

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL.,
Applicants,

v.

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

OHIO ET AL.,

Applicants,

v.

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

On Application for Stay of Administrative Action and Petition for Writ of
Certiorari to the United States Court of Appeals for the Sixth Circuit

**MOTION FOR LEAVE TO FILE AND BRIEF OF STANDARD PROCESS INC.
AS *AMICUS CURIAE* IN SUPPORT OF EMERGENCY APPLICATION FOR
ADMINISTRATIVE STAY AND STAY, AND ALTERNATIVE PETITION FOR
WRIT OF CERTIORARI BEFORE JUDGMENT**

ANN M. MAHER
REBECCA C. FURDEK
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, WI 53202

DAVID A. LOPEZ
HUSCH BLACKWELL LLP
13330 California Street, Suite 200
Omaha, NE 68154

JOSEPH S. DIEDRICH
Counsel of Record
KIRSTEN A. ATANASOFF
HUSCH BLACKWELL LLP
33 East Main Street, Suite 300
Madison, WI 53703
608.255.4440
joseph.diedrich@huschblackwell.com

MATTHEW DIEHR
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Counsel for Amicus Curiae

Standard Process Inc. moves for leave to file the enclosed brief as *amicus curiae* in support of applicants and in support of the emergency application for administrative stay and stay, and alternative petition for writ of certiorari before judgment (1) without ten days' notice to the parties of its intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (2) in an unbound format on 8½-by-11-inch paper rather than in booklet form.

As the enclosed brief elaborates, Standard Process is a Wisconsin-based employer that provides whole-food nutritional supplementation products to health care practitioners, who in turn use them to address individual patient needs. Most of the company's nearly 500 employees work at the company's headquarters in rural southern Wisconsin, which integrates production, research, and farming facilities.

The enclosed brief includes arguments that are not necessarily included in the pending applications. Standard Process presents two unique perspectives. First, rural employers like Standard Process are particularly burdened and harmed by the Emergency Temporary Standard (ETS) at issue—especially with regard to its *testing* component. Second, although not a health care facility or provider itself, Standard Process—and many employers like it—play a critical supporting role in keeping the population healthy. By burdening such employers and disrupting their operations, the ETS may actually impair public health, contrary to the public interest.

Although it was not feasible to give the parties ten days' notice of the filing of this brief, counsel for Standard Process did email all applicants and respondents to obtain consent.

Counsel for the following parties responded, stating that they consent to (or do not oppose) the motion and brief: the National Federation of Independent Business et al. (all applicants in 21A244); all petitioner States (all applicants in 21A247); BST Holdings, LLC, RV Trosclair, LLC et al.; National Association of Home Builders; Aaron Abadi; AFT Pennsylvania; Burnett Specialists, Choice Staffing LLC, Staff Force, Inc., HT Staffing, and LeadingEdge Personnel, Ltd.; Answers in Genesis, American Family Association, Inc. and Word of God Fellowship, Inc.; Cox Operating, DIS-TRAN Steel, DIS-TRAN Packaged Substations, Beta Engineering LLC, and Optimal Field Services; Gov. Greg Abbott; Bentkey Services; Baptist Theological Seminary; Asbury Theological Seminary; Christian Employers Alliance; Sioux Falls Catholic Schools; Home School Legal Defense Association, Inc.; Cambridge Christian School and The King's Academy; Phillips Manufacturing & Tower Company and Sixarp, LLC; Job Creators Network et al.; Scotch Plywood Company, Inc.; FabArc Steel Supply and Tony Pugh; Associated Builders and Contractors, Inc. and Associated Builders and Contractors of Alabama; Natural Products Association; Oberg Industries, LLC; Betten Chevrolet, Inc.; Heritage Foundation; Scott Bedke, Chuck Winder, and Sixty-Sixth Idaho Legislature; the Republican National Committee; Massachusetts Building Trades Council and North America's Building Trades Unions; Wisconsin Manufacturers & Commerce; Ohio Chamber of Commerce et al.

Counsel for the Occupational Safety and Health Administration and other federal respondents responded, stating that they take no position on the motion and brief.

Counsel for other parties either do not consent or did not respond to the email seeking their position on this motion and brief as of the time they were submitted.

CONCLUSION

Standard Process respectfully requests leave to file the enclosed brief.

