No. 21A258

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.

REPLY IN SUPPORT OF 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: January 3, 2022

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INTRODUCTION

In its response brief, the Government waffles between feigning Executive modesty and claiming breathtaking Executive authority. But at bottom, the Government cannot escape that the Mandate seeks to compel the Administration's public health policy goal of universal vaccination through the pretext of "workplace" safety. And as a result, despite paying lip service to the RNC's stay application on at least five occasions, *see* Resp. in Opp'n to Appl. for Stay ("Opp'n") 31 n.7, 61, 63, the Government does not—because it cannot—seriously respond to multiple fatal defects in the Mandate identified by the RNC.

Foremost, the Government fails to demonstrate that the Mandate operates within the realm of OSHA's statutory authority. The Government acknowledges (Opp'n 45, 48) that Congress has confined OSHA's statutory jurisdiction to "employment performed in a workplace." *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 238 n.2 (2002) (quoting 29 U.S.C. § 653(a)). But the Government has no answer for the RNC's observation, now seconded by eleven federal appellate judges, that a mandatory vaccination policy cannot fairly be described as a workplace regulation because it uses employers to compel workers to endure a medical procedure that cannot be reversed at the end of the workday. The Government's attempt to evade that problem by arguing that the vaccine Mandate "is not a 'vaccine mandate,'" Opp'n 33; *see also id.* at 3, 9, 49–50, 64–65, 84, is belied both by the record and by common sense.

Furthermore, the Government has not justified OSHA's invocation of its emergency authority. Indeed, the Government continues to ignore specific

limitations on that authority that the RNC has now briefed on four separate occasions. That is, OSHA cannot use its "emergency" authority to regulate a two-year-old virus under a statute that permits OSHA to bypass notice-and-comment for just six months. RNC Emergency Appl. for Stay 15–17 ("RNC Appl."). And OSHA cannot use that authority where it does not even purport to show that COVID-19 is a "physical agent." RNC Appl. 18–20.

Finally, the multiple errors the RNC identified in the data sets OSHA relied upon for supposed support of the Mandate cannot be brushed aside under the auspices of agency "expertise." Opp'n 30; *see id.* at 31 n.7. These errors do not involve arcane disputes about the proper interpretation of scientific data or the weight that should be given to a particular study. Instead, they amount to obvious relevance problems and incongruities between the data and the proposed solution, as well as to transparent mischaracterizations of the studies and reports that are self-evident to anyone who takes the time to review the limited set of materials the preamble cites. If this Court permits OSHA to substitute inapposite and inadequate data for substantial evidence, then OSHA will become "a monster which rules with no practical limits on its discretion." *Baltimore & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968) (citation omitted).

The Application should be granted and the Mandate stayed pending full judicial review.

ARGUMENT

I. The Government Fails To Rebut The RNC's Showing That It Will Succeed On The Merits.

A. The Government Fails To Establish That The Mandate Is A "Workplace" Regulation.

Almost fifty pages into its brief, the Government finally concedes that OSHA's statutory authority to regulate grave danger extends "solely insofar as [the danger] arises in the workplace." Opp'n 48; *see also id.* at 45 ("Everybody agrees that any standard issued by OSHA . . . must address 'work-related dangers.'"). But the Government cannot justify as an exercise of its "workplace" authority an edict that uses employers to compel their employees "to undertake a medical procedure (a vaccination) that cannot be undone at the end of the workday." App. 199 (En Banc Op. at 16 (Sutton, C.J., dissenting))[1]; *see* RNC Appl. 12–15.

Eleven federal appellate judges agree that "Congress did not clearly give [OSHA] authority to require workers to undertake a medical procedure like a vaccine or a medical test." App. 198 (En Banc Op. at 15 (Sutton, C.J., dissenting)); *see* App. 178–80 (Fifth Cir. Stay Op. at 18–20). As such, those judges observe that the Mandate's reach beyond the workplace separates it from "the kinds of requirements [OSHA] has previously imposed on various industries." App. 199 (En Banc Op. at 16 (Sutton, C.J., dissenting)); *see* App. 178–80 (Fifth Cir. Stay Op. at 18–20). By requiring employers to adopt mandatory vaccination policies, the Mandate effects a

[1] For the convenience of the Court, this Reply follows the Government's convention of using "App." to refer to the appendix to the application in No. 21A244, filed by NFIB, et al. *See* Opp'n 11 n.1.

permanent, forcible intrusion on covered employees that "extends beyond the workplace walls." App. 277 (Stay Op. at 51 (Larsen, J., dissenting)).

