No. 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.

FABARC STEEL SUPPLY, INC., AND TONY PUGH,
Applicants,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, SECRETARY OF LABOR; AND DOUGLAS L. PARKER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,
Respondents.

Reply In Support of Emergency Application to Stay Agency Standard Pending Judicial Review or, in the Alternative, Petition for Writ of Certiorari Before Judgment and Stay Pending Review

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INTRODUCTION

In their response, Respondents conceded (and failed to contest) some key points that guarantee that Applicants will prevail on their Free Exercise and RFRA claims. They also fail to note that under this Court's precedents, the mask/test mandate cannot be separated from the vaccine mandate on the religious-liberty claims. Moreover, while Respondents attempt to make a textualist argument to avoid the major-question doctrine, they fail to note that the major-question doctrine is rooted in the Constitution itself and is not merely a canon of statutory construction; therefore, even if Respondents' textual arguments are sound, they are unconstitutional as applied here. Respondents also failed to rebut key arguments as to why the OSH Act does not authorize the current ETS. Finally, it is clear that the ETS is unconstitutional under the Commerce Clause and nondelegation doctrine. Therefore, this Court should stop Respondents from enforcing the ETS.

ARGUMENT

I. Both the Vaccine and Mask Mandates Violate Applicants' Rights Under the Free Exercise Clause and the Religious Freedom Restoration Act.

Although Applicants believe that whether the ETS is valid under the Constitution and the OSH Act is logically antecedent to whether religious freedom provides them with a special exemption, Respondents concede (and fail to challenge) some key points that make Applicants' religious-liberty claims very likely to succeed. Therefore, Applicants will address the religious-liberty issues first.

A. The Free Exercise Clause

Respondents concede that the ETS "recognizes the availability of *individualized exemptions*[.]" Resp. 73 (emphasis added). Three pages later, Respondents again concede that "the OSH Act expressly provides procedures by which employers may seek variances from the ETS if they have adequate alternative means to protect workers." Resp. 76. In their application for a stay, Applicants relied heavily on this Court's decision in *Fulton v. City of Philadelphia*, which held that a law is not neutral and generally applicable if it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for *individualized exemptions*." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021) (emphasis added; citations, quotation marks, and alteration omitted). In such a case, the law in question must survive strict scrutiny. *See id.*

In this case, Respondents concede that the ETS and the law that purportedly authorizes it create a mechanism for "individualized exemptions," which is exactly what *Fulton* held invokes strict-scrutiny review. Under this framework, if the vaccine or mask/testing mandates burden Applicants' religious exercise, then those provisions will have to survive strict-scrutiny review.[1]

There is no reasonable doubt that the vaccine mandate infringes on Pugh's free exercise of religion. *See* Appl. for Stay Ex. A paras. 6-11. The ETS forces Pugh to implement a vaccine mandate that his faith does not allow him to implement. Thus, his religious exercise is burdened. Moreover, Respondents do not contest that

[1] Unlike the RFRA analysis, the ETS need not "substantially" burden Applicants' free exercise of religion; it needs only to be a burden.

FabArc is a closely held corporation, that Pugh controls a majority of the shareholders' voting power, or that Pugh's religious views should be imputed to FabArc in this case. *Compare* Appl. for Stay 5, 14-15, 20 *with* Resp. 74-77. Thus, the vaccine mandate burdens the free exercise rights of both Applicants.

Respondents attempt to dodge the obvious infringement of Applicants' free exercise rights by arguing that Respondents are not forcing Applicants to impose a vaccine mandate but is letting them choose between that and the mask/testing mandate. Consequently, Respondents conclude that "any requirement to vaccinate rather than mask and test is attributable to the choice of the employer, not a dictate from OSHA." Resp. 74. In other words, Respondents are offering Applicants a choice of violating their religion or suffering possibly over a million dollars in testing costs per year. Appl. for Stay Ex. A para. 13. But the Religion Clauses of the First Amendment were designed to avoid such scenarios where people would have to choose between suffering for their faith or violating their religious beliefs to escape such consequences. "Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." *Girouard v. United States*, 328 U.S. 61, 68 (1946). The First Amendment was designed to avoid the coercive measures that Respondents suggest as an alternative to violating one's faith.