Respectfully submitted,

ANN M. MAHER
REBECCA C. FURDEK
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, WI 53202

DAVID A. LOPEZ
HUSCH BLACKWELL LLP
13330 California Street, Suite 200
Omaha, NE 68154

JOSEPH S. DIEDRICH
Counsel of Record
KIRSTEN A. ATANASOFF
HUSCH BLACKWELL LLP
33 East Main Street, Suite 300
Madison, WI 53703
608.255.4440
joseph.diedrich@huschblackwell.com

MATTHEW DIEHR
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Counsel for Amicus Curiae

December 29, 2021

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION AND INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
I. Standard Process’s experience confirms that the ETS rests on arbitrary foundations and should be stayed.	4
A. Contrary to OSHA’s assumptions and reasoning, mandatory vaccination will result in immediate mass resignations.	4
B. Contrary to OSHA’s assumptions and reasoning, testing is under-accessible, disruptive, and costly—especially in rural areas.....	6
C. As a result, the ETS will cause irreparable harm and undermine the public interest.....	11
D. The ETS undermines private and public interests unnecessarily.	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.</i> , 17 F.4th 604 (5th Cir. 2021)	13
<i>Chamber of Commerce v. EPA</i> , 577 U.S. 1127 (2016)	11
<i>Dist. Hosp. Partners, LP v. Burwell</i> , 786 F.3d 46 (D.C. Cir. 2015).....	14
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010) (per curiam)	4
<i>In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing</i> , 86 Fed. Reg. 61402 (6th Cir. Dec. 17, 2021) (opinion and order dissolving stay), slip op.....	passim
<i>In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing</i> , 86 Fed. Reg. 61402 (6th Cir. Dec. 15, 2021) (order denying petitions for initial review en banc), slip op.....	passim
<i>Iowa Utils. Bd. v. FCC</i> , 109 F.3d 418 (8th Cir. 1996)	11
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015).....	4
<i>Missouri v. Biden</i> , No. 4:21-CV-01329-MTS, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021)	11, 12
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Ins. Co.</i> , 463 U.S. 29 (1983)	4
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	4
<i>Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.</i> , 16 F.4th 1130 (5th Cir. 2021)	11
<u>Statutes</u>	
29 U.S.C. § 655(c)(1)	3, 14
<u>Regulatory Authorities</u>	
OSHA, <i>COVID–19 Vaccination and Testing; Emergency Temporary Standard</i> , 86 Fed. Reg. 61402 (Nov. 5, 2021)	passim

OSHA, *Costs Associated with Reasonable Accommodation: Testing, Face Coverings, and Determinations* (Nov. 4, 2021), <https://bit.ly/3mqnNdG> 9

Other Authorities

Bureau of Lab. Stats., U.S. Dep’t of Lab., USDL-21-2099, *Job Openings and Labor Turnover—October 2021* (Dec. 8, 2021), <https://bit.ly/3HgJ1Cw> 6

Ctrs. for Disease Control, *Lab Advisory: Shortage of COVID-19 Rapid Tests May Increase Demand for Laboratory Testing*, <https://bit.ly/3pjLhmo> (Sept. 2, 2021)..... 7

Ctrs. for Disease Control, *Rates of COVID-19 Cases and Deaths by Vaccination Status*, <https://bit.ly/3pj4zZd> (last visited Dec. 27, 2021) 12

David Mekeel & Karen Shuey, *At-Home Rapid COVID Test Kits Scarce in Berks*, Reading Eagle (Dec. 21, 2021), <https://bit.ly/3etU130>..... 7

Delta Airlines, *Delta Air Lines Announces December Quarter and Full Year 2020 Financial Results* (Jan. 14, 2021), <https://bit.ly/3Fol5N9>..... 10

Erin Kissane, *We’re About to Lose Track of the Pandemic*, The Atlantic (Dec. 23, 2021), <https://bit.ly/3msGj56> 7

Jack J. Barry et al., *Unvaccinated Workers Say They’d Rather Quit Than Get a Shot, but Data Suggest Otherwise*, Scientific American (Sept. 24 2021), <https://bit.ly/3Ei0Lvy> 5

Jefferson Cty., Wis., *Agricultural Preservation and Land Use Plan* (Feb. 9, 2021), <https://bit.ly/33TwIxM> 7

Josh Mitchell et al., *4.3 Million Workers Are Missing. Where Did They Go?*, Wall St. J. (Oct. 14, 2021), <https://on.wsj.com/3qr6DgX>..... 6

