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

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, ISSUED ON NOVEMBER 4, 2021

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

MOTION OF ADVANCING AMERICAN FREEDOM FOR LEAVE TO FILE ATTACHED AMICUS BRIEF IN SUPPORT OF APPLICATIONS FOR STAY OR INJUNCTION PENDING REVIEW; FOR LEAVE TO FILE WITHOUT 10-DAYS NOTICE; TO FILE IN UNBOUND FORMAT ON 8 ½-BY-11-INCH PAPER

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MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Advancing American Freedom (AAF) respectfully moves for leave (1) to file the attached brief as *amicus curie* in support to the Emergency Applications for Administrative Stays and Stays of Administrative Action, and Alternative Petitions for Writ of Certiorari Before Judgement, filed December 17-22, 2021, (2) to file without providing 10 days' advance notice to the parties of AAF's intent to file; and (3) to file in unbound format on 8 ½-by-11-inch paper rather than in booklet form.

On December 27, 2021, AAF sought consent via email from counsel of record for the parties to file an *amicus curiae* brief in support of the emergency applications. Counsel of record for the Applicants in eleven of the fourteen applications – Nos. 21A243, 21A244, 21A246, 21A247, 21A248, 21A250, 21A251, 21A252, 21A258, 21A260, and 21A267 – stated their consent to or did not oppose the filing. Counsel for the remaining applications had not responded by December 30, 2021 at 9 AM. The United States Department of Justice took no position.

AAF is a nonprofit organization that promotes traditional American values and defends policies that preserve liberty and protect American freedom against encroachment by the federal government and the administrative state. AAF files amicus briefs in federal courts that support these principles.

AAF seeks permission to file the attached *amicus brief* explaining that the Occupational Safety and Health Administration's (OSHA) recently published Emergency Temporary Standard (ETS), issued November 4, 2021, conflicts with AAF's core understandings concerning the proper interpretation of Executive Agency authority and Congressionally delegated authority under the United States

Constitution. Through the separation of powers, the Framers of our Constitution placed boundaries and limitations on the ability of the Executive Branch unilaterally to impose mandates on American citizens, and to erect barriers to work, that are far outside the contemplation or authorization of the peoples' elected representatives in Congress. OSHA's ETS entirely ignores those limitations. This Court must act now to prevent the irreparable harm to Americans, to jobs, and to constitutional governance that will be done if OSHA's mandate is permitted to take effect.

AAF believes the attached brief will be useful to the Court in considering the emergency applications by offering important historical perspective on the limited scope of the emergency authorities that Congress has delegated to OSHA. The brief analyzes the nine ETSs that OSHA promulgated prior to 2021. All nine sought to regulate workplace-specific hazards. The brief explains that of the nine ETSs, six were challenged in court as an improper application of OSHA's limited emergency authority. All but one of the challenged ETSs were either fully or partially vacated or stayed. This history critically illustrates that the courts have historically played a robust role in ensuring that OSHA's exercise of emergency authorities is strictly limited to the terms of Congress's express delegation.

For the foregoing reasons, AAF respectfully requests that the Court grant its motion to file the attached *amicus brief*. AAF requests leave to file in unbound format on 8 ½-by-11-inch paper rather than in the booklet form, and, if necessary, to file a brief without providing 10 days' advance notice to the parties of its intent to file this brief. The expedited briefing ordered by the Court renders such notice impossible.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom, Inc. is a nonprofit organization that promotes traditional American values and defends policies that preserve liberty and protect American freedom against encroachment by the federal government and the administrative state. AAF also advocates for policies that preserve federalism and the separation of powers. AAF believes that it is the role of Congress to enact laws and the role of the Executive to enforce laws; it is not the role of the Executive to unilaterally expand laws that Congress approved. AAF files amicus briefs in federal courts that support these principles.[1]

SUMMARY OF THE ARGUMENT

Through the separation of powers, the Framers of our Constitution tightly bounded the ability of the Executive Branch unilaterally to impose bodily mandates on American citizens, or to erect barriers to work, that were not clearly authorized by the peoples' elected representatives in Congress. The Occupational Safety and Health Administration's (OSHA) recently published Emergency Temporary Standard (ETS), issued November 4, 2021, ignores those limitations.

This brief analyzes the nine ETSs that OSHA promulgated prior to 2021, six of which were challenged in court, and five of which were vacated or stayed in whole or in part. The brief explains that courts reviewing ETSs have rightly regarded attempts by OSHA to invoke its emergency authorities as a means to shortcut normal rulemaking requirements with deep suspicion, and have robustly policed the

[1] No counsel for a party authored this brief in whole or in part. No person other than amici curiae made any monetary contribution intended to fund the preparation or submission of this brief.

limitations on those powers that were established by Congress. This Court should follow the example of previous reviewing courts by acting now to prevent the irreparable harm to Americans, to jobs, to constitutional governance, and to our cherished freedoms that will be done if OSHA's mandate is permitted to take effect.

