No. 21A244

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AMERICAN TRUCKING ASSOCIATIONS, INC.; NATIONAL RETAIL FEDERATION; FMI–THE FOOD INDUSTRY ASSOCIATION; NATIONAL ASSOCIATION OF CONVENIENCE STORES; NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; INTERNATIONAL WAREHOUSE AND LOGISTICS ASSOCIATION; INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION; NATIONAL PROPANE GAS ASSOCIATION; BRICK INDUSTRY ASSOCIATION; AMERICAN BAKERS ASSOCIATION; KENTUCKY PETROLEUM MARKETERS ASSOCIATION; KENTUCKY TRUCKING ASSOCIATION; LOUISIANA MOTOR TRANSPORT ASSOCIATION; MICHIGAN ASSOCIATION OF CONVENIENCE STORES; MICHIGAN PETROLEUM ASSOCIATION; MICHIGAN RETAILERS ASSOCIATION; MICHIGAN TRUCKING ASSOCIATION; MISSISSIPPI TRUCKING ASSOCIATION; OHIO GROCERS ASSOCIATION; OHIO TRUCKING ASSOCIATION; TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY; TENNESSEE GROCERS AND CONVENIENCE STORE ASSOCIATION; TENNESSEE MANUFACTURERS ASSOCIATION; TENNESSEE TRUCKING ASSOCIATION; AND TEXAS TRUCKING ASSOCIATION,

Applicants,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY, U.S. DEPARTMENT OF LABOR; DOUGLAS PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents.

REPLY OF TWENTY-SIX BUSINESS ASSOCIATIONS IN SUPPORT OF IMMEDIATE STAY OF AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

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INTRODUCTION

Unless this Court immediately stays the ETS's effective date, on January 10, America's businesses will immediately begin incurring billions in nonrecoverable compliance costs, and they will lose employees amid a preexisting labor shortage. The ETS will irreparably injure the very businesses that Americans have counted on to widely distribute COVID-19 vaccines and protective equipment to save lives—and to keep them fed, clothed, and sustained during this now two-year-long pandemic. OSHA's sweeping regulatory dictate will convert hundreds of thousands of businesses into *de facto* public health agencies for two-thirds of America's private employees. It should be stayed for three primary reasons.

First, the ETS's legality warrants this Court's review. Respondents do not—nor could they—deny that two courts of appeals have reached directly conflicting results over this issue of exceptional national importance on whether the ETS should be stayed.

Second, the Business Associations are likely to succeed on their two statutory arguments. As Chief Judge Sutton wrote in dissent, it "is not particularly hard" to conclude that these statutory grounds warrant a stay. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on Covid 19 Vaccination and Testing, 86 Fed. Reg. 61402*, En Banc Order, App. 191-92 (Sutton, C.J., dissenting); *In re: MCP No. 165*, Panel Op., App. 265 (Larsen, J., dissenting); *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021); *id.* at 619 (Duncan, J., concurring). Much of the Government's 87-page response addresses constitutional claims, record-based arguments about whether COVID-19 is dangerous (it is) or whether vaccination is

worthwhile (again, it is), and administrative-law claims raised by other applicants. But this Court need not resolve any of those issues to stay the ETS.

Respondents barely address (*see* Resp. 62 n.11) the Business Associations' first argument—that the ETS is not "necessary" under 29 U.S.C. § 655(c) because the Government could have followed the usual notice-and-comment process and could have provided a customary implementation period but for the Government's own delay in issuing an "emergency" rule two years into a pandemic. It was not necessary to act immediately without notice and comment as an "emergency" measure on the pandemic for the first time on November 5, 2021. Testing has been widely available for more than a year, masking for two, and vaccines for more than eight months.

More broadly, under the major-questions doctrine, Congress did not clearly authorize OSHA to commandeer businesses into implementing a vaccine, testing, masking, and tracking mandate for 84 million Americans. Respondents' argument betrays their fundamental misunderstanding of the role of Executive Branch agencies. They repeatedly frame (Resp. 53, 54, 57) their own authority to issue the ETS as a question of whether anything in statutory text "disables" OSHA from acting.

