No. 21A_____

In The

Supreme Court of the United States

In re: MCP NO. 165, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

REPUBLICAN NATIONAL COMMITTEE,

Applicant,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION and U.S. DEPARTMENT OF LABOR,

Respondents.

EMERGENCY APPLICATION FOR STAY PENDING JUDICIAL REVIEW

To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit

Dated: December 20, 2021

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PARTIES TO THE PROCEEDING

Applicant Republican National Committee is the national party committee of the Republican Party and a petitioner in the U.S. Court of Appeals for the Sixth Circuit.

The following are petitioners in the proceedings below, but are not parties to this Emergency Application: BST Holdings, LLC; RV Trosclair LLC; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; and Trosclair Williams LLC; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; Kip Stovall; Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; LeadingEdge Personnel, Ltd.; United Food and Commercial Workers, AFL-CIO; American Federation of Labor and Congress of Industrial Organizations; National Association of Home Builders of the United States; Massachusetts Building Trades Council; Local 32BJ, Service Employees International Union; AFT Pennsylvania; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; Associated General Contractors of America, Inc.; American Road and Transportation Builders Association; Signatory Wall and Ceiling Contractors Alliance; American Family Association, Inc.; Word of God Fellowship, Inc., d/b/a/ Daystar Television Network, Inc.; State of Texas; HT Staffing, Ltd., d/b/a HT Group; State of Louisiana; Cox Operating, L.L.C; DIS-TRAN Steel, LLC; DIS-TRAN

Packaged Substations, LLC; Beta Engineering, LLC; Optimal Field Services, LLC; State of Mississippi; Gulf Coast Restaurant Group Inc.; State of South Carolina; State of Utah; Texas Trucking Association; Mississippi Trucking Association; Louisiana Motor Transport Association; American Trucking Associations, Inc.; National Federation Of Independent Business; National Retail Federation; FMI – The Food Industry Association; National Association Of Convenience Stores; National Association Of Wholesaler-Distributors; International Warehouse & Logistics Association; International Foodservice Distributors Association; Greg Abbott; Bentkey Services, LLC, d/b/a/ The Daily Wire; Phillips Manufacturing & Tower Co.; Sixarp, LLC; Commonwealth of Kentucky; State of Idaho; State of Kansas; State of Ohio; State of Oklahoma; State of Tennessee; State of West Virginia; Answers in Genesis, Inc.; Southern Baptist Theological Seminary; Asbury Theological Seminary; Tankcraft Corporation; Plasticraft Corporation; State of Indiana; Job Creators Network; Independent Bankers Association; Lawrence Transportation Company; Guy Chemical Company, LLC; Rabine Group of Companies; Pan-O-Gold Baking Company; Terri Mitchell; State of Missouri; State of Arizona; State of Nebraska; State of Montana; State of Arkansas; State of Iowa; State of North Dakota; State of South Dakota; State of Alaska; State of New Hampshire; State of Wyoming; AAI, Inc.; Doolitttle Trailer Mfg., Inc.; Christian Employers Alliance; Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools; Home School Legal Defense Association, Inc.; DTN Staffing Inc.; Jamie Fleck; Sadie Haws; Sheriff Sharma; Wendi Johnston; Miller Insulation Company;

Brad Miller; Corey Hager; Julio Hernandez Ortiz; Aaron Janz; MFA Incorporated; MFA Enterprises, Inc.; Missouri Farm Bureau Services, Inc.; Missouri Farm Bureau Insurance Brokerage, Inc.; MFA Oil Company; Doyle Equipment Manufacturing Co.; Riverview Manufacturing, Inc.; National Association of Broadcast Employees & Technicians—The Broadcasting & Cable Television Workers Section of the Communications Workers of America, AFL-CIO, Local 51; Media Guild of the West, The News Guild-Communications Workers of America, AFL-CIO, Local 39213; Union of American Physicians and Dentists; The Denver Newspaper Guild, Communications Workers of America, Local 37074, AFL-CIO; State of Florida; State of Alabama; State of Georgia; Georgia Highway Contractors Association; Georgia Motor Trucking Association; Robinson Paving Co.; Scotch Plywood Company, Inc.; The King 's Academy; Cambridge Christian School; FabArc Steel Supply, Inc.; Tony Pugh; Associated Builders and Contractors, Inc.; and Associated Builders and Contractors of Alabama, Inc.

Respondents are the Occupational Safety & Health Administration and the U.S. Department of Labor.

The following are respondents in the proceedings below, but are not parties to this Emergency Application: Marty Walsh, United States Secretary of Labor; Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health; James Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health; Joseph R. Biden, President of the United States; and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 the Republican National Committee hereby states that it has no parent companies and that no publicly held company has a 10% or greater ownership interest in the Committee.

RELATED PROCEEDINGS

The related proceedings below are:

1. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, *86 Fed. Reg. 61402*, *Issued on November 4, 2021*, No. 21-7000 (6th Cir.) (docket for lead case).
    a. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, *86 Fed. Reg. 61402*, No. 21-7000, 2021 WL 5914024 (6th Cir. Dec. 15, 2021) (denying petitions for initial hearing en banc).
    b. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, *86 Fed. Reg. 61402*, No. 21-7000, 2021 WL 5989357 (6th Cir. Dec. 17, 2021) (dissolving Fifth Circuit's stay pending judicial review).
2. *RNC v. OSHA*, No. 21-1215 (D.C. Cir.), *consolidated with* No. 21-7000 (6th Cir.) *as* No. 21-4082 (6th Cir.) (docket for individual case).
3. *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021) (staying enforcement of the mandate pending judicial review prior to lottery).

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

The Republican National Committee ("RNC") hereby respectfully requests an immediate stay pending full judicial review of the Occupational Safety & Health Administration's emergency temporary standard entitled COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402 (Nov. 5, 2021).

INTRODUCTION

This case is about the Federal Government's attempt to compel universal vaccination through the pretext of "workplace" safety. Under a rarely used statutory provision designed to address emergency situations where new workplace hazards emerge unexpectedly, OSHA mandated hundreds-of-thousands of private sector employers to implement a national COVID-19 vaccination regime for 84.2 million Americans two years after the pandemic began. And OSHA did so without providing an opportunity for notice-and-comment that could have supplied the agency with much needed input from the businesses and individuals impacted by the vaccination mandate.

The Fifth Circuit immediately stayed OSHA's mandate to prevent irreparable harm pending full review. Following consolidation by the Judicial Panel on Multidistrict Litigation, a divided Sixth Circuit panel dissolved the Fifth Circuit's stay almost six weeks later, and less than three weeks before the compliance deadline. Although eight judges of the Sixth Circuit had already agreed with the Fifth Circuit that petitioners were "likely to prevail on the merits when it comes to their petitions targeting the emergency rule" because OSHA's "reach exceeds [the]

statute's grasp," *In re: MCP No. 165, OSHA Rule on COVID-19 Vaccination & Testing*, *86 Fed. Reg. 61402*, No. 21-7000, slip op. at 8 (6th Cir. Dec. 15, 2021) ("En Banc Op.") (Sutton, C.J., dissenting), the panel majority found otherwise and reinstated the rule.