ARGUMENT

The purpose of the Occupational Safety and Health Act (OSH Act) is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b). Under the OSH Act, the Secretary of Labor, through OSHA, can promulgate occupational safety and health standards following a rulemaking process similar to that prescribed under the Administrative Procedures Act. *See* 29 U.S.C. § 655(a)-(b).

In very limited circumstances, the OSH Act permits OSHA to issue an "emergency temporary standard" (ETS) that takes effect immediately upon publication in the Federal Register and without engaging in the traditional notice-and-comment rulemaking process. 29 U.S.C. § 655(c)(1); *see Fla. Peach Grow. Ass'n v. U.S. Dept. of Labor*, 489 F.2d 120, 124 (5th Cir. 1974) ("An emergency temporary standard . . . may be issued without regard to the notice, public comment and hearing provisions of the Administrative Procedure Act."). To invoke this emergency authority, OSHA must first determine "(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).

Because the ETS temporarily shortcuts certain procedural rule-making requirements and is "OSHA's most dramatic weapon in its enforcement arsenal," *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984), "[t]he key to" its "issuance" "is the necessity to protect employees from a grave danger," *Fla. Peach Grow. Ass'n*, 489 F.2d at 124, and the existence of an "emergency situation," *id*. at 129-30. Temporary standards may be effective for six months. 29 U.S.C. § 655(c)(2)-(3). After six months the standard must either be replaced with a permanent standard that was promulgated through notice-and-comment rulemaking or revoked. *Id*.

Between 1971 and 2020, OSHA issued nine ETSs. Each ETS was unambiguously linked to an asserted occupational danger or hazard and regulated conduct or mandated actions that were explicitly limited to the workplace. Of these nine ETSs – all of which were promulgated in the late 1970s or early 1980s – six were challenged in court. *See e.g.*, Cong. Rsch. Serv., Occupational Safety and Health Administration (OSHA): COVID-19 Emergency Temporary Standards (ETS) on Health Care Employment and Vaccinations and Testing for Large Employers, at 35 tbl. A-1 (updated Dec. 21, 2021), *available at* https://crsreports.congress.gov/product/pdf/R/R46288. Only one of the six challenged ETSs entirely survived judicial scrutiny.

Courts reviewing ETSs have rightly regarded attempts by OSHA to shortcut the requirements of notice-and-comment rulemaking by invoking its emergency authorities with deep suspicion. "Congress intended a carefully restricted use of the

emergency temporary standard[.]" *Fla. Peach Grow. Ass'n*, 489 F.2d at 130 n.16. Courts reviewing ETSs (and other OSHA regulations promulgated through its normal process) apply the substantial evidence test, thus taking "a harder look at OSHA's action than [they] would if [they] 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*, 727 F.2d at 421 (internal quotations omitted).

By the early 1980s, courts had made it clear to OSHA that they would rigorously police Congress's intended limitations on its emergency authorities. OSHA thereafter abandoned the use of ETSs for nearly four decades. The COVID-19 ETS that is now before the Court is OSHA's first attempt to use of an ETS since its last ETS was invalidated in 1984.

I. Historical Disposition of OSHA ETSs

Three of OSHA's prior ETSs were never challenged in court:

1. In 1971, OSHA issued an ETS to "deal[] with the exposure of employees to asbestos dust." *See* 36 Fed. Reg. 23,207 (December 7, 1971). The ETS stated that "increasing information on the results of exposure of employees to airborne asbestos dust [under the present standard] . . . constitutes a grave danger to employees[.]" *Id* (emphasis added). The ETS sought to modify the "8-hour time-weighted average airborne concentration of asbestos dust to which employees are exposed[.]" *Id*.

2. In 1974, OSHA issued an ETS regarding exposure levels to vinyl chloride. 39 Fed. Reg. 12,342 (April 5, 1974). The ETS lowered the ceiling for worker exposure in the workplace. *Id*.

3. In 1977, OSHA issued an ETS regarding exposure levels to DBCP. 42 Fed. Reg. 45,535 (Sept. 9, 1977). The ETS implemented a "time-weighted average" for worker exposure in the workplace. *Id*.