That has it exactly backwards. Under our separation of powers, Executive Branch agencies lack power unless Congress affirmatively authorizes them to act. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). And this Court's precedents—especially *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), which cabined OSHA's power—establish that Congress must

clearly delegate power over questions of vast economic and political significance. *E.g.*, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489, (2021) (per curiam); *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*").

No emergency standard in the fifty-year history of the OSH Act has been used to encompass anything nearly so broad as this ETS, which applies to all businesses with more than 100 employees—two-thirds of America's private sector economy. The Government wisely concedes that the ETS involves major questions, *contra* the Sixth Circuit panel-majority's opinion. *See In re: MCP No. 165*, Panel Op., App. 241. Respondents' make no attempt to show that the ETS is even in the same realm as OSHA's prior emergency standards, which were far narrower than this behemoth. Even then, courts blocked all but one of OSHA's prior emergency standards that were challenged. And Respondents just abandoned OSHA's June 2021 healthcare ETS. (Further supporting the argument that Respondents are just trying to avoid the rulemaking procedures that the OSH Act otherwise requires.)

Respondents also concede (as they must) that OSHA has authority to address only *workplace* dangers and *occupational* health and safety problems. Resp. 45. Despite Respondents' attempts (Resp. 47) to establish that there is something "unique" about workplaces and COVID-19, there simply is not. People get COVID-19 by being around other people with COVID-19—at home, at restaurants, everywhere. They get it at work, too. But people get COVID-19 by social interactions that occur anywhere, and everywhere, all of the time. Congress knows how to delegate power over worldwide communicable diseases to agencies, but it has done nothing of the sort with OSHA's ETS power. COVID-19 is a societal health problem within the province

of general public health agencies—perhaps other federal agencies within HHS, and certainly state and local authorities—but not of occupational agencies.

Respondents' position that OSHA can regulate any health problem threatening an employee's health would remove any remaining limit on OSHA's authority. Under Respondents' limitless position (Resp. 45-48), OSHA could impose similar test-and-mask or vaccination requirements for influenza or pneumonia; it could regulate the workplace cafeteria for contributing to obesity, heart disease, type 2 diabetes, and other leading causes of death that are general, societal health problems.

Third, the ETS will irreparably harm the Business Associations' members—through billions in compliance costs from testing and recordkeeping, plus significant workforce disruptions when workers either quit or are fired. Respondents assert that these injuries will not be as bad as the Associations' declarants posit. But even if the ETS imposes "only" $3 billion in "routine" compliance costs (Resp. 79) and drives "only" 1-3% attrition in the workforce (Resp. 78), the ETS will still cause significant irreparable injury to the Business Associations' members. Application 31-32.

The Government has no further salve to the irreparable injury that will befall the American economy. Respondents simply contend (Resp. 61) that a devastating pandemic, not specific to workplaces, justifies the invocation of OSHA's limited emergency powers. The pandemic is undoubtedly an ongoing public-health tragedy, but regardless of the Administration's laudable intentions, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends" like "combating the spread of the COVID-19 Delta variant." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

ARGUMENT

I. The Business Associations Are Likely to Succeed on Their Claims That the ETS Exceeds Respondents' Statutory Authority.

OSHA unlawfully evaded the notice-and-comment process. And under the major-questions doctrine, Congress did not clearly grant OSHA power to issue this ETS.[1]

A. It was not "necessary" to issue an immediately effective emergency temporary standard that evaded the notice-and-comment process.

A stay is warranted solely on the ground that it was not "necessary" for OSHA to issue an immediately effective ETS, forgoing any notice-and-comment procedures. OSHA's own delay in issuing the ETS shows that notice and comment was entirely possible—and therefore that an ETS was not necessary—to address a virus that has been an unfortunate fixture of daily life for more than two years.