This "intrusion on individual liberty is serious." App. 197 (En Banc Op. at 14 (Sutton, C.J., dissenting)); *accord* Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23042, 23045 (May 30, 1989) (NPRM) ("vaccination is an invasive procedure"). Unlike the workplace solutions that OSHA may lawfully impose to address workplace hazards, "[a] reluctant or coerced vaccination cannot be undone." App. 190 (En Banc Op. at 7 (Sutton, C.J., dissenting)); *see* App. 189 (En Banc Op. at 6 (Sutton, C.J., dissenting) ("tell[ing] a worker to vaccinate . . . amounts to a medical procedure that cannot be removed at the end of the shift")); App. 277 (Stay Op. at 51 (Larsen, J., dissenting) ("A vaccine may not be taken off when the workday ends")). That alone shows that the Mandate far exceeds OSHA's statutory jurisdiction to regulate "employment performed in a workplace." 29 U.S.C. § 653(a). Furthermore, as the RNC explained (RNC Appl. 12, 14–15) and the Government never seriously disputes, the fact that the vaccine cannot be removed after work separates the Mandate from all prior OSHA standards.

The Government tries to evade the boundary Congress established by arguing—contrary to multiple statements by the President and other high-level members of the Administration—that "the [Mandate] is not a 'vaccine mandate'" because employers may "choose whether to require employees to be vaccinated or to require unvaccinated employees to mask and test." Opp'n 33; *see id.* at 3, 9, 49–50, 64–65, 84. Even if that were true, it would be cold comfort to employees because

"employers, not employees, control any non-vaccine option in the first instance." App. 277 (Stay Op. at 51 (Larsen, J., dissenting)). And it overlooks that for both employers and employees alike, the testing requirement is itself more intrusive and burdensome than any OSHA has previously required. RNC Appl. 5, 13–15.

Furthermore, the RNC has repeatedly explained—in this Court, before the Sixth Circuit, and in the agency proceedings—how the Mandate's testing and masking "exemption" is in reality a false alternative intended only as a cudgel to compel employers to require vaccination. RNC Appl. 13–14, 30–31.[2] That the Government continues to ignore the RNC's serious concerns—concerns echoed by the dissenting judges below, *see* App. 195 (En Banc Op. at 12 (Sutton, C.J., dissenting) ("[I]t is fair to say that [OSHA] is prioritizing the vaccine mandate over the test-and-mask mandate, if not coercing vaccinations.")); App. 277 (Stay Op. at 51 (Larsen, J., dissenting) ("OSHA has been candid that it has stacked the deck in favor of vaccination"))—shows that the Government has no answer.

Finally, the Government's suggestion that it may regulate beyond the workplace because "the Act's text does not carve out exceptions to OSHA's responsibility to protect employees," Opp'n 45, gets the law exactly backwards. It is axiomatic that "an agency literally has no power to act . . . unless and until Congress

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[2] *See also* RNC Opp'n OSHA's Emergency Mot. Dissolve Stay, at 8, 20, No. 21-7000 (6th Cir. Dec. 7, 2021), ECF No. 313 ("RNC CA6 Opp'n"); RNC Petition to OSHA for Stay, at 7, 16–17, OSHA 2021-0007 (Nov. 11, 2021) ("RNC Agency Pet."); RNC, Comment on Interim Final Rule entitled COVID-19 Vaccination and Testing: Emergency Temporary Standard, at 6–7, OSHA 2021-0007 (Dec. 6, 2021) ("RNC Agency Comments"), https://downloads.regulations.gov/OSHA-2021-0007-24610/attachment_1.pdf.

confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, "when an agency exercises power beyond the bounds of its authority, it acts unlawfully." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1921 (2020) (Thomas, J., concurring) (citing *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 n. (2018)). That is so even where Congress has not expressly prohibited the agency's action. *See, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 728, 746 (1973).

It thus makes no difference that Congress has not expressly "carved out" from OSHA's regulatory authority the power to require vaccination and other medical procedures. Because Congress affirmatively limited OSHA's regulatory authority to "employment performed in a workplace," 29 U.S.C. § 653(a), permitting OSHA to promulgate the Mandate "would be to grant to the agency power to override Congress," *La. Pub. Serv. Comm'n*, 476 U.S. at 374–75.

B. The Government Fails To Justify Its Decision To Bypass Notice-and-Comment Procedures.

In addition to roaming outside the boundaries Congress established for occupational safety and health standards generally, the Mandate transgresses statutory limitations specific to emergency temporary standards. RNC Appl. 15–20.

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

The OSH Act authorizes OSHA to promulgate standards that regulate "harmful physical agent[s]." 29 U.S.C. § 655(b)(5); *see id.* § 655(c). In its Application, the RNC explained that COVID-19 cannot be a "physical agent" because it is a

"biological agent." RNC Appl. 18–19; *see also Biological Agents*, OSHA, https://www.osha.gov/biological-agents (last visited Jan. 2, 2022).