The panel majority gave short shrift to the RNC's showing that OSHA lacked substantial evidence for the rule and minimized the irreparable harm that would befall American employers and workers absent a stay. Rather than grapple with the fatal defects the RNC identified in the data sets OSHA cited in support of its finding of grave danger in the workplace, RNC Opp. OSHA's Emergency Mot. Dissolve Fifth Circuit's Stay Pending Appeal, at 15-17, ECF No. 313 ("RNC Opp."), the panel majority simply parroted the flawed data and noted the support of friendly union petitioners, *see In re: MCP No. 165, OSHA Rule on COVID-19 Vaccination & Testing*, *86 Fed. Reg. 61402*, No. 21-7000, slip op. at 24-25 (6th Cir. Dec. 17, 2021) ("Stay Op."). The panel majority also wrongly excused the *post hoc* and pretextual nature of OSHA's analysis, *see* RNC Opp. at 14-15, disingenuously claiming that "employers [had] turned" to OSHA for "guidance" on how to protect their employees, Stay Op. at 1. And rather than acknowledge that the many employers that have brought suit in every regional court of appeals cannot all be mistaken in affirming their irreparable harm—harm that, in the RNC's case undermines its mission in this upcoming election cycle, RNC Opp. at 22-23—the panel majority claimed that OSHA's rule allowed employers "to determine for

themselves how best to minimize the risk of contracting COVID-19 in their workplaces." Stay Op. at 7.

In dissolving the stay, the panel majority abetted the Executive Branch's effort to use regulatory uncertainty to bend private employers to its will and, through them, to overcome significant reluctance at the grassroots level that persists despite nine months of free vaccines being offered in 80,000 locations nationwide. "But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n. of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021). And here, where our economy is still struggling to recover from the disruptions caused by the pandemic, the Federal Government should not force businesses, workers, and families to bear arbitrary regulatory burdens that exceed OSHA's constitutional and statutory authority. This Court should reimpose the stay.[1]

OPINIONS BELOW

The Fifth Circuit issued an administrative stay pending further order. That order is unpublished and available at 2021 WL 5166656 and attached as Appendix 6.

Additionally, the Fifth Circuit issued an opinion and order staying the effective date of the Mandate. That opinion and order is published at 17 F.4th 604 and attached as Appendix 5.

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[1] In the alternative, this Court may treat this application as a petition for certiorari before judgment and grant expedited briefing and argument. *See Whole Women's Health v. Jackson*, 142 S. Ct. 415 (Mem) (Oct. 22, 2021); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (Mem) (Dec. 13, 2019).

The Sixth Circuit issued a published opinion dissolving the stay. Judge Gibbons filed a separate concurring opinion. Judge Larsen filed a dissenting opinion. These opinions are available at 2021 WL 5989357 and attached as Appendix 3.

Additionally, the Sixth Circuit, in a published opinion, denied Petitioners' request for an initial hearing en banc. Judges Sutton and Bush each filed dissents. Judge Moore concurred in the denial. These opinions are available at 2021 WL 5914024 and attached as Appendix 4.

JURISDICTION

The Sixth Circuit has jurisdiction pursuant to 29 U.S.C. § 655(f) and 28 U.S.C. § 2112(a)(3). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and authority to grant the requested relief under 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

The Occupational Safety & Health Act of 1970 ("the OSH Act"), 29 U.S.C. §§ 651-678, is attached as Appendix 2.

STATEMENT OF THE CASE

President Biden took office assuring the public that the Federal Government would not compel anyone to be vaccinated for COVID-19. *Joe Biden: Covid Vaccination in US Will Not Be Mandatory*, BBC (Dec. 5, 2020), https://www.bbc.com/news/world-us-canada-55193939. That assurance comported with 230 years of constitutional history in which the Federal Government had never claimed authority to order compulsory vaccination. It also made room for those Americans, including then-Senator Harris, who were not eager to be vaccinated.

October 07, 2020 Vice Presidential Debate Tr., Comm'n on Presidential Debates (Oct. 7, 2020), https://bit.ly/3pyp5UG ("HARRIS:…if Donald Trump tells us that we should take [the vaccine], I'm not taking it.").

The promise was short lived. Faced with declining poll numbers and apparently dissatisfied with the personal medical choices of tens-of-millions of Americans, the President went before the Nation to declare that "the unvaccinated" were not "doing the right thing" and that their "refusal has cost all of us." Remarks on the COVID-19 Response and National Vaccination Efforts, 2021 Daily Comp. Pres. Docs. 725, at 1-3 (Sept. 9, 2021) ("Presidential Remarks"). The President announced that he would "combat those blocking public health" by directing OSHA to issue "an emergency rule" that would "require more Americans to be vaccinated." *Id.*

On November 5, 2021, OSHA promulgated an emergency temporary standard entitled COVID-19 Vaccination and Testing ("the Mandate"). 86 Fed. Reg. 61402 (App'x 7). The Mandate requires all employers with 100 or more employees to adopt a mandatory vaccination policy. It exempts employers "only if" they require their employees either (a) to be fully vaccinated or (b) to provide proof of weekly testing for COVID-19 and to wear a face covering, Pmbl.-61552, and follow other burdensome controls, Pmbl.-61450-54.

The Fifth Circuit stayed the Mandate, citing "grave statutory and constitutional issues." *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021); *see BST Holdings, LLC v. OSHA*, 17 F.4th

604 (5th Cir. 2021). OSHA did not seek this Court's review or ask the Fifth Circuit for reconsideration.

Instead, OSHA waited to see where the case would be consolidated by the Judicial Panel on Multidistrict Litigation. On November 16, 2021, the Panel transferred 27 petitions for review, which were pending in every U.S. Court of Appeals, to the Sixth Circuit. *See* Consolidation Order, No. 21-7000 (6th Cir. Nov. 18, 2021), ECF No. 1; Case Mgmt. Order, ECF No. 8.

Eleven days after consolidation in the Sixth Circuit, the Government filed an "emergency" motion asserting that the Fifth Circuit's stay would "cost many lives per day." OSHA Emergency Mot. Dissolve Stay at 40, ECF No. 69 ("OSHA Br."). But OSHA itself had already delayed its release of the Mandate for 57 days following the President's "emergency" announcement—time the Administration used to hold dozens of meetings with Washington lobbyists, *EO 12866 Meetings*, OIRA, https://www.reginfo.gov/public/do/eom12866Search (search criteria "RIN=1218-AD42"), and await the results of close elections in Virginia and New Jersey. If the rate at which OSHA now says the Mandate will save lives is to be taken seriously, its delay following the President's announcement purportedly resulted in more than 2,167 COVID-19 deaths and over 83,000 hospitalizations. And OSHA's delay in seeking dissolution purportedly cost an additional 391 lives and 15,000 hospitalizations. *See* Pmbl.-61408.