Even if OSHA needed "two months" to draft a "153-page preamble," Resp. 26 n.4, that simply highlights how easily OSHA could have noticed a rule for comment months ago. And as we enter the third year of an ongoing yet evolving pandemic, the significant workforce and supply chain problems currently encumbering the country are worthy of agency review and consideration. These are exactly the kinds of issues that would have been put before the agency in the standard rulemaking process.

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[1] For this Court to "postpone the effective date" of the ETS "pending conclusion of the review proceedings," 5 U.S.C. § 705, *see* 28 U.S.C § 2112(a)(4), the Court need only conclude that the Business Associations are likely to succeed on at least one of their two statutory claims and will suffer irreparable injury. *Chamber of Com. v. EPA*, 577 U.S. 1127 (2016) (order "staying [agency action] pending disposition of the . . . petitions for review in [a] United States Court of Appeals" under § 705). Respondents thus mistakenly contend (Resp. 16) that Applicants must show an "indisputably clear" right to relief. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). The Business Associations do not need "an original writ of injunction[] pursuant to the All-Writs Act." *Id.* In any event, the Business Associations' right to relief is also indisputably clear.

Application 14-15; App. 295-97 (Decl. of Beckwith); App. 315-16 (Decl. of Harned); App. 325-26 (Decl. of Martz); App. 366 (Decl. of MacKie).

Respondents assert that an ETS is by definition "necessary" anytime "'OSHA's current regulations [a]re [in]sufficient to address' the *immediate* grave danger." Resp. 44. But this view would render the word "necessary" meaningless. 29 U.S.C. § 655(c). And this Court just stated that a delegation to create "necessary" standards cannot entail a "breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

An emergency standard under 29 U.S.C. § 655(c) is "necessary" only where OSHA lacks another option to protect employees from exigent, grave, occupational danger. *Indus. Union*, 448 U.S. at 651 (plurality opinion) (emergency standards are "narrowly circumscribed"); *In re: MCP No. 165*, Panel Op., App. 270 (Larsen, J., dissenting) (observing that "'necessary' means 'indispensable'"). If an ordinary OSHA standard under § 655(b), following notice-and-comment and an implementation period, is an option, then OSHA must choose that option. Here, the "reality does not justify, much less justify clearly, a sudden invocation of an emergency medical power at roughly the two-year anniversary of the pandemic merely because the Secretary determines that not enough Americans are vaccinated." *In re: MCP No. 165*, En Banc Order, App. 191 (Sutton, C.J., dissenting); *see id*. App. 205 ("[I]t is difficult to understand how on November 5, 2021, an 'emergency' suddenly took hold . . . .").

Accepting for the sake of argument that Respondents have given businesses the "choice" of whether to require their employees to test-and-mask weekly or get fully vaccinated, tests have been available for well over a year. For that portion of the ETS that OSHA now asks the Court to keep in place, there is no reason why it was

necessary to impose testing and masking as an immediately effective emergency standard upon employers without notice and comment. OSHA also waited nearly a year after widespread availability of vaccines before issuing the ETS.

Meanwhile, those federal agencies that *do* have expertise over communicable diseases have issued guidance that conflicts with the ETS's foundational assumptions. The CDC, for instance, has advised that employees who test positive for COVID-19 may return to work after five days *even without testing* before their return if their "symptoms are resolving."[2] The ETS, by contrast, would force unvaccinated workers to test every seven days regardless of COVID-19 exposure or symptoms. The CDC also recommends that individuals who test positive for COVID-19 use a mask only for five days if they are asymptomatic.[3] Likewise, the CDC expects that "anyone with [the] Omicron [variant] can spread the virus to others, even if they are vaccinated or don't have symptoms."[4]

The emergence of newer strains of the virus cannot, as Respondents suggest (Resp. 39), justify forgoing the notice-and-comment process. New flu strains appear each year, but that would not justify treating each flu season as an emergency requiring an ETS. OSHA "cannot use its ETS powers as a stop-gap measure," *BST*

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[2] Centers for Disease Control and Prevention, *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population* (Dec. 27, 2021), https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html.