Rather than grapple with the RNC's argument, the Government attempts to sidestep it. Ignoring section 6(b)'s use of the phrase "harmful physical agent"—as well as the fact that the preamble itself purports to address this language, Pmbl.-61406—the Government repeatedly quotes section 6(c)'s use of the phrase "physically harmful agent." Opp'n 19–23; *see also id.* at 4, 10, 12, 18, 45, 47, 50, 55. By omitting the term "physical agent," the Government contends that the statute is satisfied because COVID-19 "fits the definition of 'agent.'" Opp'n 19.

But the OSH Act forecloses the Government's approach. Section 6(c) expressly provides that an emergency temporary standard promulgated by OSHA "shall also serve as a proposed rule" under section 6(b). 29 U.S.C. § 655(c)(3); *see also* 29 C.F.R. § 1911.12(a)(1) ("Whenever an emergency standard is published pursuant to section 6(c) of the Act, the Assistant Secretary must commence a proceeding under section 6(b) of the Act, and the standard as published must serve as a proposed rule."). Thus, to satisfy the terms of section 6(c), an emergency temporary standard must also satisfy the terms of section 6(b). In other words, because OSHA may not "promulgate standards" under section 6(b) unless they meet the "basic requirement" of addressing a "physical agent," *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642–43 (1980) (plurality opinion); *cf. Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) ("[I]f a rule's interim nature were enough to [circumvent statutory requirements], then agencies could issue interim rules of limited effect for any

plausible reason . . . ."), it is also true that OSHA cannot promulgate a standard under section 6(c) unless it regulates a "physical agent." And here the Government does not even argue that COVID-19 is a physical agent—nor could it. *See* RNC Appl. 18–19.

Nor is the Government helped by "longstanding OSHA regulations" that supposedly "have understood viruses to be included" within the phrase "harmful physical agent." Opp'n 19–20. The regulation the Government cites requires employers to protect employee medical records. But as the preamble to that rule makes clear, this "section 8 regulation" cannot "legitimately be characterized as an occupational safety and health standard under section 6" because it stems from a different authorizing provision. Access to Employee Exposure and Medical Records, 53 Fed. Reg. 38140, 38142 (Sept. 29, 1988). Furthermore, OSHA there merely assumed that the phrase "toxic substance or harmful physical agents" includes "biological agents" such as "virus[es]" and did not examine the statutory basis for its assumption or attempt to justify it. *See id.* at 38164, 38167. OSHA's "ad hoc statement" cannot set forth its authoritative position for the statutory provision involved in that proceeding, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019); *cf. Schindler Elevator Corp. v. Washington Metro. Area Transit Auth.*, 16 F.4th 294, 299 (D.C. Cir. 2021) (explaining precedents not "persuasive, much less binding" on issues "neither analyzed nor discussed"), much less for the statutory provision involved here.

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

Nor has the Government any answer for the RNC's showing that a two-year-old virus that can be mitigated against with a year-old vaccine cannot be a "new

hazard" when the OSH Act permits OSHA to bypass notice-and-comment for just six months. RNC Appl. 15–17. The RNC has briefed this argument four times, *see id.*; RNC CA6 Opp'n 10–12; RNC Agency Pet. 8–10; RNC Agency Comments 18, so the Government's continued silence is especially telling.

Although the Government still refuses directly to address the six-month limitation, it hints that perhaps certain "viral mutations" "since June 2021" might bring the hazard within the statutory six-month window. Opp'n 23. Putting aside whether such mutations could qualify as a "new" hazard (as opposed to a continuation of the existing pandemic), there is little in the record about "the Delta variant" and nothing about "Omicron." *Contra* Opp'n 23, 83. Furthermore, OSHA did not purport to rely on workplace transmission of Omicron to justify the Mandate. This Court cannot uphold the Mandate based upon findings OSHA never made. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

The Government also errs in suggesting that the disjunctive "or" frees OSHA from the temporal limitation attached to the "new hazard" requirement. Opp'n 22; *see* App. 236 (Stay Op. at 10 ("The statute requires OSHA to determine whether an agent is . . . physically harmful *or* from new hazards" (quotation mark omitted)). Section 6(c) 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) (placing great weight on conclusion by government

advisors that "there was no justification for use of an emergency temporary standard" where "no emergency existed"); App. 204 (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, there is no merit to OSHA's contention that it may issue the Mandate under section 6(c) two years after COVID-19 arrived and one year after vaccines became available.

C. The Government Fails To Support The Mandate With Substantial Evidence.

In addition to showing how the Mandate violates the statutory limits on OSHA's authority, the RNC explained that the Mandate is not the product of reasoned decisionmaking because it is unsupported by substantial evidence and is otherwise arbitrary and capricious. RNC Appl. 24–32.