Justin Lundy, *COVID-19 At-Home Test Kit Shortage Hit ENC Nonprofits*, WITN (Dec. 23, 2021), <https://bit.ly/3EtJVtP> 7

Remarks by President Biden at COVID-19 Response Team’s Regular Call with the National Governors Association, The White House (Dec. 27, 2021), available at <https://bit.ly/3sFUtUq>..... 14

Wis. Dep’t of Health Servs., *COVID-19: Community Testing Sites*, <https://bit.ly/3efs2UL> (last visited Dec. 27, 2021)..... 7, 8

Wis. Mfrs. & Commerce, *Biden Administration’s Vaccine & Testing Mandate Is Unlawful & Unworkable* (Nov. 17, 2021), <https://bit.ly/3EluqUF> 6

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*¹

For over 90 years, Standard Process Inc. has been a pioneer in whole-food nutritional supplementation. Driven by a commitment to support healthful living, Standard Process combines local farming practices with research-driven, science-backed insights to develop and manufacture whole-food supplements. It then supplies them to thousands of health care practitioners, who in turn use them to address individual patient needs. Millions of people nationwide consume Standard Process products as a means to maintain and improve their health—including their immune systems.

Most of Standard Process’s nearly 500 employees work at the company’s headquarters in rural southern Wisconsin. In addition to state-of-the-art research and production facilities, the company also owns and operates an expansive organic farm that supplies fresh ingredients for use in its products. Standard Process’s integrated facilities—production, research, and farming *together*—make its rural location both ideal and necessary.

Standard Process presents two unique perspectives to support the emergency applications here. First, rural employers like Standard Process are peculiarly burdened and harmed by OSHA’s sweeping Emergency Temporary Standard (ETS). OSHA, *COVID–19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). This is especially true for the ETS’s testing component. Standard Process’s rural location means lesser access to testing, greater

¹ Nobody other than *amicus* authored this brief in any part or funded its preparation or filing.

disruption of operations, and inevitably higher compliance costs. Standard Process's perspective highlights how OSHA's assumptions and reasoning are arbitrary and why a stay is required.

Second, although not a health care facility or provider itself, Standard Process—and many employers like it—play a critical supporting role in keeping the population healthy. Manufacturers and distributors of health care products and services are among those covered by the unlawful ETS. As explained more below, the ETS may have the unintended and perverse consequence of actually impairing public health, contrary to the public interest.

SUMMARY OF ARGUMENT

The applicants argue that the ETS is unlawful and that a stay will prevent irreparable harm and serve the public interest. Standard Process agrees.

Attempting to justify the ETS, OSHA paints a rosy picture. Vaccination mandates, the agency says, will be well-received by employees. Or, if an employer prefers, it can adopt an easily administrable and essentially costless testing program. As Standard Process's experience helps illuminate, however, OSHA's rosy picture paints over a rotting foundation.

Contrary to OSHA's assumptions and reasoning, mandatory vaccination will result in immediate mass resignations. At Standard Process and other employers across the country, significant numbers of employees will likely resign if vaccinations are mandated. Moreover, as a rural employer, Standard Process faces comparative difficulties recruiting new employees. The inevitable mass resignations will disrupt individual workplaces, labor markets, and the economy as a whole.

Also contrary to what OSHA says, the ETS’s testing component is not an equal or meaningful alternative. Especially in rural areas, testing is under-accessible, with supply shortages and limited options for community testing. As a practical matter, Standard Process would need to test employees in the workplace—and pay for it. Such testing would entail repurposing existing facilities, hiring new personnel, purchasing testing supplies, and managing the testing program. The cost of all this would add up quickly—well in excess of OSHA’s estimates.

As a result, the ETS will cause irreparable harm and undermine the public interest. Standard Process and all employers like it will incur substantial costs. Because they are unrecoverable, these costs are irreparable. What is more, Standard Process and countless other companies supply products and services that contribute to the overall health of the population. By forcing these companies to divert resources away from their core competencies, the ETS could actually cause public health to decline, contrary to the public interest.

Worst of all, the ETS does all this unnecessarily. OSHA had to consider meaningful alternatives and limit its regulation to what, if anything, is “necessary.” 29 U.S.C. § 655(c)(1). Much the opposite, OSHA breezily applied a uniform mandate to tens of millions of workers—with no account for the many factors influencing a particular employee’s level of risk from COVID-19.