Respondents further argue that Applicants' free exercise of religion is not burdened because they raise religious objections to the vaccine mandate but not the

alternative mask/test mandate. However, Respondents fail to note that under this Court's precedents, two commands that are passed as a single measure cannot be so neatly separated when one of them infringes on free exercise of religion. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court concluded that out of four city ordinances that were passed together, the object of three of them was to target the Santeria religion, even though they were facially neutral. As to the fourth ordinance, the Court held:

> "Ordinance 87-72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship."

Hialeah, 508 U.S. at 539-40.

In the same way here, the vaccine mandate unquestionably infringes on Applicants' free-exercise rights. Because the mask/testing mandate was passed at the same time with the vaccine mandate and "functions, with the rest of the enactments in question, to suppress" Applicants' free exercise of religion, it should be grouped in with the vaccine mandate for First Amendment purposes. *Id.* at 540. Since the vaccine-mandate unquestionably burdens Applicants' free-exercise rights, the coercive alternative does as well.

If the Court needs more evidence, Applicants direct the Court to *Hialeah*'s instructions to examine the "object" of the law. *Id.* at 540. In this case, Respondents were following the orders of President Biden, who concluded his September 9 speech announcing the OSHA rule and other COVID-related mandates by anouncing the object of the entire plan: "Get vaccinated."[2] This theme permeated his entire speech and was the central theme of his other mandates. Clearly, the President was trying to force people to get vaccinated, and therefore the real object of the ETS is to force vaccinations. Consequently, it should be no surprise that OSHA's alternative to vaccinations is a masking and testing procedure that would be expensive enough to strong-arm Applicants and those similarly situated to adopt the vaccination option. Therefore, the mask/test mandate burdens Applicants' free-exercise rights.

Having rebutted Respondents' argument that there is no burden on Applicants' free exercise of religion, the question under *Fulton* becomes whether the mandates can survive strict scrutiny. In their Application, Applicants raised the question of whether the government's interest in combatting COVID-19 remains "compelling," since over the last year we have made significant strides in combatting COVID.[3] Appl. for Stay 15-16. There can be no doubt that the government's interest remains "important" or "substantial," but strict scrutiny requires its interest to be "compelling." Although the government normally bears

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[2] *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House (September 9, 2021), https://www.whitehouse.gov/briefingroom/speeches-remarks/2021/09/09/remarks-by-president-biden-onfighting-the-covid-19-pandemic-3.

[3] Indeed, there is a good argument to be made that we have shifted from an epidemic into an endemic. *See* DeeDee Stiepan, *COVID-19: Terms to Know*, Mayo Clinic News Network (Mar. 4, 2020), https://newsnetwork.mayoclinic.org/discussion/covid-19-terms-to-know/ (explaining difference between an epidemic, pandemic, and endemic).

the burden of proving that its interest is compelling, Respondents made no attempt to prove that its interest remains compelling but simply asserted that it "surely" has a compelling interest. Resp. 76. Because Respondents made no meaningful attempt to rebut Applicants' argument, it failed to carry its burden of proving that its interest remains compelling, which is what strict scrutiny requires.

If however the Court finds that the government's interest is still compelling, then there can be no question that it did not choose the least restrictive means of achieving that interest. As the Fifth Circuit observed, the mandate is grossly overinclusive and underinclusive, or as *Hialeah* put it, "overbroad or underinclusive in substantial respects." *Hialeah*, 508 U.S. at 546. While OSHA claims that it began with imposing the mandate on businesses that have 100 employees or more but does not intend to stop there, the strict-scrutiny test does not allow the government to pick a random number to start with and then do better later. (Perhaps more to the point, it does not allow the President to test the waters by picking on large businesses to see if he can get away with it before he moves on to small businesses.) On the contrary, it must choose the "least restrictive means" of achieving its ends. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Given that the government has failed to prove that this is the least restrictive way of combatting COVID-19, it fails the strict-scrutiny test.

B. The Religious Freedom Restoration Act

Applicants also claimed that RFRA applies under this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Applicants made two key

contentions in pursuit of this argument, namely: (1) FabArc is a closely held corporation, and (2) Pugh's religious views should be imputed to the company. Appl. for Stay 14-15. Respondents did not contest either of these key points. Resp. 74-77.