[3] *Id.*

[4] Centers for Disease Control and Prevention, *Omicron Variant: What You Need to Know* (Dec. 20, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html.

Holdings, 17 F.4th at 616 (internal quotations omitted), yet that is the only possible result if OSHA refuses to notice a rule, waits months, and then springs an immediately effective emergency standard across the entire economy. Nor can increased office re-openings or "COVID fatigue" justify OSHA's action. Resp. 29, 54. The ETS remains a one-size-fits-all decree that is not tailored to any of this.

B. The OSH Act does not clearly authorize OSHA to conscript businesses into enforcing a national vaccine-or-testing mandate.

The ETS conscripts every business with more than 100 employees into imposing an unprecedented emergency mandate on two-thirds of the private American workforce. Such a "broad assertion[] of administrative power demand[s] unmistakable legislative support." *In re: MCP No. 165*, En Banc Order, App. 189 (Sutton, C.J., dissenting). There is none.

1. The major-questions doctrine requires a clear statement from Congress to delegate to an agency the power to impose an economy-wide vaccine-or-testing mandate.

There is no doubt that an economy-wide vaccine-or-testing mandate covering 84 million Americans implicates a major question of "vast 'economic and political significance.'" *Ala. Assn' of Realtors*, 141 S. Ct. at 2489 (quoting *UARG*, 573 U.S. at 324, *in turn* quoting *Brown & Williamson*, 529 U.S., at 160).

The Government gets the major-questions-doctrine analysis backwards—repeatedly asserting that "nothing in the OSH Act *disables* the agency from employing the most effective control measure to protect workers from a grave danger." Resp. 54 (emphasis added); *see* Resp. 45 ("[T]he Act's text does not carve out exceptions to OSHA's responsibility . . . ."); Resp. 55 (similar); Resp. 57 ("Nor did

Congress limit OSHA's authority . . . ."). Respondents' position stands the major-questions doctrine on its head. To grant vast regulatory power, Congress must affirmatively "speak with the requisite clarity to place that intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020).

And Respondents do not contest that throughout the more than fifty years of 29 U.S.C. § 655(c)'s history, no emergency temporary standard under this "long-extant statute" has ever been as broad as this ETS. *UARG*, 573 U.S. at 324. The Business Associations explained each of these prior ETSs, *see* Application 16-18, and the dissents of Chief Judge Sutton and Judge Larsen did the same, *In re: MCP No. 165*, En Banc Order, App. 201-02 (Sutton, C.J., dissenting); *In re: MCP No. 165*, Panel Op., App. 278-79 (Larsen, J., dissenting).

This ETS is a novel expansion of OSHA's power because it attempts for the first time to regulate a communicable disease omnipresent in daily life rather than a workplace-anchored occupational hazard. "But no matter how many times OSHA has regulated discrete illnesses in particular workspaces, this emergency rule remains a massive expansion of the *scope* of its authority." *In re: MCP No. 165*, Panel Op., App. 279 (Larsen, J., dissenting) (emphasis added).

Yet the Government's 87-page brief fails to engage with the much narrower scope of prior OSHA ETSs (most of which were blocked by courts, in any event). That OSHA has never targeted widespread societal health problems through an ETS "is a powerful indication" that it lacks such power. *FTC v. Bunte Bros.*, 312 U.S. 349, 351 (1941). After all, "the want of assertion of power by those who presumably would be

alert to exercise it[] is equally significant in determining whether such power was actually conferred." *Id.* at 352.[5]