The Court should stay the ETS.

ARGUMENT

I. Standard Process’s experience confirms that the ETS rests on arbitrary foundations and should be stayed.

This Court should stay the ETS. The applicants make a strong showing they are likely to succeed on the merits. They show they are likely to suffer irreparable harm. And they show the public interest favors a stay. *See, e.g., Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (listing stay factors); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (same). Standard Process reinforces the applicants’ ample showing with a few legal and factual points informed by its own experience.

When adopting the ETS, OSHA was required to engage in reasoned decisionmaking. *See, e.g., Michigan v. EPA*, 576 U.S. 743 (2015); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). But OSHA flunked that test. Its attempts to support the ETS are pockmarked by flawed assumptions and arbitrary reasoning. Contrary to OSHA’s portrayal, mandating employee vaccinations will result in mass resignations. And, again contrary to OSHA, testing is under-accessible, disruptive to company operations and employee lives, and extremely costly—all especially so for rural employers. OSHA’s faults not only make the ETS unlawful, but they also further illustrate how the ETS will cause irreparable harm and undermine the public interest.

A. Contrary to OSHA’s assumptions and reasoning, mandatory vaccination will result in immediate mass resignations.

At first glance, the simplest way for Standard Process to comply with the ETS would be to order its employees to get vaccinated. OSHA assures employers that vaccination mandates will be well-received and that any concerns about resignations are

severely overblown. *See* 86 Fed. Reg. at 61475. But OSHA finds support for this conclusion in one selectively cited article. *See id.* (citing Jack J. Barry et al., *Unvaccinated Workers Say They'd Rather Quit Than Get a Shot, but Data Suggest Otherwise*, *Scientific American* (Sept. 24 2021), <https://bit.ly/3Ei0Lvy>). At the same time, OSHA dismisses overwhelming contrary evidence that most recently “filled” the briefing below. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402 (6th Cir. Dec. 15, 2021) (order denying petitions for initial review en banc) [hereinafter *In re: MCP No. 165* (en banc order)], slip op. at 56 (Sutton, C.J., dissenting).

Contrary evidence comes in the form of direct employer experience, including at Standard Process. If it were to mandate vaccination, Standard Process estimates at least 15 percent of its employees would resign at once. Exacerbating the problem, recruiting new employees to rural employers—as compared to their urban and suburban counterparts—often takes longer and requires more effort. Indeed, Standard Process typically has 20 to 30 open positions at any given time, each of which takes about 50 days on average to fill. With increasing pressure on wages, recruitment in rural areas will only become more difficult. Not to mention, rural populations have been less receptive to voluntary vaccination: the ETS would make Standard Process’s candidate pool even shallower than usual.

Employers across the state and nation forecast ETS-induced resignations at levels similar to Standard Process. Responding to a survey conducted by a Wisconsin-based business advocacy group, 88 percent of ETS-covered employers said they expect

to lose employees. Wis. Mfrs. & Commerce, *Biden Administration’s Vaccine & Testing Mandate Is Unlawful & Unworkable* (Nov. 17, 2021), <https://bit.ly/3EluqUF>. Of those businesses, “more than half expect to lose between 11 and 40 percent of their workforce.” *Id.* In similar surveys reported by OSHA (but brushed aside in the ETS’s reasoning), between 38 and 50 percent of unvaccinated employees said they would rather quit than submit to vaccination mandates. *See* 86 Fed. Reg. at 61475. It is not difficult to envision how mass exoduses of employees will cause seismic disruptions—not only at individual workplaces, but also across the labor market, exacerbating already-existing worker shortages and supply-chain clogs. *See, e.g.*, Bureau of Lab. Stats., U.S. Dep’t of Lab., USDL-21-2099, Job Openings and Labor Turnover—October 2021 (Dec. 8, 2021), <https://bit.ly/3HgJ1Cw>; Josh Mitchell et al., *4.3 Million Workers Are Missing. Where Did They Go?*, Wall St. J. (Oct. 14, 2021), <https://on.wsj.com/3qr6DgX>.

B. Contrary to OSHA’s assumptions and reasoning, testing is under-accessible, disruptive, and costly—especially in rural areas.