Of the six OSHA ETSs that were challenged in court, five were enjoined or vacated in whole or in part:

1. In 1973, OSHA issued an ETS to "deal[] with the exposure of employees to pesticides." 38 Fed. Reg. 10,715 (May 1, 1973), amended by 38 Fed. Reg. 17,214 (June 29, 1973). The ETS explicitly noted that "[p]esticides, herbicides and fungicides used in the agricultural industry have increasingly become recognized as a particular source of hazard to large numbers of farmers and farmworkers." *Id*. The ETS sought to regulate worker exposure to several pesticides. *Id*. Several months after OSHA promulgated the ETS, it issued a second ETS, amending the table of pesticides and promulgating "a new emergency temporary standard for the protection of farm workers from the occupational exposure to organophosphorous pesticide." 38 Fed. Reg. 17,214 (June 29, 1973). The ultimate purpose of this ETS was to "prescribe[] safeguards to be taken regarding the exposure of field workers to certain organophosphorous pesticides." *Id*.

The U.S. Court of Appeals for the Fifth Circuit vacated the ETS, finding that "[t]he reasons published by the Secretary with the standards do not

themselves evidence a factual need for emergency standards. The record supports the need for some standards, but not emergency standards." *Fla. Peach Grow. Ass'n*, 489 F.2d at 130. The court noted that the "[e]xtraordinary power" provided to OSHA to promulgate ETSs "should be delicately exercised, and only in those emergency situations which require it." *Id*. at 129-30. It further stated that "an abundance of evidence [exists] that emergency standards are not necessary[;]" several investigative groups commissioned by the government to study the problem "firmly concluded that no emergency existed and that there was no justification for use of an emergency temporary standard." *Id*. at 129. The court also found that the record did not support a finding that workers faced a "grave danger" from exposure, as only a small number of employees became sick, with no associated deaths, and the illnesses have "been going on during the last several years thus failing to qualify for emergency measures." *Id*. at 131.

2. Also in 1973, OSHA issued an ETS to "deal[] with the exposure of employees to certain listed substances that are known to cause cancer." 38 Fed. Reg. 10,929 (May 3, 1973). The ETS explicitly identified 14 carcinogens that "are toxic and physically harmful" and found that the standard "is necessary to protect the employees from such exposure." *Id*. Like other ETS, OSHA's regulatory action was limited to employee/employer workplace conduct.

The U.S. Court of Appeals for the Third Circuit vacated and remanded the ETS to OSHA with respect to two of the challenged carcinogens, finding deficiencies in the agency's statement of reasons. *Dry Color Mfrs. Ass'n Inc. v. Dep.*

of Labor, 486 F.2d 98, 107 (3d Cir. 1973). The court found that the statement of reasons was insufficient because it "fail[ed] to set forth the basis for its finding that the 14 chemicals listed in the standard are carcinogens" and "failed to offer any explanation as to why this particular standard is necessary to protect the employees from such exposure." *Id*. at 106-07 (internal quotations omitted). The court's reasoning emphasized that to justify invocation of its emergency authorities, OSHA must make specific findings demonstrating why the standard is necessary to protect employees.

In dicta, the Third Circuit also questioned whether substantial evidence supported OSHA's finding that the two carcinogens subjected workers to a grave danger, as the evidence at most demonstrated a "potential" to cause cancer in humans. *Id*. at 104-05. The court stated that emergency standards "must be supported by evidence that shows more than some possibility" of harm. *Id*. at 104.

3. In 1976, OSHA issued an ETS "to protect divers from the grave dangers to which their occupation subjects them." 41 Fed. Reg. 24,272 (June 15, 1976). The ETS noted that regulations were necessary because "unsafe practices" were occurring within the diving industry. Although the ETS generally noted the grave dangers in diving, it only regulated diving activities within the employee/employer relationship. *Id*. Indeed, the ETS specifically noted that "diving by persons engaged in recreational or sport diving or other diving not in an employment context are beyond the jurisdiction of the Act." *Id*.

In a *per curium* opinion, the United States Court of Appeals for the Fifth Circuit stayed the ETS on grounds that the challengers were likely to prevail on the merits, finding that ETSs should only be "exercised . . . in those emergency situations which require it" and that the "underlying facts" did not support such an emergency. *Taylor Diving Salvage v. U.S. Dept. of Labor*, 537 F.2d 819, 820-21 (5th Cir. 1976).

4. In 1977, OSHA concluded that data "conclusively establish[ed] that employee exposure to benzene presents a leukemia hazard." 42 Fed. Reg. 22,516 (May 3, 1977). The agency issued an ETS that limited "employee exposure to benzene . . . as an 8 hour time-weighted average concentration" and implemented monitoring requirements that measure employee exposure. *Id*.