While there has not been a pandemic on the scale of COVID-19 in more than a century, *every single year* there are flu outbreaks that cause tens of thousands of American deaths—and make tens of millions more Americans sick (and miss work). There is also a well-established pattern over decades of the emergence of novel strains of flu, such as H1N1 in 2009, that are even more deadly and severe than the regular flu.[6] Perhaps the agency responsible, as Respondents assert (Resp. 5), for the workplace health of "*every*" American worker, 29 U.S.C. § 651(b), has been perennially abdicating its responsibility for its entire existence. But far more likely is that no one ever thought, in 1970 or up until now, that society-wide illnesses such as influenza, pneumonia, and even coronaviruses, presented an occupational health emergency within the scope of OSHA's limited regulatory authority.[7]

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[5] *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2261 (2021), has no application here. *Contra* Resp. 61. That case dealt with eminent-domain authority—not administrative law and not the major-questions doctrine. Whatever can be said about the "non-user of a power" in construing constitutional limits on that authority, *PennEast Pipeline*, 141 S. Ct. at 2261 (internal quotation omitted), this Court's precedents squarely provide that prior *agency* action under a particular statutory delegation is an important consideration for the major-questions doctrine. *See, e.g.*, *UARG*, 573 U.S. at 324 (rejecting agency's discovery of "unheralded authority to regulate a significant portion of the American economy" in a "long-extant statute").

[6] Centers for Disease Control and Prevention, *2009 H1N1 Pandemic (H1NWpdm09 virus)* (June 11, 2019), https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html.

[7] Just last week OSHA "withdr[ew] the non-recordkeeping portions of the [June 2021] healthcare ETS," conceding that "a final rule cannot be completed in a timeframe approaching the one contemplated by the OSH Act." OSHA, *Statement on the Status*

Respondents elide these dispositive points by asserting (Resp. 60-61) that the statutory delegation at 29 U.S.C. § 655(c) is "neither recently 'discover[ed]' nor 'unheralded,'" nor "novel." That is not the proper analysis, which must examine the agency's prior actions invoking this delegation. *UARG*, 573 U.S. at 324; *Brown & Williamson*, 529 U.S. at 132. OSHA has only *once* successfully defended an emergency temporary standard on judicial review, *BST Holdings, LLC*, 17 F.4th at 609, and the prior emergency temporary standards were much narrower.

Respondents attempt to characterize (Resp. 33-34, 65) the ETS as "only a temporary regulation on employers that may be fully satisfied by the adoption of a mask-and-test option." That ignores OSHA's own description of the ETS as "designed to strongly encourage vaccination." 86 Fed. Reg. at 61,434; *see id.* at 61,420. And "the grounds upon which [the ETS] must be judged are those upon which the . . . [ETS] was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Even if OSHA had imposed only a testing (with recordkeeping and tracking) mandate, the ETS would still present a major question of vast political and economic significance. Testing for unvaccinated workers will cost at least $4 billion.[8]

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of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), https://www.osha.gov/coronavirus/ets. This healthcare ETS, issued nearly five months before the one at hand, mandated measures only in the healthcare sector—and it did not mandate vaccines or tests.

[8] Respondents point (Resp. 20) to *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 520 (1981), a decision upholding the "cotton dust standard" on the ground that the OSH Act's "legislative history confirm[s]" that OSHA can impose "substantial costs" on employers "when necessary." This Court's application of the major-questions doctrine turns on statutory text, context, and prior agency actions—not legislative history. And precedent confirms that Congress must speak

Application 28. And if OSHA had decreed a testing mandate that applied to vaccinated individuals as well, then those costs would be even higher. Nor can the test-and-mask alternative, even if otherwise permissible, salvage the ETS. Agencies cannot adopt rules exceeding their statutory authority by mitigating the rules' sweeping front-end coverage through back-end dispensations.[9] *See UARG*, 573 U.S. at 324 & n.7, 328.

2. The ETS is not clearly authorized by the OSH Act.

This Court's controlling opinion in *Industrial Union* held that because of "the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary [an] unprecedented power over American industry." 448 U.S. at 645 (plurality opinion). If OSHA's authority to issue standards subject to notice-and-comment does not give it "unprecedented power over American industry," then its narrower emergency power lacking notice-and-comment procedure cannot either. *Id.* A majority in *Industrial Union* rejected OSHA's broader reading of the OSH Act, because such an interpretation would reflect a "sweeping delegation of legislative power" that "might be unconstitutional under" the non-delegation

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"expressly" when an agency action on a major question implicates "billions of dollars." *King v. Burwell*, 576 U.S. 473, 485-86 (2015).