The Government attempts to recharacterize these flaws as differences of opinion to be resolved by "OSHA, the expert agency." Opp'n 25; *see also id.* at 31 n.7. But the fatal defects the RNC identified do not involve arcane disputes about the proper interpretation of scientific data within an area reserved for agency expertise. To the contrary, they are basic errors self-evident to anyone who takes the time to read the materials or review the data sets that OSHA incorporates into the record. As the RNC has thoroughly explained, nearly all the peer-reviewed studies OSHA cites focus on discrete industries that are unlike most covered professions or were published too early to consider widespread vaccine availability. RNC Appl. 25, 27. The non-peer-reviewed materials—mostly unsubstantiated "investigations" lifted

from state websites—contain express or obvious caveats and limitations that OSHA ignores. RNC Appl. 25–26. There is thus no "rational connection between the facts found and the choice made" by OSHA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (internal citation omitted). If OSHA is permitted to substitute such inapposite and inadequate data for substantial evidence, then OSHA will become "a monster which rules with no practical limits on its discretion." *Baltimore & Ohio R.R. Co.*, 393 U.S. at 92 (citation omitted).

Rather than engage with specifics, the Government ties to overwhelm the Court with the supposedly "extensive" record and "length[y]" "153-page preamble." Opp'n 26 n.4, 28, 30. But neither the size of the record nor the length of the preamble has ever been the key to substantial evidence review, *see Indus. Union Dep't, AFL-CIO*, 448 U.S. at 631 (holding standard unsupported by substantial evidence despite "[t]he written explanation of the standard fill[ing] 184 pages of the printed appendix"), so multiplying citations cannot replace rigorous analysis. In any event, here the Government ultimately is forced to concede the RNC's point that "the operative discussion in the preamble is just five pages," RNC Appl. 25 (citing Pmbl.-61411–15); *see* Opp'n 31 (citing Pmbl.-61412–15). So, the supposedly "extensive" record is nothing more than an illusion. *See also Dry Color Mfrs. Ass'n, Inc. v. DOL*, 486 F.2d 98, 105 (3d Cir. 1973) ("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").

The insufficiency of the agency record is underscored by OSHA's decision to forego notice-and-comment. Unlike the cases the Government relies upon—cases involving proceedings where agencies "repeatedly asked commenters to submit empirical or statistical studies," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021); *see* Opp'n 31 n.7—here OSHA affirmatively denied opportunity for public comment even while it delayed the standard for months. "[G]iven that the emergency standard circumvents any public input," Judge Larsen explained, it is hardly surprising that in many respects "the record is silent as to petitioners' concerns." App. 282 (Stay Op. 56 (Larsen, J., dissenting)); *see* App. 205 (En Banc Op. at 22 (Sutton, C.J., dissenting) ("the give and take that comes with the notice-and-comment process . . . always leads to more transparency about the costs and benefits of any new rule for workers and companies")). In light of the intentionally one-sided nature of the record OSHA has assembled, this Court should take an especially hard look at OSHA's purported evidence.

II. The Government Fails To Rebut The RNC's Showing Of Irreparable Harm.

In its Application, the RNC showed that the equitable factors likewise favor a stay. RNC Appl. 32–36. The Government contends otherwise, dismissing irreparable injury to the RNC and other applicants as mere "speculation." Opp'n 14, 78.

These injuries are not speculative. OSHA itself estimates these costs as ranging from as little as $2,000 to almost $900,000 per covered entity, with a combined projected cost of nearly $3 billion. Pmbl.-61493–94. And because OSHA reached these estimates while "circumvent[ing] any public input," App. 282 (Stay Op.

56 (Larsen, J., dissenting)); *see* RNC Agency Comments 26–27, it almost certainly underestimates them. The Government's suggestion that hundreds of petitioners in every federal circuit court and dozens of applicants in this Court are all participants in a mass delusion regarding the severity of their injuries simply is not credible.

The Government also ignores the unique harm to the RNC as the national party committee of the Republican Party. The RNC is preparing to hire 300 additional staff in connection with the 2022 primary and general elections, RNC App. 5 (Lynch Decl. ¶ 20); *id.* at 14, 19 (Reed Decl. ¶¶ 9, 30), raising substantial concerns that the Mandate will infringe the RNC's freedoms of speech and association, *see, e.g.*, *Hadnott v. Amos*, 394 U.S. 358, 364 (1969) ("First Amendment rights . . . include the right to band together for the advancement of political beliefs."). The Government appears to acknowledge that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see* Opp'n 80. So, its utter failure to even address the Mandate's disruption of the RNC's First Amendment activities should be fatal to its efforts to avoid a stay.

CONCLUSION

For these reasons and those explained in the RNC's Application, the Court should grant the Application.

Dated: January 3, 2022

Respectfully submitted,

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