Nos. 21A244, 21A247

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.,

Applicants,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.,

Respondents.

STATE OF OHIO, ET AL.,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.,

Respondents.

ON APPLICATIONS FOR STAY OF ADMINISTRATION ACTION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF TEXAS VALUES AND 30 ADDITIONAL FAMILY POLICY ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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Texas Values and 30 additional family policy organizations respectfully move for leave to file the enclosed brief as *amici curiae* in support of applicants. *Amici* are state-based nonprofit organizations that promote their core values of faith, family, and freedom through policy research, public education, and grassroots mobilization. *Amici* believe that religious liberty is critical to a flourishing, tolerant society, and their proposed brief explains how excessive deference to agencies undermines that liberty. *Amici* include Texas Values, Nebraska Family Alliance, Cornerstone Policy Research of New Hampshire, Kansas Family Voice, Indiana Family Institute, Palmetto Family Council (South Carolina), Family Policy Institute of Washington, Center for Christian Virtue of Ohio, Montana Family Foundation, The Family Foundation of Virginia, Idaho Family Policy Center, Florida Family Policy Council, New Yorkers for Constitutional Freedoms, Family Policy Alliance of New Jersey, Delaware Family Policy Council, North Dakota Family Alliance, Christian Civic League of Maine, Family Institute of Connecticut, Wisconsin Family Action, The Family Foundation (Kentucky), California Family Council, Massachusetts Family Institute, Michigan Family Forum, Louisiana Family Forum, Frontline Policy Council (Georgia), Minnesota Family Council, Family Policy Alliance of New Mexico, Pennsylvania Family Council, The Family Leader of Iowa, North Carolina Family Policy Council, and Family Policy Alliance.

Amici also move to file their brief without ten days' notice to the parties of their intent to file as ordinarily required by Sup. Ct. R. 37.2(a) and to file this brief in an unbound format on 8½-by-11-inch paper rather than in booklet form. These requests

are necessary due to the press of time related to the emergency nature of the applications for stay.

Amici notified counsel for applicants and respondents to obtain consent for their proposed brief. The State Applicants consented, and the Business Association Applicants do not oppose. The other parties have not responded.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici are state-based nonprofit organizations that promote their core values of faith, family, and freedom through policy research, public education, and grassroots mobilization. *Amici* believe that religious liberty is critical to a flourishing, tolerant society. *Amici* include Texas Values, Nebraska Family Alliance, Cornerstone Policy Research of New Hampshire, Kansas Family Voice, Indiana Family Institute, Palmetto Family Council (South Carolina), Family Policy Institute of Washington, Center for Christian Virtue of Ohio, Montana Family Foundation, The Family Foundation of Virginia, Idaho Family Policy Center, Florida Family Policy Council, New Yorkers for Constitutional Freedoms, Family Policy Alliance of New Jersey, Delaware Family Policy Council, North Dakota Family Alliance, Christian Civic League of Maine, Family Institute of Connecticut, Wisconsin Family Action, The Family Foundation (Kentucky), California Family Council, Massachusetts Family Institute, Michigan Family Forum, Louisiana Family Forum, Frontline Policy Council (Georgia), Minnesota Family Council, Family Policy Alliance of New Mexico, Pennsylvania Family Council, The Family Leader of Iowa, North Carolina Family Policy Council, and Family Policy Alliance.[*]

[*] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This case involves an attempt by the federal government to enact a sweeping regulation of most employees without action by Congress or even typical notice-and-comment agency rulemaking procedures. For support, the Occupational Safety and Health Administration points to a rarely used emergency provision, even though the agency has never used that provision to do anything like what it seeks to do here: impose a nationwide vaccine mandate on most employees, to be policed by their own employers. OSHA asks the courts to defer to its understanding of its own statutory authority. But such deference undermines rule-of-law values, for it puts important policy decisions in the hands of unelected, unaccountable bureaucrats instead of those who represent the People. And it takes important legal questions away from the judiciary, which alone has the constitutional authority to adjudicate cases or controversies.