On its face, the ETS offers another option: testing. The court below depicted this option as an equal alternative to mandatory vaccination. *See, e.g., In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, 86 Fed. Reg. 61402 (6th Cir. Dec. 17, 2021) (opinion and order dissolving stay), slip op. at 7 [hereinafter *In re: MCP No. 165* (stay order)] (“[T]he ETS allows covered employers . . . to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces.”). “But OSHA consciously designed this exception to be less palatable to employers and employees.” *Id.* at 40 (Larsen, J., dissenting);

accord In re: MCP No. 165 (en banc order), slip op. at 35–36 (Bush, J., dissenting). Testing, in reality, is not a meaningful alternative.

1. For starters, testing is under-accessible in rural areas. OSHA notes that “COVID-19 testing has become more widely available throughout the pandemic” and assumes that rural employers “will have sufficient access to COVID-19 tests and will be able to comply.” 86 Fed. Reg. at 61450, 61456. But these assumptions overlook real deficiencies in access to testing, particularly in rural areas.

As the CDC has recognized (and a trip to the drug store often confirms), an ongoing shortage limits access to point-of-care and over-the-counter COVID-19 tests. Ctrs. for Disease Control, *Lab Advisory: Shortage of COVID-19 Rapid Tests May Increase Demand for Laboratory Testing*, <https://bit.ly/3pjLhmo> (Sept. 2, 2021). In rural areas, the supply crunch is even more pronounced. *See, e.g.*, Justin Lundy, *COVID-19 At-Home Test Kit Shortage Hit ENC Nonprofits*, WITN (Dec. 23, 2021), <https://bit.ly/3EtJVtP>; David Mekeel & Karen Shuey, *At-Home Rapid COVID Test Kits Scarce in Berks*, Reading Eagle (Dec. 21, 2021), <https://bit.ly/3etU130>.

Community testing, for its part, fares no better. *See, e.g.*, Erin Kissane, *We’re About to Lose Track of the Pandemic*, The Atlantic (Dec. 23, 2021), <https://bit.ly/3msGj56>. While long lines dominate in urban areas, many rural counties in Wisconsin have two or fewer sites to begin with. Wis. Dep’t of Health Servs., *COVID-19: Community Testing Sites*, <https://bit.ly/3efsf2UL> (last visited Dec. 22, 2021). This is where Standard Process finds itself: in a town with fewer than 2000 people, surrounded by farmland. *See* Jefferson Cty., Wis., *Agricultural Preservation*

and Land Use Plan 4 (Feb. 9, 2021), <https://bit.ly/33TwIxM>. Due to Standard Process's rural location, there are no community testing sites within a reasonable distance of company facilities. Even sites further away, moreover, lack capacity to handle the large volume of tests that Standard Process alone would require. Employees would need to drive impracticably long distances to obtain tests. *See* Wis. Dep't of Health Servs., *supra*. Such travel would likely lead to dismal compliance rates, compromised job performance, or both.

2. Testing also disrupts company operations in myriad ways. As explained, Standard Process's rural location means testing at community sites is a nonstarter. So, compliance would entail testing employees at the workplace—a complex process overseen by dedicated personnel either newly hired or displaced from another job duty. Yet OSHA discounts the administrative burdens facing employers like Standard Process, claiming they would be “de minimis.” 86 Fed. Reg. at 61488. They are anything but.

What would meaningful compliance look like in practice? To start, Standard Process would need to create one or more controlled testing spaces within its facilities. The spaces would need to be large enough to socially distance and to place private-testing modules. They would need to be staffed by one or more employees to monitor testing and stock supplies. And they would need to be regularly sanitized. Finally, to meaningfully organize and monitor the company's testing program, specialized software would need to be purchased and maintained.

Once at the testing space on pre-determined schedules (which could vary often based on occupational responsibilities), employees would first register themselves in the software program. Then they would be tested. The tests, in turn, would be shipped to a laboratory for processing. The laboratories would return results many hours after receipt. Employees who test positive would receive phone calls.

3. All this complexity makes testing costly. True enough, OSHA explains that the ETS does not technically require employers to pay for testing. 86 Fed. Reg. at 61437, 61484. But with off-site testing effectively unavailable, *see supra* pp. 7–8, and concerns about employees resigning if forced to pay for testing, the only real option is for Standard Process to cover the cost.