Instead, Respondents argued that RFRA is inapplicable for the same reasons that the Free Exercise Clause is inapplicable: Respondents are not burdening religious exercise because they give the employer a choice, and in any event, the ETS survives strict scrutiny. *Id.* As discussed in Part I.A *supra*, these arguments should be rejected.[4]

Moving on from there, Respondents briefly raise two new arguments concerning the RFRA claim: (1) bearing the costs of the mandate is not a "substantial burden" on religious exercise, and (2) *Hobby Lobby* is distinguishable. Resp. 76. As to the first argument, *Hobby Lobby* concluded that the burden on religious exercise was substantial *exactly because* of the costs they would bear for choosing to adhere to their religious convictions. *Hobby Lobby*, 573 U.S. at 720. Since *Hobby Lobby* invalidates Respondents' first argument, they are left with no choice but to argue that *Hobby Lobby* is distinguishable because Applicants have no religious objection to testing. Resp. 75. In other words, Applicants can choose to bear substantial financial costs rather than violate their religious beliefs. But that was exactly the dilemma that *Hobby Lobby* rejected. And, as argued thoroughly above, the mask/test mandate cannot be so neatly separated from the vaccine

[4] Respondents also argue that strict scrutiny is satisfied because Applicants can seek a variance. Response 76. This argument resembles the procedure from Obamacare's contraceptive mandate that was hotly contested but never adjudicated. *See Zubik v. Burwell*, 578 U.S. 403 (2016); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020); *see also id.* at 2387 (Alito, J., concurring) (reasoning that RFRA claim would prevail in the end).

mandate when it comes to burdening religious exercise. *See* Part I.A., *supra*. Thus, *Hobby Lobby* applies, and it dooms Respondents' attempts to dodge RFRA.

II. Applicants Have Shown That They Are Likely to Prevail on the Major-Question Doctrine Because It Is Rooted in the Constitution

The chief problem with Respondents' attempts to dodge the major-question doctrine is that it mistakes the doctrine as *only* a canon of statutory construction rather than a rule of constitutional interpretation. Framing their response as a principled textualist argument, Respondents argue extensively that the plain text of the OSH Act authorizes them to issue the ETS and that nullifying the text through the major-question doctrine would do violence to the statute. Resp. 17-62. While Respondents' arguments may have had some merit if this were strictly a matter of statutory interpretation, their arguments are invalid because the major-question doctrine comes from the Constitution itself. And of course, if the Constitution and the statute conflict, then the Constitution wins. U.S. Const. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

The major-question doctrine was first discussed in Justice Rehnquist's concurrence in *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607 (1980). In that concurrence, Justice Rehnquist began with John Locke's principle that legislative power is the power "'only to make laws, and not to make legislators[.]'" *Id.* at 672-73 (Rehnquist, J., concurring in judgment) (quoting John Locke, *Second Treatise on Civil Government* 244 para. 141 (1690)). Justice Rehnquist reasoned that this principle lies at the foundation of the nondelegation doctrine, which this Court held in 1892 prohibits Congress from delegating "'its legislative power to the President,'"

which was "'a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.'" *Id.* at 673 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). Because the source of this principle comes from the pre-existing legislative power, which the People vested in *Congress alone*, U.S. Const., art. I, § 1, the source of the nondelegation doctrine is found in the Constitution, not canons of statutory interpretation.

Going further, Justice Rehnquist thought that the nondelegation doctrine served three important functions, one of which was ensuring "to the extent consistent with orderly governmental administration that *important choices of social policy* are made by Congress …." *Id.* at 685 (emphasis added). A majority of sitting Justices have expressed the view that the Court as a whole should consider this position. *See, e.g., Gundy v. United States*, 139 S.Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S.Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari). And as Justice Gorsuch noted, "Although it is normally a question of statutory construction, *we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency*." *Gundy*, 139 S.Ct. at 2142 (Gorsuch, J., dissenting). This Court's decisions reflect this principle: although they are more commonly read as statutory-construction rules, the cases do not limit the major-question doctrine to statutory-construction alone but focus on whether Congress may validly delegate such power to administrative agencies. *See,*

e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (focusing on whether Congress could "delegate a policy decision of such economic and political magnitude to an administrative agency"). Such an inquiry concerns not only statutory construction but also constitutional authorization.