One consequence of deferring to agencies in cases like this is that it often underprotects religious exercise. But religious liberty is a bedrock of this country. Many settlers came to America searching for the freedom to exercise their religious beliefs. The Founders considered religious liberty to be a cornerstone of civil society and human flourishing. Accordingly, the founding generation protected religious liberty through their state constitutions, the federal Constitution's structural provisions, and the First Amendment of the Bill of Rights.

When making laws, Americans have continued to protect religious liberty against ever-expanding governmental power. The political branches—accountable to the

public—have enacted laws like the Religious Freedom Restoration Act, which was supported by an overwhelming majority of Congress and signed by President Clinton. RFRA prevents the federal government from burdening religious exercise without a paramount justification. Dozens of other federal laws now protect religious liberty. And many states have passed state versions of RFRA or similar laws to protect religious exercise.

Yet unelected and unaccountable administrative agencies approach public policy much differently. To these agencies, religious liberty is often an afterthought, an inconvenience that stands in the way of their desired policy. In the last 20 years, this Court has repeatedly had to step in to protect religious exercise from agency hostility. And OSHA's rule here continues this unfortunate tradition of agency disregard of religious liberty questions. Despite prominent religious exercise questions, the agency said almost nothing about religious objections. Instead, OSHA contented itself with passing references to Title VII's general prohibition on religious discrimination. Not only does that approach put the burden of addressing difficult religious issues on employers—including religious employers with their own beliefs at stake—but it also leaves religious employees at the mercy of a Title VII regime weakened by this Court. Under the Court's precedents, an employer can deny an accommodation if it would impose anything more than a *de minimis* cost. That is wrong, and the agency's refusal to grapple with the religious liberty questions here reiterates and compounds the inadequate protection offered to religious employees. In short, agencies like OSHA

approach religious liberty questions much differently, and with much less care, than the political branches.

Thus, deferring to OSHA's interpretation of its own authority to bypass standard rulemaking requirements and immediately promulgate a massive new regulation would undermine religious liberty. Had Congress considered the action taken by OSHA as legislation, it would have addressed religious exercise, and as shown by RFRA and other laws, protected it. Had OSHA followed standard rulemaking requirements, it would have at least been forced to consider these issues. But OSHA charted its own course, promulgating a rule that gives the back of the hand to religious liberty and asking the courts to defer to its unprecedented approach. This Court should decline that invitation. And because OSHA's interpretation is contrary to the statutory text, this Court should grant the applications and stay the rule.

ARGUMENT

I. Protecting religious liberty has been of paramount importance since the Founding.

"[O]ne of the primary reasons for the establishment of this country was the desire of early settlors to escape religious persecution." *Uphaus v. Wyman*, 364 U.S. 388, 397 (1960) (Black, J., dissenting). So, by the time of the Founding, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990). And from the start, religious Americans have been "accorded a high degree of autonomy from civil control." *Id.* at 1422. The colonists were intimately familiar with

"historical instances of religious persecution and intolerance," and that historical background informed "those who drafted the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (cleaned up).

Indeed, the Founders' writings teem with references to the importance of religious liberty. Advocating for religious liberty protections in the Commonwealth of Virginia, James Madison described religious liberty as "an unalienable right" because a man's religion represents "a duty towards the Creator," which "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[1] In 1788, John Adams cautioned that "nothing is more dreaded than the national government meddling with religion."[2] And in his Farewell Address, George Washington warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[3]

Thus, religious liberty is "a valuable and necessary feature of any attractive legal regime because it reflects, promotes, and helps to constitute human flourishing." Richard Garnett, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman*, 39 Pepp. L. Rev. 1149, 1155 (2013). To guard this liberty, the Founders sought to create a system of government where the rights of the minority are protected from tyrannical rule by the majority party. In the *Federalist Papers*, Alexander Hamilton expressed the need for religious liberty and to protect

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[1] *Memorial and Remonstrance Against Religious Assessments*, in James Madison: Writings 29 (Jack N. Rakove ed., 1999).
[2] James H. Hutson, Religion and the Founding of the American Republic 77 (1998).
[3] *Farewell Address to the People of the United States* (Sept. 19, 1796), *available at* https://tinyurl.com/444uc35t.

minority rights: "in politics as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution." The Federalist No. 1. Under the system contemplated by the Founders, religious liberty means "the right to differ as to things that touch at the heart of the existing order." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1945).

