cases. 448 U.S. at 646 (plurality). That kind of "sweeping" power is undoubtedly what the government demands here, given that it disclaims any limitations on its ETS power beyond identifying *some* harm that *might* be dangerous for *some* workers *somewhere*.

Not only did the opinion below refuse to acknowledge *API*'s holding, but it even doubled down on the notion that OSHA is calling the shots here, insisting that

judges must defer to the "legislative judgment' made by an agency" like OSHA. *In re MCP No. 165*, 2021 WL 5989357, at *9 (Stranch, J.). One would suppose that "legislative judgments" must be made by legislatures, not agencies. The original understanding of the Constitution prohibited any transfer of Congress's vested legislative powers to any other entity. *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). Congress must "make[] the policy decisions when regulating private conduct." *Id.* But policymaking is the role of Congress, and it "would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* at 2133. Thus, Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825).

It is the rare case where the lower court and the agency itself so freely admit that the agency is engaging in legislation. By insisting that OSHA is exercising delegated legislative powers, the majority opinion below seems intent on forcing this Court to invoke its holding in *API* that such an interpretation of § 655 would violate the non-delegation doctrine. Ultimately, *API* applied a constitutional-avoidance interpretation to read OSHA's power narrowly and thereby avoid a delegation concern. The Court here should follow the same path, but if the Court nonetheless adopts OSHA's view, the Court should conclude that § 655 violates the nondelegation doctrine.

D. Even if OSHA has authority, an ETS is inappropriate.

OSHA also failed to satisfy the statutory requirements for imposing an ETS.

No Necessity. OSHA can invoke its extraordinary ETS powers only upon a finding that an urgent, new emergency has arisen that the agency simply cannot wait for the normal notice-and-comment process to occur. 29 U.S.C. § 655(c).

In their opening brief, Applicants demonstrated that OSHA's own actions confirmed that there was no urgent, new necessity for the Mandate in November 2021. For example, OSHA had refused to issue any kind of ETS in the summer of 2020 despite far worse conditions. *In re Am. Fed'n of Lab. & Cong. of Indus. Organizations*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). The government insists that there were no vaccines available at that time—but that argument makes no sense because the development of vaccines "does not heighten health risks; it alleviates them." *In re MCP No. 165*, 20 F.4th 264, 2021 WL 5914024, at *2 (Sutton, C.J., dissenting). Moreover, even once vaccines were widely available, OSHA yet again waited a substantial period of time before issuing the Mandate. As Chief Judge Sutton noted, this means vaccine availability is "hardly a new development." *Id.* And OSHA did not even bother to explain why it was just now strong-arming employees into vaccinations, after nearly a year of availability and high voluntary vaccination rates.

There is also a dramatic flaw in OSHA's "necessity" argument: there is no pretense of explanation for why it is necessary that every industry in the country be subject to the same rules. In *API*, this Court criticized OSHA for "decid[ing] to apply the same limit to all [industries], largely as a matter of administrative

convenience." *API*, 448 U.S. at 650 (plurality). The majority opinion in the Sixth Circuit did not respond to this point, even though Judge Larsen's dissent cited long-established ETS caselaw holding that "even an emergency standard must consider 'obvious distinctions' among those it regulates." *In re MCP No. 165*, 2021 WL 5989357, at *24 (Larsen, J., dissenting) (quoting *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973)). The government insists that ETSs need not make "employer-by-employer or employee-by-employee" distinctions, OSHA Resp. Br. 36, but that is sleight of hand. An ETS must at least make sensible *industry-by-industry* distinctions, and that was not even attempted here.

In an effort to show some degree of tailoring, the majority opinion below, as well as the government in this Court, *see* OSHA Resp. Br. 2, 9, 35, 36, 41, 48, repeatedly point to exceptions for employees who work "exclusively outdoors." *See, e.g., In re MCP No. 165*, 2021 WL 5989357, at *2 (Stranch, J.). As Applicants argued in their opening brief to this Court, these exceptions are trivial. The Mandate estimates that *only 9%* of landscapers and groundskeepers will qualify as working exclusively outdoors—and that is the *highest* percentage of any occupation. 86 Fed. Reg. at 61,461. If only 9% of landscapers are deemed to work outside, the entire exception is a fig leaf designed only to provide the false sense of tailoring. Tellingly, the government never responds to this argument.