The major error in Respondents' response is that they attempt to classify all the Court's decisions involving the major-question doctrine as statutory-canon cases while forgetting that the Constitution addresses the same matter. *See* Resp. 55-62. That error is fatal, because this case absolutely involves an "important choice[] of social policy," which under Article I, § 1, must be made "by Congress." *Indus. Union Dep't*, 448 U.S. at 685 (Rehnquist, J., concurring in judgment). Given that this Court's precedents allow for the major-question doctrine to be based in the Constitution itself and that a majority of sitting justices have expressed strong interest in pursuing this view, Applicants are likely to succeed on their claim that the Constitution does not permit Congress to delegate such major questions to administrative agencies.[5]

III. The ETS Fails to Comport with the OSH Act's Requirements

As noted in the previous section, Respondents argue extensively that the OSH Act authorizes the ETS. Nevertheless, several problems remain, the largest of

[5] While the vaccine mandate indisputably falls under the major-question doctrine, Respondents may argue that the test/mask mandate does not. While the test/mask mandate may not be as controversial as the vaccine mandate, implementing the test/mask mandate will have vast economic consequences for businesses. *See, e.g.*, Appl. for Stay Ex. A paras. 13-14 (estimating that the test/mask mandate will cost FabArc between $360,000 and $1,200,000 per year plus the toll on the its customer relationships). Because of the economic implications, the test/mask mandate falls under the major-question doctrine as well.

which has to do with the necessity of the ETS. *See* 29 U.S.C. § 655(c)(1). As the Fifth Circuit observed:

> the Mandate's strained prescriptions combine to make it the rare government pronouncement that is both overinclusive (applying to employers and employees in virtually all industries and workplaces in America, with little attempt to account for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to shoulder in a cramped warehouse) *and* underinclusive (purporting to save employees with 99 or more coworkers from a "grave danger" in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat).

BST Holdings, L.L.C. v. OSHA, 2021 U.S. App. LEXIS 33698 at *8-*9 (5th Cir. Nov. 12, 2021).

Respondents attempt to dodge this problem by arguing that substantial evidence supports its conclusions. *See* Resp. 30-44. While 29 U.S.C. § 655(f) does not define "substantial evidence," the lower courts (relying on this Court's precedents) have defined it as evidence that "a reasonable mind might accept as adequate to support a conclusion." *See, e.g.*, *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While a reasonable mind might accept that vaccines, masking, or testing would protect a fair amount of people from COVID-19, *a reasonable mind could not conclude that this is necessary for <u>all</u> businesses employing 100 people or more.*

Moreover, Respondents attempt to use the plain text of the OSH Act to rebut the contention that the law has, as Chief Judge Sutton put it, a "workplace-anchored scope." *In re: MCP No. 165*, 2021 U.S. App. LEXIS 37024 at *9 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting). However, Respondents later concede the

context matters, arguing that "statutes must be understood 'in the context of the *corpus juris* of which they are a part.'" Resp. 52 (quoting *Branch v. Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.)). Thus, Respondents cannot rip § 655 out of its context to justify imposing a *healthcare* decision on 80 million Americans under the guise of making a *workplace* decision.

IV. The ETS Is Likely Unconstitutional Under the Commerce Clause and the Nondelegation Doctrine

Lately, when forced to choose between what the Constitution means and erroneous precedents interpreting the Constitution, a majority of Justices of this Court have emphasized that the Constitution matters more than precedent. *See, e.g.*, *Gamble v. United States*, 139 S.Ct. 1960, 1984-85 (2019) (Thomas, J., concurring); *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020) (Gorsuch, J., for the Court); *id.* at 1414-16 (Kavanaugh, J., concurring in part); *Fulton*, 141 S.Ct. at 1888 (Alito, J., concurring in judgment); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013). While nobody is asking this Court to overrule precedents on an emergency motion to stay, the question is whether Applicants are likely to succeed on the merits. If this case returns to the Court, then Applicants fully intend to ask the Court to reconsider whether the Constitution allows OSHA to wield the awesome power that it seeks to wield here.

As explained in Applicant's application, the Commerce Clause did not give Congress the general police power to protect the public safety—which is exactly what OSHA purports to do in this case. *See* Appl. 22-23; Resp. 57 (quoting 29 U.S.C.