The First Amendment's Religion Clauses illustrate the principles of religious liberty and tolerance that motivated the Founders. But the Founders did not rely solely on the First Amendment to protect religious liberty. Many found the Bill of Rights unnecessary because the structural protections of the Constitution would protect fundamental rights like religious liberty. *See generally* The Federalist No. 84 (Hamilton). These structural protections include both the separation of powers and the federalist system of government, with states retaining powers not given to the national government. *See* The Federalist No. 51 (Madison) (explaining that the constitutional structure provides "a double security" to the rights of the people); Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417 (2008). Together, these structural protections, the First Amendment, and parallel (and often antecedent) provisions in many state constitutions all point to the same conclusion: religious liberty is a vital and enduring thread in the nation's fabric. And the frontline protection for religious liberty is the involvement of the People through their representatives in lawmaking.

II. Congress and the states are highly protective of religious liberty when making laws.

Throughout our nation's history, Congress and the states have been broadly attentive to the importance of religious liberty. They routinely adopt religious liberty protections on a bipartisan (and often unanimous) basis. In the past thirty years alone, Congress has adopted many federal statutes that enshrine religious liberty protections. Most prominently, a unanimous House and a 97-3 Senate passed the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, and President Clinton signed RFRA into law. RFRA "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014).

Congress followed RFRA with another significant statutory protection for religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.* RLUIPA passed both the House and the Senate by a unanimous voice vote before being signed by President Clinton. RLUIPA applies the RFRA standard to the states in land use cases and claims by prisoners who "seek religious accommodations." *Holt v. Hobbs*, 574 U.S. 352, 356–58 (2015) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)) (requiring a prison to accommodate a Muslim prisoner's request for a beard).

Federal law now prohibits religious discrimination in places of public accommodation, 42 U.S.C. § 2000a; public facilities, *id.* § 2000b; public education, *id.* § 2000c-6; employment, *id.* §§ 2000e, 2000e-2, 2000e-16; housing, *id.* § 3604; real-

estate brokerage services, *id.* § 3606; federal jury service, 28 U.S.C. § 1862; access to limited open forums, 20 U.S.C. § 4071; and participation in or receipt of benefits from federally funded programs, *see, e.g.*, 15 U.S.C. § 3151; 20 U.S.C. § 1066c(d); 42 U.S.C. § 290cc-33(a)(2). All these and more bipartisan efforts have enshrined statutory protections of religious liberty. In this way, as shown next, Congress has been "far more sensitive to religious sensibilities than [agency] administrators."[4]

Likewise, the states, as laboratories of democracy, generally safeguard religious freedom in their legislation. Scholars have estimated that by 1995, there were around 2,000 federal and state statutory religious exemptions.[5] Since this Court struck down RFRA's applicability to the states in *City of Boerne v. Flores*, 521 U.S. 527 (1997), 23 states have adopted RFRA analogues. And several additional states have seen their supreme courts interpret their constitutions as providing RFRA-like protections.[6]

In the COVID context too, states have broadly protected religious exercise. The Texas Legislature, for example, passed an amendment to the state constitution barring any state official from "prohibit[ing] or limit[ing] religious services . . . by a religious organization established to support and serve the propagation of a sincerely held religious belief." Tex. Const. art. 1., § 6-a. And the People of Texas overwhelming approved the amendment at the polls on November 2, 2021.[7]

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[4] Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1943 (2015).
[5] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844–45 (citing James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445–46 (1995) (estimating around 2000 statutes based on a Lexis search of four states' statutes and federal statutes)).
[6] Laycock, *supra* note 5, at 844 & n.22.
[7] *See* Chuck Lindell, *Voters Approve All 8 Amendments to Texas Constitution*, Austin American-Statesman (Nov. 3, 2021, 3:24 PM), https://tinyurl.com/yckzfcbc.