OSHA vaguely concedes that employers “may have costs” if they provide testing, but it does not account for such costs. 86 Fed. Reg. at 61484. Exemplifying the ETS’s generally underdeveloped reasoning, this glib remark results from a drastic underestimation of administrative burdens, especially on rural employers. The costs of testing are steep.

Standard Process, for example, would likely need to hire and pay multiple new employees to take on dedicated roles in the testing process. In addition, leadership in all departments would be impacted by the need to communicate testing procedures, schedule testing, and address non-compliance.

The tests themselves, of course, also cost money. Tests available to Standard Process would cost \$70 to \$90 per employee per week—approximately twice OSHA’s estimated cost of \$40.46. OSHA, *Costs Associated with Reasonable Accommodation:*

Testing, Face Coverings, and Determinations 6 (Nov. 4, 2021), <https://bit.ly/3mqnNdG>. Assuming a workplace vaccination rate near the statewide average, testing supplies would cost Standard Process nearly \$20,000 per week. Additional costs would include implementation (about \$5000), as well as the software previously mentioned (\$5000, plus a \$6500 per-year licensing fee).

Less direct—but no less impactful—are anticipated costs flowing from lost productivity. If Standard Process were to ask employees to test while not on paid time, compliance rates would likely flounder. At the same time, allowing employees to test during work time would divert them from regular job duties to the tune of hundreds of hours and thousands of dollars of lost productivity every week. Relatedly, human resources personnel would need to divert attention from already packed workloads to address positive test results, time off for quarantine, replacement-worker scheduling, employee non-compliance, and exemption requests.

OSHA’s solution for employers is to “absorb” testing costs. 86 Fed. Reg. at 61474. The agency nods approvingly to Delta Airlines as an exemplary employer already facilitating weekly testing for employees. *Id.* at 61451. But Delta earned over \$17 billion in revenue last year. Delta Airlines, *Delta Air Lines Announces December Quarter and Full Year 2020 Financial Results* (Jan. 14, 2021), <https://bit.ly/3Fol5N9>. While certainly not inconsequential, Standard Process’s revenues are a fraction of Delta’s. The company cannot simply “absorb” hundreds of thousands of dollars in testing and testing-related costs.

C. As a result, the ETS will cause irreparable harm and undermine the public interest.

1. All told, the ETS will cause significant financial strain on Standard Process and all employers like it. While OSHA claims compliance will cost employers (only) \$3 billion, 86 Fed. Reg. at 61493, “testing-related costs are not included in [this] [cost] analysis,” *id.* at 61484. The cumulative bill is staggering. Conservative assumptions estimate 6.3 million tests per week and an average weekly cost of \$40.46 per employee. These figures produce a whopping \$4 billion in testing costs (and potentially higher, if the \$40.46 is off-base for everyone, *see supra* p. 9)—thereby more than doubling OSHA’s claimed compliance cost.

Neither Standard Process nor any employer could recover these costs from the government. *See, e.g., Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021) (“[F]ederal agencies generally enjoy sovereign immunity for any monetary damages.”). The harm is therefore irreparable. *See, e.g., Chamber of Commerce v. EPA*, 577 U.S. 1127 (2016) (granting stay to prevent nonrecoverable compliance costs); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”).

2. What is more, the harm is not just monetary, and it is not just private. OSHA’s overreach will “cause a cascade of consequences.” *Missouri v. Biden*, No. 4:21-CV-01329-MTS, 2021 WL 5564501, at *12 (E.D. Mo. Nov. 29, 2021). Although not a healthcare facility or provider itself, Standard Process supplies products to healthcare facilities and practitioners. Many of its products are specifically designed

to aid immune system function. Countless other for-profit and non-profit companies produce products and provide services that contribute to the overall health of the population. Yet as shown above, the vaccine mandate will almost surely result in mass resignations; and the testing mandate will disrupt operations and diminish productive capacity. Either way, Standard Process and companies like it will have to divert resources away from their core competencies, leading to decreased supply and increased costs for their customers. In the aggregate, a measure intended to keep people healthy could easily end up impairing overall health. That result runs directly counter to the purpose of the ETS and harms the public interest.