[9] Respondents describe (Resp. 61) the ongoing national debate over responding to the pandemic as "the emergence of political controversy about a particular agency action." But this controversy exists because the appropriate governmental response to the pandemic has been at the forefront of public debate for the past two years. To suggest that the controversy "emerge[d]" only after OSHA acted blinks reality. *Id.* Rejecting OSHA's overreach would not place in jeopardy lawful exercises of agency power simply because an agency action draws "vocal[] oppos[ition]." *Id.* at 62.

doctrine.[10] *Indus. Union*, 448 U.S. at 646 (plurality opinion) (internal quotations omitted); *id.* at 686-87 (Rehnquist, J., concurring in the judgment) (concluding that the OSH Act did in fact violate the "the nondelegation doctrine").[11]

Respondents' textual analysis (Resp. 19-44) entirely ignores *Industrial Union*'s recognition that "Congress . . . narrowly circumscribed the Secretary's power to issue temporary emergency standards." 448 U.S. at 651 (plurality opinion). No part of § 655(c)(1) better reflects that limit than Congress's use of the word "necessary." This Court just held that delegation of power to promulgate "necessary" standards cannot entail "a breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

The word "necessary," in context, "refers only to indispensable or essential measures, *not to whatever [OSHA] determines is useful or beneficial*," *In re: MCP No. 165*, En Banc Order, App. 202 (Sutton, C.J., dissenting) (emphasis added). Especially when analyzed in the context of the larger provision requiring OSHA to address "grave" dangers in an "emergency," the word "necessary" is much closer to "indispensable"/"essential" than to the alternate definition of "useful." *Id.*; Bryan A. Garner, *Garner's Dictionary of Legal Usage* 598 (3d ed. 2011) (giving "indispensable"

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[10] Respondents cite (Resp. 55-56) *Little Sisters of the Poor Saints Peters and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). Unlike there, the OSH Act does "set forth . . . criteria or standards to guide" the agency's discretion. *Id.* So OSHA does not have "unbridled discretion" under a "capacious grant of authority." *Id.* If it did, that would be a non-delegation problem, as *Industrial Union* held.

[11] Respondents contend (Resp. 72) that the plurality in *Industrial Union* "rejected Justice Rehnquist's nondelegation concerns." But in fact, the plurality invoked the constitutional-avoidance canon by "favor[ing]" a "construction of the statute that avoid[ed] th[e] kind of open-ended grant" of authority violating the non-delegation doctrine. 448 U.S. at 646 (plurality opinion) (citing cases finding non-delegation violations).

as the only meaning of "necessary"). As Judge Larsen explained in contrasting OSHA's § 655(c) emergency power with OSHA's regular power, "[a]]n emergency measure must, therefore, be more than 'reasonably' needful." *In re: MCP No. 165*, Panel Op., App. 270 (Larsen, J. dissenting). So, while it is true that "[m]any over-broad solutions might work" to address the risks that COVID-19 poses, "they would not be a 'necessary' or 'indispensable,' means of curing the ill" presented in the workplace. *Id.* at App. 271 (Larsen, J. dissenting).

The Government errs in asserting (Resp. 5) that "[n]o clearer statement is necessary" than the OSH Act's purpose clause. The entire statutory context must be examined. *Brown & Williamson*, 529 U.S. at 132. Agencies cannot wield power over major questions through myopic interpretations of "a particular statutory provision in isolation." *Id.* Furthermore, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

In addition, "before promulgating *any* standard the Secretary must make a finding that the *workplaces* in question are not safe." *Indus. Union*, 448 U.S. at 642 (plurality opinion) (emphasis added). Because "[t]here are many activities that we engage in every day—such as driving a car or even breathing city air"—or being around other people who can transmit a communicable disease—OSHA's power must be limited to occupational, workplace-anchored hazards to avoid an unconstitutionally "sweeping" delegation of legislative power. *Id.* at 642, 646.