III. Agencies tend to underprotect religious liberty, a problem exacerbated when agencies exceed their statutory authority.

Unlike Congress and the states, federal agencies have historically been inattentive to religious liberty. They often disregard potential effects of their rules on religious exercise, leading to results that the political process would not otherwise countenance. These negative consequences for religious liberty are worsened when agencies are given wide leeway by the courts to interpret their own authority and the meaning of federal statutes. OSHA's rule here epitomizes these problems, as the agency invoked a novel reading of its own statutory authority to avoid any public participation at all through notice-and-comment rulemaking and then all but ignored the significant religious liberty implications of its rule. This approach casts aside our nation's most important legal principles. And it underscores why this Court should decline OSHA's invitation to defer to the agency's own assertions about its statutory authority to disregard rulemaking requirements in imposing a massive new regulatory regime on the country.

A. Religious liberty suffers under agency rule.

Executive branch rulemaking often fails to provide the types of religious exercise protections that Congress and the states consistently provide on a bipartisan basis. Time and again, religious exercise has suffered when agencies disregard the First Amendment, RFRA, or the limits of their enabling statutes. And even when agencies may not violate another law, they often do not heed important principles of religious liberty.

This lack of protection for religious liberty follows from the undemocratic design of most modern administrative agencies. The early proponents of the administrative state, including Woodrow Wilson, advocated for increased agency authority because the administrative state could regulate without persuading "a voting majority of several million heads" or having to overcome "meddlesome" public opinion.[8] Modern agency heads have continued to promote this undemocratic philosophy as a virtue of the administrative state. In 2011, a former Director of the Office of Management and Budget argued that "we need less democracy," that our current democratic process has produced "too much of a good thing," and that making "our political institutions . . . less democratic" would benefit the country.[9]

This view of government is contrary to the Founders' views. By designing a tripartite system of checks and balances and protecting the States' prerogatives, the Founders sought to prevent the development of a tyrannical government. As Madison explained, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47.

As the legislative branch, Congress is "the [branch] most responsive to the will of the people." *Tiger Lily, LLC v. United States Department of Housing & Urban Development*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). "And the

[8] Hamburger, *supra* note 4, at 1946–47 & n.79 (citing Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 208 (1887)).
[9] Peter Orszag, *Too Much of a Good Thing*, New Republic (Sept. 14, 2011), https://tinyurl.com/vv74r3nn.

Founders designed it that way for a reason: Congress wields the formidable power of 'prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated.' If legislators misused this power, the people could respond, and respond swiftly." *Ibid.* (quoting The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

But as the frequency and breadth of administrative rulemaking has increased, the modern administrative state has "turned into a vortex of authority that was [initially] constitutionally reserved for the people's representatives in order to protect their liberties." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). This modern approach "comes with a distinctively hard edge for many religious Americans" because administrative officials' "self-conscious rationalism and scientism" often leads them "to be relatively indifferent, if not unsympathetic to religious concerns."[10] Administrative rulemaking has been a "continual and disturbing source of imposition" upon American faith communities, particularly "religious minorities." Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1025 (2005).

This Court's cases highlight the indifference religious Americans face from administrative agencies. In the past two decades alone, the Court has addressed many cases involving agency disregard of religious liberty or other First Amendment rights. *See, e.g.*, *Gonzales v. O Centro*, 546 U.S. 418 (2006) (Attorney General's use of

[10] Hamburger, *supra* note 4, at 1921.

delegated authority to deny religious accommodation); *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) (agency use of delegated authority to compel speech in exchange for government aid); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (agency adoption of contraceptive mandate on religious businesses); *Holt v. Hobbs*, 574 U.S. 352 (2015) (prison officials' denial of religious accommodation to grooming policy); *Zubik v. Burwell*, 578 U.S. 403 (2016) (per curiam) (agency adoption of contraceptive mandate on religious nonprofits); *Harvest Family Church v. FEMA*, No. 17A649 (application withdrawn after FEMA revoked categorical bar on religious houses of worship receiving disaster relief funds); *cf. South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (addressing the improper limitations on religious worship imposed under what the Court of Appeals described as "a complex set of regulations" designed by "California's public health and epidemiological experts," 985 F.3d 1128, 1131 (9th Cir. 2021)).