D. The ETS undermines private and public interests unnecessarily.

Perhaps worst of all, the ETS will cause all these hardships unnecessarily. “OSHA’s mandate applies, in undifferentiated fashion, to a vast swath of Americans: 84 million workers, 26 million unvaccinated, with varying levels of exposure and risk.” *In re: MCP No. 165* (stay order), slip op. at 46 (Larsen, J., dissenting). Yet individuals making up this vast swath face vastly different levels of risk. As “[t]he government’s own data show,” “*unvaccinated* workers between the ages of 18 and 29 bear a risk roughly equivalent to *vaccinated* persons between 50 and 64.” *Id.* at 47 (Larsen, J., dissenting) (emphases added) (citing Ctrs. for Disease Control, *Rates of COVID-19 Cases and Deaths by Vaccination Status*, <https://bit.ly/3pj4zZd> (last visited Dec. 16, 2021)). The Centers for Medicare & Medicaid Services likewise reports that “the death rate for older adults age 65 or higher was hundreds of time[s] higher than for those in their 20s,” and that “those aged 65 years and older account for more than 80-percent of U.S. COVID-19 related deaths.” *Missouri*, 2021 WL 5564501, at *9 (quoting

86 Fed. Reg. at 61601). Like virtually every employer subject to the ETS, Standard Process’s diverse workforce runs the gamut from young to old.²

Age is only one of many factors affecting an individual employee’s risk. Standard Process’s several hundred employees work under varying conditions. Some work in relatively close proximity to each other—such as manufacturing specialists on production lines and scientists in research laboratories. Others work in relative isolation—such as customer service representatives in offices, professional support personnel from their homes, and agricultural workers in spacious facilities and fields. Obviously the risk of contracting and spreading COVID-19 is higher among the former group than the latter.

It follows that OSHA needed to—at minimum—tailor any rule to account for the numerous variables in workplace risk. Yet the ETS treats all these different conditions, and the employees who work in them, identically. Not only did OSHA fail to adopt a common-sense tailored option (choosing instead to regulate with a “one-size-fits-all sledgehammer,” *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 17 F.4th 604, 612 (5th Cir. 2021)), but it also never even considered such tailoring, *see In re: MCP No. 165* (stay order), slip op. at 47 (Larsen, J., dissenting) (noting OSHA’s failure to consider tailored alternatives accounting for different risk levels, including by age and in “[c]ertain occupational

² Specifically, Standard Process’s employees break down by age as follows: 18–29 years old, 22%; 30–39, 26%; 40–49, 21%; 50–59, 22%; and 60+, 9%.

sectors”); *In re: MCP No. 165* (en banc order), slip op. at 21 (Sutton, C.J., dissenting) (similar).³

OSHA’s statutory authority and general reasoned-decisionmaking duty require it to at least *consider* tailored alternatives. *See* 29 U.S.C. § 655(c)(1) (requiring ETS be “necessary”); *In re: MCP No. 165* (stay order), slip op. at 44 (Larsen, J., dissenting) (connecting “necessary” requirement to tailored alternatives); *Dist. Hosp. Partners, LP v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (holding agency action arbitrary and capricious where the agency’s data revealed a “significant and viable and obvious” alternative). It did not, choosing instead to forgo public input entirely.

The ETS thus fails on the merits. And as Standard Process’s experience illustrates, the ETS will cause irreparable harm and undermine the public interest. The only thing “necessary” is a stay.

CONCLUSION

The Court should stay the ETS pending review, grant certiorari before judgment, or both.

³ The most “tailored” alternative of all is no ETS. Absent the ETS, states, local governments, and private employers can regulate as appropriate based on local conditions. Discussing Omicron infections *just this week*, President Biden agreed: “There is no federal solution. This gets solved at a state level.” *Remarks by President Biden at COVID-19 Response Team’s Regular Call with the National Governors Association*, The White House (Dec. 27, 2021), available at <https://bit.ly/3sFUtUq>.

Respectfully submitted,

ANN M. MAHER
REBECCA C. FURDEK
HUSCH BLACKWELL LLP
511 North Broadway, Suite 1100
Milwaukee, WI 53202

DAVID A. LOPEZ
HUSCH BLACKWELL LLP
13330 California Street, Suite 200
Omaha, NE 68154

JOSEPH S. DIEDRICH
Counsel of Record
KIRSTEN A. ATANASOFF
HUSCH BLACKWELL LLP
33 East Main Street, Suite 300
Madison, WI 53703
608.255.4440
joseph.diedrich@huschblackwell.com

MATTHEW DIEHR
HUSCH BLACKWELL LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

Counsel for Amicus Curiae

December 29, 2021