The United States Court of Appeals for the Fifth Circuit stayed the ETS. *See Indus. U. Dept., AFL-CIO v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977); *see also Am. Petrol. Inst. v. OSHA*, 581 F.2d 493, 499 (5th Cir. 1978).

5. In 1983, OSHA issued its last ETS prior to 2021, which sought "to reduce the permissible exposure limit [] for asbestos . . . per cubic centimeter as an eight-hour time-weighted average[.]" 48 Fed. Reg. 51,086 (Nov. 4, 1983). The agency believed that the ETS was necessary because continued exposure to asbestos at the current standards presented a "grave danger" to employees "of developing asbestos-induced cancer[.]" *Id*. Like every other ETS issued to date, OSHA's regulations were limited to employee/employer workplace conduct.

The United States Court of Appeals for the Fifth Circuit stayed the ETS "because the record, considered as a whole, [did] not indicate that the risk the ETS seeks to eliminate is grave, as OSHA itself has defined it, or that the ETS is necessary, as those terms are used in the ETS statute." *Asbestos Info. Ass'n*, 727 F.2d at 427 (internal quotations omitted). In reaching this conclusion, the court noted that "[n]o new data or discovery leads OSHA to invoke its extraordinary ETS powers," *id.* at 418, and that the agency could accomplish its objectives through current regulations that require use of respirators, *id*. at 426.

Of the six OSHA ETSs that were challenged in court, only one withstood judicial scrutiny:

1. In 1978, OSHA issued an ETS amending its prior standard concerning employee exposure to vinyl cyanide to further reduce the permissible exposure level as an 8-hour time-weighted average concentration. 43 Fed. Reg. 2,586 (Jan. 17, 1978).

The United States Court of Appeals for the Sixth Circuit declined to stay the *ETS*, based upon a study that the chemical caused cancer in rats, and a second study that showed multiple cancer cases in plant workers who were exposed to the chemical. *Vistron v. OSHA*, 6 OSHC 1483 (6th Cir. 1978).

II. Common Characteristics of Past OSHA ETSs

OSHA's nine historical ETS share three common characteristics worthy of the Court's consideration.

First, no prior ETS attempted to require or coerce employees "to undertake a medical procedure (a vaccination) that cannot be undone at the end of the workday."

In re: MCP No. 165, Occupational Safety & Health Admin. Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402 (Sutton, C.J., dissenting from the denial of initial hearing en banc).

Second, each ETS sought to regulate an asserted occupational danger or toxin that arose directly, significantly, or exclusively in the workplace, such as workplace exposure to asbestos, pesticides, carcinogens, or chemicals. *See id.* ("As a threshold matter, the Act is designed to protect employees from dangers that arise directly out of the workplace and addresses only workplace conditions, as the title of the Act suggests . . . and as the rest of the Act confirms. The language of the Act covers dangers arising out of work, say a chemical used to make a plastic product or the heat generated at a steel foundry, not any risk facing the country and every citizen in it."); *see also Indus. Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607, 615-16 (1980) ("[Although] [t]he entire population of the United States is exposed to small quantities of benzene," a toxic substance, OSHA only sought to regulate the conditions of "workers [who were] subject to additional low-level exposures as a consequence of their employment."). "The virus that causes COVID-19 is not, of course, uniquely a workplace condition." *In re: MCP No. 165, Occupational Safety & Health Admin. Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard* 86 Fed. Reg. 61402 (Larsen, J., dissenting).

Finally, courts have struck down ETSs where OSHA failed to substantiate the existence of a true emergency, as distinct from continuing everyday hazards, or where OSHA's assertion that the targeted danger was "grave" was found to be insufficiently

supported. In the instant case, OSHA's thin justification for invocation of its extraordinary emergency authorities, which is described at length in the Applicants' chief briefs, strongly suggests that the Biden Administration is not truly seeking to mitigate workplace hazards through the ETS, but rather is attempting to use OSHA to accomplish an end that it has been unable to persuade Congress to support: the mandatory vaccination of the American public. *See BST Holdings, L.L.C. v. OSHA*, No. 21-60845 n.13 (5th Cir. Nov. 12, 2021) ("On September 9, 2021, White House Chief of Staff Ron Klain retweeted MSNBC anchor Stephanie Ruhle's tweet that stated, OSHA doing this vaxx mandate as an emergency workplace safety rule *is the ultimate work-around for the Federal govt to require vaccinations*.") (internal quotations omitted) (emphasis in original).

CONCLUSION

The Sixth Circuit erred when it lifted the Fifth Circuit's stay of OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021). The Court should reverse, and immediately stay the ETS.

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