§ 651(b)). So how do Respondents justify the takeover of state police powers? One way only: citing precedent. But if the Constitution and precedent conflict, the Court's duty is to uphold the Constitution.

If the Court is not as persuaded as Justice Thomas that clearly erroneous precedent should not be followed, then the Court should consider that it largely stopped enforcing the Commerce Clause and the nondelegation doctrine after FDR threatened to pack the Court. That factor alone weighs *heavily* against the "quality of the precedent's reasoning." *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448, 2479 (2018). Experience has also shown that these precedents are not workable, as they allow federal agencies to get away with things that the Framers would think even Congress could not do. *Id.* at 2481. The growth of the so-called "fourth branch of government" has certainly eroded the Court's underpinnings as well. *Id.* at 2483. When these three factors are present, they usually constitute the "special justification" needed to outweigh reliance and overrule precedent. *Id.* at 2484, 2486.

The emperor clearly has no clothes, and the Supreme Court of the United States should not embarrass itself by pretending that he does.[6] Even assuming that OSHA is constitutional at all,[7] it cannot implement this ETS. Even assuming for the moment that the emperor is clothed, this Court should note that despite Respondents' attempts to frame this case as about regulating workplace safety, it is really about using the Commerce Power to regulate individuals whenever enough of them are not making a healthcare decision that Respondents would have them

[6] Hans Christian Andersen, *The Emperor's New Clothes*, in *Andersen's Fairy Tales* (1837).
[7] *See* Cass R. Sunstein, *Is OSHA Unconstitutional?* 94 Va. L. Rev. 1407 (2008).

make. *NFIB v. Sebelius*, 567 U.S. 519, 553 (2012) (opinion of Roberts, C.J.); *id.* at 649-60 (Scalia, JJ., joined by Kennedy, Thomas, and Alito, JJ.). Thus, even under current precedent, the ETS is unconstitutional.

Likewise, the power to make law resides in Congress alone, not the Executive Branch. This is clearly a case of making law. Whether under a pure originalist analysis or under the Court's major-question doctrine, OSHA cannot do this.

V. Respondents' Contention that Applicants Will Not Suffer Irreparable Harm Is Incorrect.

In attempt to claim that Applicants will not suffer irreparable harm, Respondents argue (1) there is no religious-liberty infringement, and (2) OSHA's data suggests that the costs Applicants bear will be minimal. The first argument has been thoroughly refuted by Part I, *supra*. As to the second, although this Court is not a trial court that is tasked with judging the evidence, it is still required to determine who is likely to prevail. OSHA would have this Court believe that it can determine the costs FabArc will bear better than Applicants can. "Pure applesauce." *King v. Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting).[8]

VI. The Balance of Equities and the Public Interest Do Not Favor Letting the Mandate Go into Effect.

While Applicants share Respondents' concern about combatting COVID-19 (although they disagree with how Respondents seek to curb it), the public interest and balance of equities tip in favor of Applicants when the government seeks to use an illegal means to accomplish its ends. *Ala. Ass'n of Realtors*, 141 S.Ct. at 2490.

[8] Moreover, *as Respondents concede*, "'significant' compliance costs may establish irreparable harm." Resp. 79 (quoting *Ala. Ass'n of Realtors*, 141 S.Ct. at 2489). The costs here *are* significant, contrary to Respondents' assertions.

VII. This Court Has Jurisdiction to Grant Certiorari Before Judgment

While Respondents' point about this Court's original jurisdiction is intriguing, Respondents raise only a question about whether it would be proper rather than proving their case. This Court may grant certiorari if a case is in a court of appeals. 22 *Moore's Federal Practice – Civil* § 405.03(1). Moreover, a final judgment is not necessary as a prerequisite to granting certiorari, as Respondents seem to suggest. *Id.* § 405.03(2)(a)(ii)(A) (citing *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947)). Because this case was filed originally in a court of appeals, consolidated with the others with a court of appeals, and because the court of appeals essentially decided in its December 17 decision how it is going to rule, certiorari before judgment is proper if the Court chooses to exercise that power.

CONCLUSION

WHEREFORE, premises considered, Applicants request that this Court grant Applicants' request for a stay pending review or, in the alternative, to treat this application as a petition for certiorari before judgment, grant certiorari, and issue a stay pending review.

Respectfully submitted January 1, 2022,

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