No Grave Danger Demonstrated from Workplace Transmission. OSHA must also demonstrate that the Mandate addresses a "grave" danger. 29 U.S.C. § 655(c). The question is not whether COVID *generally* presents a grave danger, but

whether the lack of a vaccine mandate and weekly testing for the next few months presents a grave danger to nearly every workplace in the entire nation such that OSHA was not required to go through notice-and-comment rulemaking. But OSHA's prior actions declining to issue an ETS, as well as the lack of tailoring discussed above, confirm no such grave danger.

II. Applicants Will Suffer Irreparable Injury in the Absence of a Stay.

The government insists, and the majority opinion below agreed, that Applicants would suffer no irreparable harm in the absence of a stay because "employers may choose to comply with the standard by enforcing the mask-and-test component, which are entirely temporary in nature and do not create irreparable injuries." *In re MCP No. 165*, 2021 WL 5989357, at *19 (Stranch, J.); *see* OSHA Resp. Br. 78 But this argument cannot be credited because it directly contradicts the Mandate itself, which expressly recognizes that companies will have to incur costs now even for testing compliance: it is "critical[ly] importan[t]" to "implement[] the requirements in this ETS, including the recordkeeping and reporting provisions, as soon as possible," 86 Fed. Reg. at 61,505, and "it is essential that remediation efforts at a workplace be undertaken immediately," *id.* at 61,545.

The government cannot have it both ways, insisting that companies undertake the extensive costs of complying now—yet somehow they are not facing imminent injuries.

The Sixth Circuit majority opinion's premise—*i.e.*, that testing is an easy alternative—is also demonstrably wrong. The Mandate's onerous logistical

requirements for testing effectively "force[] [workers] either to get vaccinated, or quit." Lawrence Affidavit, Ex. 4, ¶ 10. Companies often lack the manpower to carry out mass testing—meaning workers must leave the premises to get tested, causing additional lost productivity. Berkebile Affidavit, Ex. 4, ¶ 10. The testing regime is undoubtedly designed to be so burdensome that it presents no real option for the vast majority of companies. The Mandate itself is riven with statements openly acknowledging that OSHA is making testing burdensome and onerous so there will be a strong incentive to get vaccinated instead. 86 Fed. Reg. at 61,433, 61,434, 61,435, 61,436, 61,437, 61,439, 61,525, 61,532. The Sixth Circuit erred in relying on this "alternative" as evidence of lack of irreparable harm.

Moreover, even if companies did undertake the onerous testing requirements, the Sixth Circuit majority opinion below failed to address the obvious fact that those costs of doing testing are still irreparable. "[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring).

And all this is even before we get to the fact that Applicants will suffer tremendous harms from lost employees. The majority opinion below dismissed this concern as "entirely speculative." *In re MCP No. 165*, 2021 WL 5989357, at *19 (Stranch, J.). But it is amply supported by the unrebutted affidavits submitted below and in support of Applicants' opening brief in this Court. Applicants are already facing intense labor shortages (a nationwide problem with which everyone

in the country is now personally familiar), and they often require many employees with specialized licenses or training, leading to an extremely small pool of potential hires. McKee Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶ 4; Berkebile Affidavit, Ex. 4, ¶ 6; Rabine Affidavit, Ex. 4, ¶¶ 4–5.

But sizable portions of their workforce—sometimes a majority—have indicated that they will not comply with the Mandate, and to maximize the odds of finding a job at a company not covered by the Mandate, there is a strong incentive for them to leave soon, *regardless of when OSHA will actually start enforcing the Mandate*, and changing jobs is especially easy given the low unemployment rate. Berkebile Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶ 5.