Even while the stay was in place, the Administration continued to urge employers to comply with the Mandate. Specifically, the White House said that

because it expected to prevail at the merits stage, "[o]ur message to businesses right now is to move forward" because "nothing has changed." *Press Briefing by Press Secretary Jen Psaki*, The White House (Nov. 18, 2021), https://bit.ly/3DE2s78. And by delaying the administrative comment deadline until mid-January, 86 Fed. Reg. 68560 (Dec. 3, 2021), OSHA confirms that it is unserious about timely finishing the permanent standard.[2]

Meanwhile, roughly 59 parties, including the RNC, petitioned the Sixth Circuit to initially hear the case en banc. *See, e.g.*, RNC Pet. Initial Hr'g En Banc, ECF No. 26. On December 15, 2021, the Sixth Circuit—on an evenly divided 8-8 vote—denied the petitions. En Banc Op. at 3. Judge Moore concurred. Although she agreed "[t]his is an important case on an accelerated timeframe" she found the "normal process" sufficient. En Banc Op. at 4 (Moore, J., concurring in the denial of initial hearing en banc).

Chief Judge Sutton issued an opinion on behalf of the eight dissenting judges. These judges would have granted initial hearing en banc and, on the merits, would have upheld the Fifth Circuit's stay because "federal courts 'expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance' and to use 'exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'" En Banc Op. at 6 (Sutton, C.J, dissenting from the denial of initial hearing en banc) (quoting *Ala.*

[2] The RNC filed its comments on the original deadline. *See* RNC Comments, OSHA-2021-0007 (Dec. 6, 2021), https://prod-static.gop.com/media/documents/RNC_OSHA_rulemaking_comments_-_vaccine_mandate_1638887219.pdf.

Ass'n of Realtors, 141 S. Ct. at 2489). Congress did not do so with respect to the Mandate because (1) the OSH Act empowers OSHA to regulate "only *occupational* health and safety risks," not "all hazards that might affect employees at some point during" work hours; (2) OSHA failed to show that the Mandate was "necessary"—meaning "indispensable or essential"—to address a "grave" danger; and (3) OSHA improperly used its emergency powers to implement a regulation that is neither "temporary" nor credibly in response to an "emergency." *Id.* at 6-7 (emphasis in original).

In addition to joining the principal dissent authored by Chief Judge Sutton, Judge Bush authored a separate opinion dissenting on a ground not reached by the principal dissent: "Congress likely has no authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine mandate upon the American public." En Banc Op. at 33 (Bush, J., dissenting).

Two days later, on December 17, 2021, a divided Sixth Circuit panel entered an order dissolving the Fifth Circuit's stay—that is, nearly a month after the Government filed its "emergency" motion regarding its "emergency" temporary standard that under the OSH Act should expire within six months. Judge Stranch and Judge Gibbons held that OSHA had acted within its statutory authority. Stay Op. at 5; *see also id.* at 38 (Gibbons, J., concurring). Judge Larson dissented, stating that she would have upheld the Fifth Circuit's stay because "ordinary tools of statutory interpretation and bedrock principles of administrative law" show that

Congress never authorized OSHA to issue the Mandate. *Id.* at 39 (Larsen, J., dissenting).

Following the Sixth Circuit's order, OSHA posted an online statement purporting to "exercis[e] enforcement discretion with respect to the compliance dates" for the Mandate. *COVID-19 Vaccination and Testing ETS*, OSHA, https://www.osha.gov/coronavirus/ets2#litigation (last visited Dec. 20, 2021). But the language was carefully couched, and OSHA did not purport to delay any compliance deadline. Rather, OSHA reserved to itself the right to take action as it deems appropriate—saying only that it will "not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9," so long as an employer is "exercising reasonable, good faith efforts" to comply. *Id.*

OSHA's internet posting—which appears nowhere in the Mandate's rulemaking docket, *cf. Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810, 1817 (2019) (rejecting HHS's use of an Internet post to set policy)—makes no specific mention of compliance deadlines for the vaccination process. But some vaccine series take weeks to complete, Pmbl.-61549 (stating that Pfizer-BioNTech series takes 21 days to complete and Moderna series takes 28 days to complete), and OSHA only considers a person "fully vaccinated" two weeks after receiving their last shot, Pmbl.-61519. As a result, employers must start pressing the vaccine no later than December 29, 2021, lest their employees fall subject to the Mandate's delayed

testing deadline. This short time horizon over the holidays necessitates immediate action from this Court.

REASONS FOR GRANTING THE APPLICATION

In assessing the application for stay, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). On the merits, the OSH Act adopts the "substantial evidence" standard. 29 U.S.C. § 655(f).

I. The RNC Will Succeed On The Merits Because The Mandate Exceeds OSHA's Statutory Authority.

The OSH Act forecloses the Mandate because its vaccination and testing requirements regulate far beyond the "workplace." *See* 29 U.S.C. § 653(a). Furthermore, OSHA is precluded from using emergency authority to bypass notice-and-comment rulemaking because COVID-19 is neither a "new hazard" nor a "harmful physical agent." *See id.* § 655(b)(5), (c). These fundamental limitations are underscored by the major questions doctrine and constitutional avoidance.

A. The Mandate Exceeds OSHA's Authority To Regulate The Workplace.

The OSH Act regulates "employment performed in a workplace." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 238 n.2 (2002) (quoting 29 U.S.C. § 653(a)); *see id.* at 245. Section 6(b) authorizes OSHA to promulgate mandatory "occupational safety and health standards" that are "reasonably necessary or

appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8); *see* §§ 654, 655(b). Under section 6(c), OSHA may bypass rulemaking when an "emergency standard is necessary to protect employees" from "new hazards" presenting "grave danger." 29 U.S.C. § 655(c)(1).

Either way, the standard may regulate only "a place of employment." *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality); *see id.* at 640 n.45. Numerous provisions of the OSH Act confirm this limitation. *See* 29 U.S.C. § 651(b) ("working conditions"), (b)(1) (same), (b)(2) (same), (b)(4); *see also id.* § 651(a) ("work situations"), (b)(7) ("work experience"); § 654 (creating workplace duties); § 656(a)(1) (establishing standards advisory committee comprised of labor and industry).

Simply put, the OSH Act does not address harms "which operate primarily outside the workplace." *Oil, Chem. & Atomic Workers Int'l. Union v. Am. Cyanamid Co.*, 741 F.2d 444, 447 (D.C. Cir. 1984). Nothing in "the Act indicates that Congress intended it to apply to places which are not places of work." *Frank Diehl Farms v. Sec. of Lab.*, 696 F.2d 1325, 1331 (11th Cir. 1983). Accordingly, "for coverage under the Act to be properly extended to a particular area, the conditions to be regulated must fairly be considered *working* conditions, the safety and health hazards to be remedied *occupational*, and the injuries to be avoided *work-related*." *Id.* at 1332 (vacating enforcement actions where OSHA lacked statutory authority to regulate unsafe migrant housing); *accord Steel Joist Inst. v. OSHA*, 287 F.3d 1165, 1167

(D.C. Cir. 2002) (affording saving construction to joist standard by limiting enforcement to "the worksite"); En Banc Op. at 6-7, 16-17 (Sutton, C.J., dissenting).