These cases reflect just a fraction of the similar cases addressed by the lower courts.[11] All too often, agency officials reply to requests for religious exemptions with the "classic rejoinder of bureaucrats throughout history"; that is, "If I make an exception for you, I'll have to make an exception for everybody, so no exceptions." *O Centro*, 546 U.S. at 436.

The negative consequences of this indifference to religious liberty are exacerbated when judges afford broad deference to agencies, whether to their statutory

[11] *E.g.*, Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11*, 98 Iowa L. Rev. 231, 236–39 (2012) (describing an empirical study of over 1,600 cases from 1996–2005).

interpretations or the breadth of their statutory delegations. For instance, if a court determines that the statutory text is ambiguous as to the agency's ability to issue a given regulation, the regulation will stand as long as the court deems it "permissible." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Judges must "make that initial clarity versus ambiguity decision in a settled, principled, [and] evenhanded way." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2118 (2016). But that does not always happen. And even when it does, *Chevron* and other deferential doctrines allow agencies to act beyond what Congress has instructed. Those doctrines thus cement agency disregard of religious liberty into law.

A principled approach focusing on the text and the traditional tools of statutory interpretation would better constrain agencies—and limit their disregard of religious liberty. Scrutiny of agency legal claims "promote[s] the separation of powers objective of preserving liberty by dispersing government authority." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 682 (1996). "[I]f an agency had to speak more precisely" to pass review, then this "independent judicial check" would provide "a layer of security against unwise or oppressive agency lawmaking." *Id.* at 682–83.

That system makes sense. As seen time after time, when the government follows traditional separation of powers principles and courts apply traditional tools of statutory interpretation, religious liberty thrives. But when agencies demonstrate disregard for religious liberty—as they often do—and courts broadly defer to an

agency's own indifferent regulations, religious liberty suffers. In keeping with the constitutional protections for religious liberty and our long national tradition of legislatures affording statutory protections for religious liberty, agencies should not be afforded broad deference—especially when trying to issue transformative regulations without express congressional intent.

B. OSHA's rule epitomizes agency inattention to religious liberty.

The rule here epitomizes agency disregard of religious exercise protections. Even as OSHA estimated that a plurality of "vaccine-hesitant" workers have a religious reason, it refused to offer any meaningful guidance for employers or employees. *COVID-19 Vaccination Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402, 61,471 (Nov. 5, 2021). Instead, OSHA kicked the can to other potentially "relevant federal laws" like Title VII, explaining that "if the vaccination, and/or testing for COVID-19, and/or wearing a face covering conflicts with a sincerely held religious belief, practice or observance, a worker may be entitled to a reasonable accommodation." *Id.* at 61,522. But, OSHA emphasized, "[s]uch accommodations exist independently of the Occupational Safety and Health Act and, therefore, OSHA does not administer or enforce these laws." *Ibid.* OSHA suggests that employers and employees look to another agency, saying that the EEOC's guidance may "be helpful to employers in navigating employees' requests for accommodations, including the process for determining a reasonable accommodation and information on undue hardship" under Title VII. *Ibid.*

This cursory treatment gives short shrift to religious liberty. First, OSHA's approach puts the onus on employers to arbitrate religious claims, with

corresponding liability for the employer if it arbitrates the claim incorrectly. But the employer is not causing any potential religious conflict: the government is. Yet the government places responsibility for that conflict in the lap of the employer. And employers have basically no guidance for weighing these claims, particularly given the ever-evolving understanding of COVID and thinly supported official policy changes.[12] That standard may well lead to underprotection for religious liberty, especially considering that the lower courts have been slow to protect religious liberty in the COVID context.[13]