Because of the difficulty in finding replacement workers, these companies will be drastically short in workers, meaning cascading lost business with no hope of recovery. *Ala. Ass'n*, 141 S. Ct. at 2489. These delayed and canceled shipments and services will sour customer relationships, leading to lost business and reputational harm. Pyle Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶¶ 7–8; Berkebile Affidavit, Ex. 4, ¶ 8; Rabine Affidavit, Ex. 4, ¶ 8. To stay afloat, companies will have to make drastic employment cuts, including of vaccinated workers. *See, e.g.*, Lawrence Affidavit, Ex. 4, ¶ 7.

The government insists that only a small percentage of employees in the past actually quit rather than be vaccinated, and the same must be true going forward for remaining unvaccinated workers. OSHA Resp. Br. 78. But that argument is directly contradicted by the Mandate itself, the entire premise of which is that the

remaining unvaccinated people *cannot* be persuaded by the measures used in the past: "OSHA has found that neither reliance on voluntary action by employers nor OSHA non-mandatory guidance is an adequate substitute for specific, mandatory workplace standards at the federal level." 86 Fed. Reg. at 61,445.

Applicants further argued in their opening brief that OSHA falsely downplayed the harms of the Mandate by refusing to calculate the irreparable damage that will occur from employees leaving businesses because of the impending Mandate deadlines, and the resulting cascading destruction wrought upon already-stressed supply chains. But the government simply doubles down on the theory that businesses can just impose testing instead—an unrealistic proposal, as demonstrated above.

The majority opinion below also failed to consider *employees*' irreparable harms. As Chief Judge Sutton noted in his separate opinion, the Mandate imposes irreparable harm for the simple reason that it cannot be reversed: the Mandate all but requires tens of millions of individuals "to undertake a medical procedure (a vaccination) that cannot be undone at the end of the workday." *In re MCP No. 165*, 20 F.4th 264, 2021 WL 5914024, at *7 (Sutton, C.J., dissenting). As Judge Larsen wrote, this represents a most dramatic form of "nonrecoverable compliance costs," given that "an individual petitioner might reluctantly submit to vaccination, rather than incur a weekly hit to her finances and to her time. And if it turns out she did so due to an invalid regulation, she will have been irreparably harmed." *In re MCP No. 165*, 2021 WL 5989357, at *29 (Larsen, J., dissenting).

That is precisely the scenario facing individual Applicant Terri Mitchell, for whom a compelled vaccination represents an irreparable harm because it cannot be undone. The government responds to Ms. Mitchell that she should just undergo weekly testing instead. OSHA Resp. Br. 78. This ignores her sworn affidavit saying she considers involuntary nasal or throat testing—by edict of the President—to be a breach of personal autonomy. Nor is she alone in that sentiment. As Justice Scalia said: "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

III. The Equities and Public Interest Strongly Favor a Stay.

It "is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n*, 141 S. Ct. at 2490. That ends the matter: OSHA has no equitable interest in enforcement of an invalid ETS.

Moreover, the Sixth Circuit's majority opinion below failed even to acknowledge the substantial interest in maintaining the status quo, under which the Mandate had not been in effect for nearly its entire existence. The Sixth Circuit's decision to spring the Mandate back into life—on a Friday night after close of business, no less—is predictably causing chaos. The Sixth Circuit erred by failing even to consider the whipsaw effect its ruling would have, and the only way to end that harm is to emphatically stay the Mandate once and for all.

Further, as Applicants argued in their opening brief, the government has diminished equities because OSHA seeks to press-gang private parties into forcibly vaccinating or testing over 30 million employees, and repeatedly made statements designed to confuse businesses into complying with the Mandate even when it was stayed by the Fifth Circuit. The government offers no response to these examples of bad behavior.

Nor does the government defend the Mandate's personal attacks against those who question OSHA's authority. *See* 86 Fed. Reg. at 61,444 (labeling those who "resist curbs on personal freedoms" as suffering from "psychological reactance," which OSHA implies is some kind of undesirable mental condition).