The Mandate far exceeds the statute's limitations. By requiring employers to adopt mandatory vaccination policies, the Mandate effects permanent, forcible intrusions on employees that are not confined to workplaces. OSHA itself has long recognized that "vaccination is an invasive procedure." Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23042, 23045 (May 30, 1989) (NPRM); *cf. Buck v. Bell*, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."). This recognition makes sense because a vaccine, unlike a traditional safety measure, is irreversible and cannot be removed from the employee's body when he or she leaves the job site. Health effects, likewise, are not confined to the workplace. *See also* En Banc Op. at 7-8, 22-23 (Sutton, C.J., dissenting).

That overreach is the entire point of the Mandate. The Executive Branch was dissatisfied that "after months of education and incentives, additional actions needed to be taken in order to reach the tens of millions of people who remained unvaccinated." Exec. Office Pres., *White House Report: Vaccination Requirements are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy*, (Oct. 7. 2021), https://bit.ly/3DftSPt. "[S]o, the President announced vaccination requirements [including the Mandate] that in total will cover approximately 100 million people." *Id.* The Administration claims these measures will enhance "*public health*," Presidential Remarks, 2021 Daily Comp.

Pres. Docs. 725, at 2 (emphasis added), not workplace safety. By facilitating that broad objective, OSHA exceeds its authority.

The panel majority accepted OSHA's claim that the purported testing and masking "exemption" avoids these problems. *See* Stay Op. at 7 (majority) ("The ETS does not require anyone to be vaccinated[.]"). But even putting aside that the Administration itself has repeatedly called the emergency temporary standard a vaccination "mandate" and a "requirement," *see, e.g.*, Exec. Office Pres., *supra*, OSHA plainly intends the testing option to be so onerous that employers will be cudgeled into adopting mandatory vaccination policies. The "exemption" imposes burdensome requirements that do not enhance workplace safety and make it more difficult for employers to maintain operations by, for example, requiring isolation of employees under certain circumstances when they have not actually tested positive for COVID-19. Pmbl.-61553 (§ 1910.501(g)). And the preamble reminds employers that implementing the mandate entails "advantages" because "only employers who decline to implement a mandatory vaccination program are required by the rule to assume the administrative burden necessary to ensure that unvaccinated workers are regularly tested for COVID-19 and wear face coverings when they work near others." Pmbl.-61437. The "choice" presented to employers is, as a practical matter, no choice at all. *See* En Banc Op. at 12-13, 23 (Sutton, C.J., dissenting).

The same is true for employees. Unlike prior standards making testing "optional" and results "confidential," Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64004, 64154, 61157 (Dec. 6, 1991) (Final Rule)

("Bloodborne Pathogens"), *aff'd Am. Dental Ass'n v. Martin*, 984 F.2d 823 (7th Cir. 1993), the Mandate requires that "self-administered" tests must be "observed by the employer or an authorized telehealth proctor" and that employees must "promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19," Pmbl.-61551 (§ 1910.501(c)(iii)), Pmbl.-61553 (§ 1910.501(h)(1)). Furthermore, the Mandate authorizes employers to shift the cost of testing and masking (but not vaccination) to employees. Pmbl.-61553 (Note 1 to paragraph (g)(1)); Pmbl.-61553-54 (Note 2 to paragraph (i)). These weekly burdens are plainly designed to compel vaccination.

For these reasons, the Mandate is unlike prior OSHA standards. The Sixth Circuit panel majority agreed with OSHA that the Occupational Noise Exposure standard shows that "COVID-19 is not the first hazard that OSHA has regulated that occurs both inside and outside the workplace." Pmbl.-61407; *see* Stay Op. at 13. And that is true as far as it goes. But the panel majority overlooked that the Fourth Circuit upheld the noise exposure standard because it regulates only "occupational noise" and expressly "provides that non-occupationally caused hearing loss [is] excluded from its regulation." *Forging Indus. Ass'n v. Sec. of Lab.*, 773 F.2d 1436, 1444 (4th Cir. 1985) (en banc). Furthermore, the actual protections contemplated by the noise exposure standard—that is, certain noise controls for machinery and "hearing protectors, such as ear muffs or plugs, to reduce employee noise exposure to permissible limits," *id.* at 1440—are confined to the workplace.

The Bloodborne Pathogens standard is similarly circumscribed. There, OSHA limited healthcare workers' occupational exposure to Hepatitis-B through an array of safe handling practices for blood and other potentially infectious materials. With respect to the Hepatitis-B vaccine, OSHA agreed with the CDC that "a mandatory vaccination program would be inappropriate" in part "because of the invasive nature of such a procedure" and found "voluntary vaccination" is "the best approach." 56 Fed. Reg. at 64029, 64154. Similarly, OSHA limited employee testing to "post-exposure evaluation" conditioned on an "employee's optional choice." *Id.* at 61453. By thus eschewing mandates, OSHA avoided extending its regulatory authority beyond the "workplace." 29 U.S.C. § 653(a). But here, the Mandate far exceeds OSHA's jurisdiction.

B. The OSH Act Forecloses OSHA's Decision To Bypass Notice-and-Comment Procedures.

1. *COVID-19 Is Not A "New Hazard."*

Section 6(c) "applies only to new hazards." *United Auto. Workers v. OSHA*, 938 F.2d 1310, 1314 (D.C. Cir. 1991); *see BST Holdings*, 17 F.4th at 611 n.11. OSHA contends COVID-19 remains "new" because it "was not known to exist until January 2020." Pmbl.-61406. But two years is too long when "an emergency temporary standard must be replaced within six months." *Dry Color Mfrs. Ass'n v. Brennan*, 486 F.2d 98, 108 (3rd Cir. 1973).

The structure of the OSH Act shows why. An emergency standard "take[s] immediate effect upon publication" and "serve[s] as a proposed rule" for a permanent standard that "supersede[s]" the emergency standard "no later than six

months after publication of the emergency standard." 29 U.S.C. § 655(c); *see* 29 C.F.R. § 1911.12(c). Under the statutory design, the emergency standard "expires six months from its promulgation." *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984); *see Dry Color*, 486 F.2d at 101.

Because Congress has determined that OSHA may bypass notice-and-comment for just six months, there is no merit to OSHA's contention that it may issue the Mandate *two years* after COVID-19 arrived and *eleven months* after vaccines became available. Courts have rejected similar claims without a statutory deadline. *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) ("concern for public safety further is undermined by [the agency's] own seven-month delay in promulgating the Interim Rule"); *Florida v. HHS*, No. 21-14098-JJ, 2021 WL 5768796, at *26 (11th Cir. Dec. 6, 2021) (Lagoa, J., dissenting) ("The [CMS] mandate was announced two months before it was issued by CMS, and . . . does not take effect until one month after the issuance date. Moreover, vaccines have been available to healthcare workers for nearly a year . . . and the Delta variant has been spreading in the United States for months, yet CMS took no action. . . . CMS's own regulation establishes a lack of urgency on its part, either demonstrating that the situation is not so dire as it claims, or that it created the urgency by its own delay."). *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846, at *10 (W.D. La. Nov. 30, 2021) (holding two-month delay prevented CMS from invoking "good cause" exception for COVID-19); *Missouri v. Biden*, 4:21-cv-01329, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021) (similar); *Chamber of Com. v. DHS*, 504 F. Supp.