For religious employers, the problem is even worse, for they must deal with the complex interplay between their own beliefs, their employees' beliefs, carrying out their ministries, and supervising their leaders. Religious organizations may face the choice of violating their tenets or incurring significant financial costs. And their employees themselves—many of whom share their beliefs, and some of whom lead their organizations—may well choose to go work instead at other employers with less than ninety-nine employees. This type of indirect coercion contradicts fundamental religious autonomy principles. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (explaining that the Free Exercise Clause

[12] *See, e.g.*, CDC, *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population* (Dec. 27, 2021), https://tinyurl.com/yckd5pfr (announcing that the quarantine requirement for asymptomatic carriers of COVID-19 had changed from 10 to 5 days in some circumstances).

[13] *See* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 Harv. J.L. & Pub. Pol'y 637, 676–77 (2021) (addressing the lower courts' initial reluctance to afford religious liberty protections in the COVID-19 context).

prohibits "indirect coercion or penalties on the free exercise of religion, not just outright prohibition.").[14]

Religious employees may also suffer. No one could claim that Title VII, especially as presently interpreted, provides robust religious exercise protections for employees. Title VII merely bars outright discrimination based on religion. 42 U.S.C. § 2000e-2(a). As the EEOC's guidance explains, an employer does not need "to reasonably accommodate an employee's religious belief" if an accommodation would present "an 'undue hardship' on [the employer's] operations." EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://tinyurl.com/2p98rzt9 (last updated Dec. 20, 2021) (quoting 42 U.S.C. § 2000e(j)). And this Court "has held that requiring an employer to bear more than a 'de minimis,' or a minimal, cost to accommodate an employee's religious belief is an undue hardship." *Ibid.* According to the EEOC, "[c]osts to be considered" here "include not only direct monetary costs but also the burden on the conduct of the employer's business—including, in this instance, the risk of the spread of COVID-19 to other employees or to the public." *Ibid.* Here, of course, the premise of the ETS is that it "is necessary to protect unvaccinated workers from the risk of contracting COVID-19." 86 Fed. Reg. at 61,429; *see also* DOL Resp. 76 (arguing that "regular testing and

[14] The government minimizes the significance of First Amendment free exercise and establishment protections, arguing, for example, that the "ministerial exception" only applies to "employment disputes." DOL Resp. 77. But the ministerial exception is merely a "component" of the broader religious autonomy doctrine. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). And as a component of that doctrine, it broadly "protects a religious organization's employment relationship with its ministers." *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 985 (7th Cir. 2021) (en banc).

masking of unvaccinated workers [i]s essential to address the grave danger of COVID-19 transmission across a broad spectrum of American workplaces").

As an original matter, Title VII should offer greater protection for religious employees. The interpretation of "undue hardship" as anything more than a *de minimis* cost comes from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), which drew this flimsy standard not from any statutory interpretation or even a party's argument but from applying an EEOC guideline. *See Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 & n.* (2020) (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting from the denial of certiorari). "The de minimis cost test cannot be reconciled with the plain words of Title VII, defies simple English usage, and effectively nullifies the statute's promise" of protection for religious employees. *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari) (cleaned up). Nor is it consistent with judicial interpretations of "comparable statutorily protected civil rights." *Ibid.*

Given this misinterpretation of Title VII, the rule's sidestepping of religious exercise questions is all the more inexcusable. And it reveals the core problem here. When Congress passed Title VII, it articulated a robust protection for religious exercise. The courts weakened it. Then unelected agencies refused to address potential religious exercise issues at all, gesturing toward the weakened statutory

regime while making it nearly impossible for religious employers and employees to apply or rely on that regime.[15]

Had this lawmaking taken its proper course through the political branches, the result would not have been so dismissive of religious liberty. Or if OSHA had engaged in notice-and-comment rulemaking under the Administrative Procedure Act, at least the agency would have been forced to consider and respond to religious liberty concerns. *See Perez v. Mortgage Bankers Association*, 575 U.S. 92, 96 (2015). "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1816 (2019).