The Government concedes (Resp. 45) that OSHA may regulate only "work-related dangers." But OSHA did not focus on a specific workplace threat. It focused on workplaces because the threat it wants to address is everywhere, including

workplaces. For example, "the Secretary did not calculate the number of people who will contract COVID-19 *at work*; he calculated the number of people *who happen to work* who would, in any event, contract COVID-19." *In re: MCP No. 165*, Panel Op., App. 277 (Larsen, J., dissenting) (emphasis in original).

The OSH Act "does not clearly give [OSHA] power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the individual goes to work and may face the hazard in the course of the workday." *In re: MCP No. 165*, En Banc Order, App. 190 (Sutton, C.J., dissenting). Rather, Congress focused on "injuries and illnesses arising out of *work situations*" and sought to "reduce the number of *occupational* safety and health hazards at *places of employment*."[12] 29 U.S.C. §§ 651(a), (b)(1) (emphases added).

The Government and the Sixth Circuit panel majority thus radically depart from the recognized limits on OSHA's authority. They posit a view of "[t]he Secretary's authority to regulate *workplace safety* [that] is simply too 'indirect[]' to cover this nearly horizonless assertion of power." *In re: MCP No. 165*, En Banc Order, App. 199 (Sutton, C.J., dissenting) (emphasis added) (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488); *see Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984) (OSHA's authority extends only to dangers arising out of "work or work-related activities"); *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325,

[12] The OSH Act's plain text limits OSHA's authority to "work situations," 29 U.S.C. § 651(a); "working conditions," *id.* § 651(b); the "work experience," *id.* § 651(b)(7); "employment performed in a workplace," *id.* § 653(a); "occupational" standards, *id.* § 655(b); and "particular industries, trades, crafts, occupations, businesses, workplaces or work environments," *id.* § 655(g).

1332 (11th Cir. 1983) ("[T]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*." (emphases in original)); *BST Holdings*, 17 F.4th at 613 (rejecting "OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace)" into the OSH Act's purview).

The Government's theory of OSHA's power (Resp. 57) would give the agency limitless, "unprecedented power over American industry," *Indus. Union*, 448 U.S. at 645 (plurality opinion), by allowing the agency to target dangers that exist in workplaces only because they exist in the world at large—not because the power applies "nationwide," as OSHA suggests. Under this theory, OSHA could, for example, mandate flu vaccines for all American workers (or pneumonia vaccines for all workers over 65)—with corresponding employer recordkeeping and tracking. OSHA could regulate obesity and heart disease by arguing that it is the nature of workplaces that employees must eat during the workday. *Contra* Resp. 47. Like COVID-19, these societal health problems are not tethered to occupations; they appear in the workplace only because they exist in society at large. And unlike other OSHA preventatives, a vaccine cannot be "undone," *In re: MCP No. 165*, En Banc Order, App. 190 (Sutton, C.J., dissenting), or "taken off," *In re: MCP No. 165*, Panel Op., App. 277 (Larsen, J. dissenting)—neither at the end of the day nor after the temporary standard expires.

If Congress intended OSHA to take the lead in confronting society's most widespread and persistent afflictions simply because most people must go to a

workplace, then it did not express that intent with the clarity this Court requires. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *In re: MCP No. 165*, En Banc Order, App. 199 (Sutton, C.J., dissenting) ("Whatever the health and safety challenges of today . . . or tomorrow . . . the Secretary does not have emergency authority to regulate them all simply because most Americans who face such endemic risks also have jobs and simply because they face those same risks on the clock.").