3d 1077, 1089 (N.D. Cal. 2020) (holding six-month delay prevented DHS from invoking "good cause" exception for COVID-19). *A fortiori*, OSHA's claim must fail.

The panel majority construed the disjunctive "or" to free OSHA from the "new hazard" requirement. Stay Op. at 10. But section 6(c) also requires an "emergency"—that is, an "unforeseen" or "urgent" event, https://www.merriam-webster.com/dictionary/emergency—and "statutory context can overcome the ordinary, disjunctive meaning of 'or.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *see also Fla. Peach Growers Ass'n, Inc. v. DOL*, 489 F.2d 120, 129 (5th Cir. 1974) (holding "there was no justification for use of an emergency temporary standard" where "no emergency existed"); En Banc Op. at 21 (Sutton, C.J., dissenting) ("The statute covers only an 'emergency' and only 'temporary requirements.'"). It thus makes no difference whether the six-month temporal qualifier is located in "new hazard" or "emergency." Either way, OSHA lacks authority to regulate COVID-19.

The panel majority attempts to salvage an "emergency" from the record. Stay Op. at 19-20. But that attempt fails because both "the virus" itself and the "tools to address the virus" are more than six months old, *id.* at 19, placing both outside the statutory window. It is also belied by the Administration's foot-dragging in issuing the Mandate, the Government's delayed response to the Fifth Circuit's stay, and the panel's decision to wait nearly a month to dissolve the stay. It is simply not credible to claim an "emergency" less than three weeks before the Mandate is scheduled to become effective and a week before the holidays given the timeline of how this

unfolded. And the panel's suggestion that "the Omicron variant" might be more recent, *id.* at 20 n.2, is inadequate because it was not relied upon by OSHA. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"). In any event, the panel's consideration of the Omicron variant is unsupported by any evidence in the record, let alone "substantial evidence."

2. *COVID-19 Is Not A "Harmful Physical Agent."*

Nor was the Sixth Circuit panel majority correct that COVID-19 constitutes a "harmful physical agent." 29 U.S.C. § 655(b)(5); *see id.* § 655(c). The opinion adopts OSHA's concession that an "agent" is "a chemically, physically, *or* biologically active principle." Stay Op. at 10 (quoting *Agent*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/agent) (emphasis added). And it argues for a firmly disjunctive reading of "or." *Id.* Therefore, according to the majority's own reasoning, physical agents must be wholly distinct from biological agents.

This should have prevented the panel from affirming OSHA. The agency previously classified COVID-19 as a "biological agent." *Biological Agents*, OSHA, https://www.osha.gov/biological-agents (last visited Dec. 20, 2021); *see also* Pmbl.-61406 (referencing "biological hazards like SARS-CoV-2"). That classification makes sense because the term "physical agent" means an "[a]coustic, aqueous, electrical, mechanical, thermal, or light energy applied to living tissues to alter physiologic processes for therapeutic purposes," *Physical Agent*, Stedman's Pocket

Medical Dictionary (1st ed. 2010), and thus could not encompass a coronavirus even if OSHA had proposed to revisit its classification in this proceeding. The panel majority, however, overlooked this critical distinction in interpreting the phrase "physically harmful" broadly, without any authority, to mean "causing bodily harm." Stay Op. at 10.

The panel majority was also mistaken in concluding that a statutory reference to "immunization" gives OSHA authority to address viruses. *Id.* at 11. As Chief Judge Sutton recognized, "[t]his argument tries to squeeze a lot of power out of a very small statutory tube." En Banc Op. at 27 (Sutton, C.J., dissenting). The provision in question concerns only research and related activities conducted by HHS and does not purport to confer substantive regulatory authority upon HHS (let alone upon OSHA). *Cf. Mot. Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) ("Congress authorized and ordered the Commission to produce a report . . . not . . . to promulgate regulations"). Furthermore, the "single reference to immunizations" explains only "when they are prohibited." En Banc Op. at 27 (Sutton, C.J., dissenting); *see* 29 U.S.C. § 669(a)(5). Congress cannot be expected to have conferred power upon OSHA merely by denying it to HHS.

The panel majority's invocation of the Workers Family Protection Act is likewise inapposite. *See* Stay Op. at 11-12. That statute never mentions "harmful physical agents" but merely directs "the National Institute for Occupational Safety and Health" to "study" certain "issues related to . . . hazardous chemicals and substances, including infectious agents." 29 U.S.C. § 671a(c)(1)(A). That the Act

instructs OSHA to consider these studies does not expand its substantive authority—a point the Act makes express when it specifies that "[i]f [OSHA] determines that additional regulations or standards are needed" they must be promulgated "pursuant to [OSHA's] authority under the [OSH] Act," § 671a(d)(2), and only after OSHA "prepare[s] and submit[s] to . . . Congress a report concerning" that determination, § 671a(d)(1)(B). Thus, far from expanding OSHA's regulatory authority, the Workers Family Protection Act reinforces the limits of the OSH Act and imposes additional procedural hurdles.

C. Congress Never Contemplated Using The OSH Act To Implement A Nationwide Vaccine Requirement.

Even if the OSH Act were ambiguous, the scope of the Mandate would counsel against OSHA's interpretation. Courts require "Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' [courts] typically greet its announcement with a measure of skepticism." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citation omitted).

Considerable skepticism is warranted here. The Mandate is a "major rule" that OSHA estimates will cost nearly $3 billion to implement. Pmbl.-61504, 61495; *see* 5 U.S.C. § 804(2). According to OSHA, the Mandate will regulate 84.2 million employees or "two-thirds of the nation's private sector workforce," Pmbl.-61467, Pmbl.-61512, and will commandeer into OSHA's enforcement brigade hundreds-of-

thousands of employers, Pmbl.-61467. Since its enactment in 1970, no regulation premised on the OSH Act has even begun to approach this size and scope. It is highly unlikely that Congress would have delegated such a sweeping decision to OSHA without an express statement.