By contrast, Applicants have strong equitable interests. They have already suffered greatly over the last two years and now face terribly difficult choices about the viability of their businesses, as demonstrated above. There are also very strong public interests in staying the Mandate, as the attached affidavits explain in detail. Applicants were deemed "essential" during the lockdown because they serve as critical cogs in our nation's economy. Lawrence Affidavit, Ex. 4, ¶ 9; Berkebile Affidavit, Ex. 4, ¶ 9; Rabine Affidavit, Ex. 4, ¶ 10.

IV. The Court Should Reject the Government's Attempts to Narrow a Stay.

The government alternatively asks this Court to allow at least the masking-and-testing requirement to remain in effect. OSHA Resp. Br. 83 (inadvertently acknowledging that there is indeed a "portion of the ETS concerning a vaccination requirement"). This argument is unsupported and illogical.

First, OSHA lacks authority to issue the Mandate, period. OSHA has no more statutory power to impose a masking-and-testing mandate than to impose a vaccine-or-masking-and-testing mandate. This is especially true given that narrowing the Mandate would not eliminate the statutory and constitutional flaws identified above. The ETS openly and repeatedly insists that it wants to force as many people as possible to get vaccinated by making the masking-and-testing alternative as painful and onerous as possible. 86 Fed. Reg. at 61,433, 61,434, 61,435, 61,436, 61,437, 61,439, 61,525, 61,532. It is therefore not a "mistake" to refer to the Mandate as a "vaccine mandate," as the government repeatedly insists. OSHA Resp. Br. 49, 84.

Given this, by proposing that the Court allow the masking-and-testing portion to go into effect, the government is asking the Court to let the *entire* Mandate go into effect, including its continued strong-arming for forced vaccinations, because the end result is the same: masking-and-testing procedures so onerous that companies will feel no option but to require vaccinations, which is the same scenario under the "full" Mandate. The government seeks to employ the courts as partners in its *in terrorem* scheme of strong-arming companies into requiring vaccinations despite the government's lack of legal authority to compel the companies to do so. The Court should decline to play this game.

Second, even in the presence of a severance clause in agency rulemaking, courts routinely vacate (or stay, as appropriate here) the entire rule whenever there is "substantial doubt" that the agency would have wanted the fragmentary portions

to remain in effect. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020). As applied here, "the [Mandate] is not severable because it is clear [OSHA] intended the [Mandate] to stand or fall as a whole, and the agency desired a single, coherent policy" of forcing vaccination through every means possible, including the masking-and-testing "alternative." *Id.*

Third, even setting aside the above flaws, there is no "grave" and imminent "necessity" for a mask mandate, given that masks have been a protective tool from the outset and thus widely available since early 2020. There would accordingly be no statutory authority for allowing the masking-and-testing requirement to go into effect via ETS. Chief Judge Sutton made short work of the government's theory on this point when it was raised below: "As the Secretary well knows, masks are not a new idea. They have been a protective tool from the outset. Given the wide availability of this option since the beginning, the view that this requirement counts as an 'emergency' measure, all at a time when fewer people face lethal risks from COVID-19, sucks the concept dry of meaning." *In re MCP No. 165*, 20 F.4th 264, 2021 WL 5914024, at *10 (Sutton, C.J., dissenting).

Finally, given that the White House made clear it would still try to strong-arm companies into compliance even in the face of the Fifth Circuit's unanimous ruling staying the Mandate, this Court should clarify who is covered by any stay issued. Although courts generally do not enjoin the President directly, *see Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992); *Citizens for Resp. & Ethics in Washington v. Trump*, 971 F.3d 102, 110–11 (2d Cir. 2020) (Menashi, J., dissenting

from denial of rehearing *en banc*) (providing original analysis on whether and when courts can enjoin the President), the Court should make clear that any stay nonetheless applies to the President's "officers, agents, servants, employees, and attorneys; and … other persons who are in active concert or participation," Fed. R. Civ. P. 65(d)(2), which would include all federal agencies and all White House employees, including the Press Secretary's office.

CONCLUSION

For the foregoing reasons, Applicants respectfully request a stay pending the disposition of Applicants' petition for review currently pending before the United States Court of Appeals for the Sixth Circuit and pending any further proceedings in this Court.

Respectfully submitted,

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