But the government here did not take the APA's route for the public to have a say in agency rulemaking, much less the constitutionally suggested route of passing a law. *See* U.S. Const. art. I, § 7. Instead, OSHA adopted an untenably broad reading of its own statutory authority to announce a rule with significant—but unconsidered—effects on religious liberty, without input by the People. And now OSHA tells the courts that any "uncertainty about the meaning of the statute allows [it] to construe the statute to exercise more power." App. 208 (Sutton, C.J., dissenting from the denial of initial hearing en banc). OSHA's inattention to religious liberty

[15] The agency's brief here also evinces hostility toward religious exercise, suggesting that no RFRA claim could be maintained if the religious person is offered some more costly "alternative." DOL Resp. 75 & n.13. By the agency's lights, a rule requiring a person to violate their conscience or pay $1 million poses no problem, since the person has no *religious* objection to paying money. That is absurd. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977) (permitting Section 1983 claim to proceed when town imposed small fines and suspended sentences on plaintiffs practicing their faith).

issues underscores why this Court should instead scrutinize the agency's novel statutory assertions, which are inconsistent with the text.

IV. The regulation exceeds OSHA's statutory authority

As the applicants explain in detail, OSHA's attempt to bypass notice and comment rulemaking is unprecedented. In the agency's history, "no regulation" of this magnitude has ever been adopted under the emergency temporary standard pathway. App. for Stay 16–19. "OSHA acknowledges the certainty" that those who oppose the federal mandate—including religious objectors—"will quit their jobs rather than submit." *Id.* at 3. Under the major questions doctrine, the enabling act's "text and structure and OSHA's own practice" show that Congress did not delegate the authority to adopt this mandate. *Id.* at 21.

The mandate also runs contrary to this Court's recognition that vaccine mandates on private employers "do not ordinarily concern the national government," because the power to impose them is a traditional police power reserved to the states. *Jacobson v. Massachusetts*, 197 U.S. 18, 38 (1905). Congress must adopt "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *United States Forest Service* v. *Cowpasture River Preservation Association*, 140 S. Ct. 1837, 1849–50 (2020). Congress did not do so here.

This departure from principles of federalism is compounded by the separation of powers problems posed by deferring to the agency's view about its own authority—especially when such deference exacerbates OSHA's disregard of religious exercise concerns. Under this Court's longstanding precedents, "[t]he Constitution's wariness of executive power, combined with the relatively exacting approach traditionally

taken to statutes affecting fundamental rights, support a more demanding" review of agency rulemaking. Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 319 (2014). Just a few months ago, this Court reiterated that a mere "downstream connection" between a regulation and its enabling statutory text is "markedly different from the direct targeting of" an issue "identified in the statute." *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2488 (2021). And when, as here, the statute's text, its structure, and agency practice do not support the agency's ability to issue the regulation, "[i]t strains credulity to believe that [it] grants the [government] the sweeping authority" asserted. *Id.* at 2486.

Despite these longstanding precedents, the panel majority below maintained that the rule reaffirmed in *Alabama Association* "do[es] not control this case" because that case concerned a "different agency" and a "different regulation." App. 242. But "like cases should be treated alike," and the same "interpretative rules of the road" should apply to all statutory interpretation cases, "regardless of the subject matter and regardless of the identity of the parties to the case." Kavanaugh, *supra*, at 2120–21. And, as Judge Larsen pointed out in her dissent, "it is hard to think of a more apt comparison than the one th[is] Court just gave us to follow" in *Alabama Association of Realtors*. App. 280. Because the text, tradition, and this Court's precedent is clear, as President Biden said last week, "This gets solved at the state level."[16] And as

[16] @WhiteHouse, Twitter (Dec. 28, 2021, 2:20 PM), https://tinyurl.com/2p99besf.

shown, states will protect religious liberty far better than unaccountable federal bureaucrats.

CONCLUSION

A stay pending review should be granted.

Respectfully submitted,

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