It is equally unlikely that Congress would have authorized OSHA to take this radical step without notice-and-comment. When, in the 1990s, OSHA noticed its intent to facilitate vaccination in the Bloodborne Pathogens standard, "forced vaccination" was opposed by corporations, labor unions, and professional associations that believed it "illegal and unfair." 56 Fed. Reg. at 64155 (citation omitted). Similarly, when the Federal Government began adopting compulsory vaccination requirements in response to COVID-19, it immediately became clear that public opposition to these mandates was widespread. *See Missouri*, 2021 WL 5564501, at *3 ("it would be difficult to identify many other issues that currently have more political significance at this time"). Among federal employees, resistance was so strong that the Federal Government was forced to assure its labor unions that it will "pursue only 'education and counseling efforts'" against employees "who have not yet complied with the vaccination requirement." Eric Yoder & Lisa Rein, *Federal Agencies Won't Seriously Discipline Vaccine Holdouts Until Next Year, White House Tells Unions*, Wash. Post (Nov. 29, 2021), https://wapo.st/3yHpeJk. Such wide-ranging opposition to compulsory vaccination underscores the need for public input concerning the Mandate. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Perhaps even more compelling, Congress has itself directly addressed COVID-19 by enacting more than twenty statutes[3] in response to the pandemic. Those statutes authorize federal agencies to "plan, prepare for, promote, distribute, administer, monitor, and track COVID-19 vaccines"; study vaccine "performance, safety, and effectiveness"; and engage in "research, development, manufacturing, production, and purchase of vaccines," American Rescue Plan Act of 2021, Pub L. No. 117-2 §§ 2301-2303, 135 Stat. 4, 37-39 (Mar. 11, 2021),[4] among other things. Despite this wide-ranging legislative activity, Congress has stopped well short of directing OSHA or any other agency to order compulsory vaccination. And Congress did so against 230 years of history in which the Federal Government has never claimed such authority. Congress's actions thus show "Congress has not given [OSHA] the authority that it seeks to exercise here." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

D. OSHA's Interpretation Of The OSH Act Is Unconstitutional.

OSHA claims the Mandate is "an exercise of Congress's Commerce Clause authority." Pmbl.-61505; *see* Stay Op. at 32. But this Court has said the authority to compel vaccination stems from "the police power," *Jacobson v. Massachusetts*, 197

[3] Sixteen are summarized in Andrew P. Scott et al., Congressional Research Service, *Pandemic-Related Provisions Expiring in the 117th Congress* (May 2021) (CRS R46704).

[4] The panel majority overreads the American Rescue Plan Act as "authoriz[ation] to regulate infectious diseases." Stay Op. at 12. But there is nothing in the Act purporting to grant such broad authority. Rather, as the afore cited language shows, Congress was there concerned with facilitating vaccination not mandating it. The congressional earmarks the panel majority pin cited confirm the point. The first set aside $10 million for educational grants. § 2101, 135 Stat. at 30. The second set aside $5 million for enforcement of existing rules at "high risk" workplaces. *Id.* Neither directs OSHA to issue the Mandate.

U.S. 11, 25 (1905), that is, from the "general power of governing, possessed by the States but not by the Federal Government," *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (Roberts, C.J.). That Congress itself has never attempted to enact a compulsory vaccination requirement is a "telling indication of a severe constitutional problem" with OSHA's expansive reading of the Commerce Clause. *Id.* at 549 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)); *see also* En Banc Op. at 30-31 (Sutton, C.J., dissenting); *id.* at 36 (Bush, J., dissenting) ("[T]he Commerce Clause . . . cannot be read to effect [this] late-breaking revolution in state-federal affairs . . . .").

Equally problematic is OSHA's attempt to "displace state law" absent exceedingly clear "congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). Congress has not instructed OSHA to address vaccination, and this Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The irony in OSHA's incursion on the States' police power is especially rich because OSHA hailed its overreach to the Sixth Circuit as a victory for "employers' choice" ensuring "that employers (of all sizes) can run their businesses as they see fit." OSHA Br. 49; *see also id.* at 50 ("employers [should] choose the best protection for their own workplaces during the pendency of this case"). If that were really so, then the hundreds of employers involved in this litigation are wasting their time. "Another such victory and

[employers] [are] undone.'" *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

OSHA's sweeping claim of authority also violates the non-delegation doctrine. Under the agency's construction of the OSH Act, there is nothing that constrains its jurisdiction to the workplace or its emergency authority to new threats. It is hard to see what measures would be prohibited if, as OSHA claims, it can use its emergency authority to regulate long-extant hazards through any means that can be enforced through an employer. Could OSHA impose a "broccoli mandate" designed to keep workers healthy by directing all employers with more than 100 employees "to buy one crown of broccoli per year"? *See* Josh Blackman, *An NFIB Counterfactual: What if the Obamacare Individual Mandate Were Enforced By Employers?*, Volokh Conspiracy (Sept. 12, 2021), https://bit.ly/30bo8bN. How about skipping sodas at work to fight obesity and tooth decay? Or taking public transportation to and from work to combat climate change? A construction "that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dept., AFL-CIO*, 448 U.S. at 646.

II. The RNC Will Succeed On The Merits Because The Mandate Is Unsupported By Substantial Evidence.

A. OSHA Fails To Establish A "Grave" Workplace Danger.

To find "grave danger," OSHA must have compelling evidence of a serious workplace danger involving "incurable, permanent, or fatal consequences to workers." Pmbl.-61405 (quoting *Fla. Peach Growers*, 489 F.2d at 132). OSHA has not made that showing here.

To begin, the Mandate relies heavily on the transmissibility and health effects of COVID-19 generally, citing cases and deaths in the United States as a whole. These figures, while tragic, are only loosely connected to *occupational* hazards. They are, however, closely connected with the Administration's public health goal of achieving more vaccinations.

With respect to workplace transmission, the panel majority credited OSHA's supposedly "extensive" administrative record. Stay Op. at 18. But the operative discussion in the preamble is just five pages. Pmbl.-61411-15. What is more, those materials have been unlawfully "cherry-pick[ed]" to support the preordained vaccination decision. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008); *see Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150-51 (D.C. Cir. 2011).

The age of the materials provides the first clue. Nearly all the peer-reviewed studies were published in 2020 or early 2021. *See* Pmbl.-61413-16. Just three address outbreaks in 2021, and those occurred in non-workplace settings prior to widespread vaccine availability. Pmbl.-61413-14 (citing Gold (Feb. 26, 2021) (analyzing January data from school); Sami (Apr. 9, 2021) (analyzing February data from bar); Dougherty (July 16, 2021) (analyzing April data from gym)).

The non-peer-reviewed materials published later in 2021—mostly unsubstantiated "investigations" on state websites—are also of questionable relevance. These generally fail to isolate pre-vaccine-availability data from post-vaccine-availability data. *See* Pmbl.-61412-16 (citing WSDH (Sept. 8, 2021); OHA (Sept. 1, 2021); TDH (Sept. 8, 2021); NCDHHS (Aug. 30, 2021); CDPHE/CSEOC

(Sept. 8, 2021); LDH (Aug. 24, 2021)). But pre-vaccine-availability materials cannot account for reduced community spread from vaccination,[5] rendering these materials effectively moot now that 62.4% of workers are vaccinated. Pmbl.-61435.

The state websites are also substantively over-inclusive. Most address congregate settings generally, not workplaces specifically. For example, Washington reviews "agricultural settings, public events, schools, childcare, restaurants, food processing facilities, and prisons." WSDH (Sept. 8, 2021); *see* Pmbl.-61429. Tennessee considers transmission in assisted care living facilities, nursing homes, correctional facilities, bars, construction, farms, homeless shelters, and industrial settings. TDH (Sept. 8, 2021); *see* Pmbl.-61429. Colorado considers childcare, schools, healthcare, and corrections settings. CDPHE/CSEOC (Sept. 8, 2021); *see* Pmbl.-61429. North Carolina looks at schools, colleges, and religious gatherings. NCDHHS (Aug. 30, 2021); *see* Pmbl.-61428. And Hawaii focuses on how COVID-19 spread during and after a concert held at a bar. Hawaii State (Aug. 19, 2021); *see* Pmbl.-61413.

OSHA even ignores the express limitations contained in this data. For example, OSHA overreads an Oregon report as "detailing outbreaks directly related to work settings," Pmbl.-61412, when Oregon itself acknowledges that its "[c]ase counts include all persons linked to [an] outbreak, which may include household

[5] Studies in the record confirm that higher vaccination rates affect transmission among unvaccinated individuals in a given population. *See* Hetemäki (July 29, 2021) (Pmbl.-61416); Williams (July 8, 2021) (Pmbl.-61416).

members and other close contacts." OHA (Sept. 1, 2021). OSHA commits similar errors with respect to data from other states.

Some peer-reviewed studies purport to focus on workplace transmission. But these address discrete sectors involving circumstances where individuals are required to remain in close contact or in poorly ventilated indoor areas, like construction, food processing, and correction settings. *See* Pmbl.-61414-15. These professions are unlike most covered professions—such as office workers—where employees may encounter each other only briefly, and then return to separate work areas. Similarly, the data OSHA cites with respect to healthcare workers, Pmbl.-61415-16, pertains to an obviously high-risk profession covered by a separate emergency temporary standard. The record simply does not support OSHA's finding that workers in "approximately 263,879 entities and approximately 1.9 million establishments" "across all industry sectors" are in grave danger. Pmbl.-61409, 61467.

The panel majority refused to engage these specifics and instead brushed aside OSHA's errors as "technical matters" outside "the court's expertise." Stay Op. at 23 (quotation mark omitted). *But see id.* at 38 (Gibbons, J., concurring) (faulting petitions for "sweeping" constitutional arguments "untethered from the specific facts and issues presented here"). But the OSH Act requires courts to "take a 'harder look' at OSHA's action" by thoroughly analyzing the agency's statement of reasons. *Asbestos Info. Ass'n*, 727 F.2d at 421; *see Dry Color*, 486 F.2d at 105 ("we find that the statement of reasons . . . is inadequate, and we are troubled by doubts

as to whether all the documents included by OSHA . . . were actually considered in the course of making its decision"). It is the Sixth Circuit panel majority that failed to meaningfully grapple with "OSHA's factual explanations" and "supporting scientific evidence concerning harm." Stay Op. at 8.

OSHA's mistakes underscore the need for a deliberative process that could have provided it "a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019); *see also* En Banc Op. at 22 (Sutton, C.J., dissenting). OSHA's decision to forego notice-and-comment cannot excuse its responsibility to act upon substantial evidence.

B. OSHA Fails To Show That The Mandate Is "Necessary."

Nor can OSHA show the Mandate is "necessary." 29 U.S.C. § 655(c)(1). Courts have found emergency standards unnecessary where the claimed reduction in danger can be achieved through "voluntary efforts" or more enforcement. *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983); *see also Asbestos Info. Ass'n*, 727 F.2d at 426.

OSHA contends "voluntary self-regulation" will not work. Pmbl.-61445. That argument is undermined by OSHA's own analysis, which acknowledges "most employers already have some type of vaccination policy" and that "more than 60 percent of surveyed employers requir[e] vaccinations for some or all employees." Pmbl.-61448. Those findings, central to OSHA's feasibility analysis, are incompatible with OSHA's claim that there is a "lack of widespread compliance with existing voluntary guidance." Pmbl.-61445.

The claimed "necessity" is likewise inconsistent with the Healthcare ETS. There, OSHA used "paid leave" to "encourag[e] [healthcare] workers to choose vaccination" because healthcare workers "are exposed to COVID-19 at a much higher frequency than the general population while providing direct care for both sick and dying COVID-19 patients during their most infectious moments." Occupational Exposure to COVID-19, 86 Fed. Reg. 32376, 32384, 32598 (June 21, 2021). Here, by contrast, OSHA failed to support the Mandate with industry-specific findings. If compulsory vaccination remains unnecessary to protect healthcare workers with high exposure risk, then it cannot be necessary to protect workers with an undifferentiated risk.

Nor does the supposed "imbalance in state and local regulation" provide support. Pmbl.-61445. Many "northern states" enjoy high vaccination rates but "are currently experiencing increases in their rate of new cases." Pmbl.-61431. Meanwhile, the sources OSHA incorporated into the administrative record, Pmbl.-61431, confirm that "[c]ases [have] receded in the Southern regions." Daniel E. Slotnik, *Coronavirus Cases Rise in the Northern U.S. Amid Lower Temperatures*, N.Y. Times (Oct. 18, 2021), https://nyti.ms/3GobiGL; *see* CDC, October 18, 2021—Cases, Deaths, and Laboratory Testing (NAATS) by State. The data support the need for flexibility, not uniformity. In any event, OSHA's dissatisfaction with how States are exercising their police power cannot substitute for necessity.

III. The RNC Will Succeed On The Merits Because The Mandate Is Arbitrary And Capricious.

Other aspects of the Mandate show "OSHA was arbitrary and capricious." *N. Am.'s Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 309 (D.C. Cir. 2017); *see also Schwalm v. Guardian Life Ins. Co. of Am.*, 626 F.3d 299, 308 (6th Cir. 2010) (recognizing arbitrary and capricious review as part of the substantial evidence standard).

OSHA's about-face on compulsory vaccination is a prime example. In Bloodborne Pathogens, OSHA determined "*voluntary* vaccination" is "the best approach to foster greater employee cooperation and trust in the system." 56 Fed. Reg. at 64155 (emphasis added). The Healthcare ETS likewise eschewed mandates by requiring employers to provide paid leave for employees who "choose vaccination." 86 Fed. Reg. at 32598.

Here, by contrast, the Mandate imposes a "mandatory vaccination policy requirement." Pmbl.-61521; *see BST Holdings*, 17 F.4th at 612 ("the Mandate at issue here is" "a national vaccine mandate"); En Banc Op. at 23 (Sutton, C.J., dissenting) ("the rule . . . will operate much more like a vaccine mandate than a vaccine option."). And although this Court requires OSHA to "display awareness that it is changing position," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation omitted), OSHA simply *denies* the Mandate is compulsory. Pmbl.-61436-37.

There is no merit to OSHA's denial. As explained above, the supposed "exemption" cudgels submission, which "OSHA consciously designed . . . to be less

palatable to employers and employees." Stay Op. at 40 (Larsen, J., dissenting). Furthermore, the President and his Administration have been unequivocal that the Mandate will "require more Americans to be vaccinated." Presidential Remarks, 2021 Daily Comp. Pres. Docs. 725, at 2; *see also, e.g.*, *'This Week'* Tr.: Dr. Vivek Murthy, ABC News (Nov. 7, 2021), https://abcn.ws/3095aTu. Americans know this, and the Court need not "exhibit a naiveté from which ordinary citizens are free." *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

In addition to denying the change, OSHA fails to "show that there are good reasons for the new policy." *Encino Motorcars*, 579 U.S. at 221. OSHA asserts that "vaccination mandates have generally been more effective than merely encouraging vaccination," Pmbl.-61435, but its anecdotes fail to account for employees who may have left their employers rather than submit to private mandates, Pmbl.-61435-36, and OSHA makes no effort to square this claim with Bloodborne Pathogens' finding that mandates are *less effective* than voluntary vaccination programs. *See* 56 Fed. Reg. at 64155.

The 100-employee threshold is likewise arbitrary. OSHA and the Sixth Circuit claim that this figure will ensure coverage for "two-thirds of the nation's private sector workforce, providing protection to millions." Pmbl.-61512; *see* Stay Op. at 28 (majority) ("the ETS 'will reach the largest facilities'"). But the emphasis on numbers only underscores that the threshold "rests on reasoning divorced from the statutory text," *Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an

agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"), by revealing the objective as public health rather than workplace safety.

OSHA's illustrations confirm the point. According to the preamble, "[i]f an employer has 150 employees, 100 of whom work from their homes full-time and 50 of whom work in the office at least part of the time, the employer would be within [the Mandate's] scope." Pmbl.-61514. Similarly, "[i]f an employer has 102 employees and only 3 ever report to an office location, that employer would be covered." Pmbl.-61514. Meanwhile, companies with only 50 or only three employees would not be subject to the Mandate. As these and other examples show, OSHA's goal is to further the Administration's vaccination goals, not to remedy a workplace hazard.

IV. The Equitable Factors Favor The Stay.

A. Failure To Reinstate The Stay Will Irreparably Injure The RNC.

The Mandate requires the RNC to effect a massive reallocation of resources and personnel to police the vaccination status of its employees and to implement a costly and burdensome regimen of weekly testing for unvaccinated employees. Lynch Decl. ¶¶ 25, 35 (App'x 1.A); Reed Decl. ¶ 30 (App'x 1.B). The RNC's existing donors may not be permitted to supply budget shortfalls under federal contribution limits. 52 U.S.C. § 30116. The substantial economic losses that the RNC will experience are irreparable because the RNC cannot recover "money damages" from

OSHA. 5 U.S.C. § 702; *see, e.g.*, *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

In addition to economic losses, the Mandate will disrupt the RNC's election operations. The Mandate places the RNC at risk of losing employees who may prefer to find employment at an organization not subject to the Mandate, Lynch Decl. ¶¶ 28-30, 38; Reed Decl. ¶ 25, exacerbating the staffing and reallocation problems the Mandate creates. These disruptions come as the RNC is preparing to hire 300 additional staff in connection with the 2022 primary and general elections, Lynch Decl. ¶ 20; Reed Decl. ¶¶ 9, 30, raising substantial concerns that the Mandate will infringe the RNC's freedom of association. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Implementing the Mandate will also harm the RNC's goodwill and reputation. *See, e.g.*, *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 546 (7th Cir. 2021). The Republican Party has long advocated for limited government, particularly at the national level. The Mandate is viewed by many as a direct assault on that principle, Reed Decl. ¶¶ 14-19, 22-23, an assessment that has not been aided by the Administration's casual dismissal of these serious concerns, Presidential Remarks, 2021 Daily Comp. Pres. Docs. 725, at 2 ("This is not about freedom or personal choice[.]"). Forcing the RNC to comply with the Mandate will irretrievably damage its reputation and goodwill among voters by conscripting the

RNC to enforce a government edict at odds with the Republican Party's fundamental political message.

B. The Balance Of Equities Favors The Stay.

Because the Government is a party, the Court considers the balance of equities and public interest together. *Nken*, 556 U.S. at 435. There is "no public interest in the perpetuation of unlawful agency action," so the RNC's likelihood of success on the merits is a "strong indicator" the stay serves the public interest. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (citation omitted); *see Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. In addition, the stay will facilitate notice-and-comment rulemaking, a process that "serve[s]" "[t]he public interest." *California*, 911 F.3d at 581 (staying interim final rule).

Employers will benefit from the stay. "The Mandate places an immediate and irreversible imprint on all covered employers in America," forcing hundreds-of-thousands of employers to incur "'the irreparable harm of nonrecoverable compliance costs.'" *BST Holdings*, 17 F.4th at 618. No doubt, employers will be forced to pay out their share of the $3 billion in estimated compliance costs and must compete "with smaller companies who can attract workers disinterested in complying with the mandate." En Banc Op. at 30 (Sutton, C.J., dissenting). These pressures are especially acute for the many employers already facing costly labor shortages. *See* Stay Op. at 55 (Larsen, J., dissenting) (finding that employers "will be harmed in various ways, including unrecoverable compliance costs and loss of employees amidst a labor shortage"). "OSHA responds that the administrative record it compiled does not support the alleged severity of petitioners' harms. Of

course the record is silent as to petitioners' concerns, given that the emergency standard circumvents any public input." *Id.* at 56 (Larsen, J., dissenting).

Employees will also benefit. The Mandate "put[s] [employees] to a choice between their job(s) and their jab(s)" when the Fifth Circuit has already held that it "runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty." *BST Holdings*, 17 F.4th at 618-19. Although two judges on the divided Sixth Circuit panel rejected these arguments, eight members of that court—in addition to a unanimous Fifth Circuit panel—would have held the Mandate outside OSHA's power. *See* En Banc Op. at 9 (Sutton, C.J., dissenting); *id.* at 33 (Bush, J., dissenting); Stay Op. at 57 (Larsen, J., dissenting). If this Court does not reinstate the stay, many employees will be forced to pay "uncompensated testing costs." En Banc Op. at 30 (Sutton, C.J., dissenting). Others will be compelled to get their first shots—an action that is "irreversible" even if the Sixth Circuit or this Court conclude at the merits phase that the Mandate is unlawful. En Banc Op. at 30 (Sutton, C.J., dissenting).

Finally, the Mandate is pretextual. The Fifth Circuit found that the Administration settled on the OSH Act as "a 'work-around' for imposing a national vaccine mandate," *BST Holdings*, 17 F.4th at 612 (footnote omitted), a finding confirmed by the public record, the untimely and irrelevant "evidence" relied upon by the agency with respect to workplace settings, and the preamble itself. *See also* En Banc Op. at 23 (Sutton, C.J., dissenting) (stating that the changing "challenges presented by communicable diseases . . . does not give one national agency the

option of labeling something an 'emergency' in perpetuity, immediately imposing a one-size-fits-all-companies solution on the country, preempting all contrary approaches to the matter in our States and cities, and circumventing the notice-and-comment process"); *id.* at 37-38 (Bush, J., dissenting) (stating that OSHA cannot rely on pretext "to gain what is, in effect, a novel police power of the national government"). This Court "cannot ignore the disconnect between the decision made and the explanation given." *New York*, 139 S. Ct. at 2575.

The equities favor the RNC.

CONCLUSION

The Court should grant the Application.

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Respectfully submitted,

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