The Government contends (Resp. 47) that the ETS *does* target "a particularly acute workplace danger," because "[t]he nature of workplaces is that employees come together in one place for extended periods and interact." But that is less the nature of *workplaces* than the nature of human society. Clusters and outbreaks of COVID-19 have arisen "in virtually every type of *work* environment" (Resp. 18 (emphasis added)), only because they have arisen in virtually every environment where people congregate. The fact that outbreaks occur *wherever* humans "come together" and "interact" shows that there is no particularly "acute" (Resp. 47)—let alone "unique," 86 Fed. Reg. at 61,511—risk in the workplace as opposed to in the world at large.

The Government retorts (Resp. 36) that OSHA does not have to show that a danger is specific to any workplace or to calibrate the standard to every possible workplace. That misses the point. OSHA does not have to account for every workplace variation. But "[t]he burden is on the agency to articulate rationally why the rule should apply to a large and diverse class." *In re: MCP No. 165*, Panel Op., App. 272 (Larsen, J., dissenting) (internal quotation omitted). And an emergency standard must explain "the alternative kinds of regulations considered by OSHA." *Dry Color Mfrs' Ass'n v. Dep't of Labor*, 486 F.2d 98, 107 (3d Cir. 1973).

Recent congressional appropriations for OSHA and various other federal agencies "to carry out COVID-19 related worker protection activities" provide no authority for OSHA's exercise of *emergency* authority in this case. American Rescue Plan Act of 2021, Pub. L. No. 117-2, Tit. II, Subtit. B, § 2101(b)(1), 135 Stat. 30 (2021). Nothing in this provision amended the OSH Act or altered OSHA's authority with regard to emergency standards. That Congress authorized funding to combat COVID-19 does not expand OSHA's emergency authority to regulate a risk that every American faces. If anything, this appropriation confirms that OSHA must tether its regulations to the risks faced in a particular workplace or by a particular occupation—for example, those on the front lines of treating COVID-19 patients.

Likewise, the OSH Act's mere mention (Resp. 50) of religious exemptions for "immunization," 29 U.S.C. § 669(a)(5), is not a clear statement allowing OSHA to issue a vaccine-or-testing mandate for two-thirds of private-sector employees. Instead, this section simply retains the religious exemption for medical treatment and immunization that may otherwise be imposed under OSHA's separately delegated authority. Applicants here do not contend that OSHA lacks the authority to mandate immunization, testing, or treatment where such a mandate is within the statutory powers constitutionally delegated by Congress. That is precisely what happened in the bloodborne pathogens rule, which was not an emergency standard—and which, contrary to the Government's view (Resp. 51), also "undermines" OSHA's argument since it "narrowly targeted 'health care workers' for protection." *In re: MCP No. 165*, En Banc Order, App. 209 (Sutton, C.J., dissenting); *see* Application 21-22.

II. The Business Associations' Members Will Suffer Irreparable Harm if the ETS Takes Effect.

Without a stay, the Business Associations' tens of thousands of members, which collectively contribute trillions of dollars to the Nation's economy, will be irreparably harmed by the ETS. They will immediately face $3 billion in compliance costs that OSHA recognized, at least $4 billion more in testing costs that OSHA ignored, workforce disruption from employees who quit or are fired—and the resulting lost sales, profits, and business reputation. Application 25-34.

Respondents do not dispute that these harms are irreparable. Instead, they wrongly contend that the harms are "speculati[ve]" and "avoidable." Resp. 77-79.

The Government first argues (Resp. 77) that employers who are facing increased attrition during an unprecedented labor shortage can avoid losing employees by forcing those employees to undergo weekly testing and constant masking instead of vaccination. But this ignores evidence that "[m]asking alone will result in employees quitting." App. 387 (Decl. of Demos); *see* App. 373 (Decl. of Stillman). And OSHA designed the test-and-mask alternative to "strongly encourage" vaccination, 86 Fed. Reg. at 61,434, and to "create[] a financial incentive for . . . employees to become fully vaccinated" so that they can "avoid t[esting] cost[s]," *id.* at 61,532. Because the test-and-mask alternative is intentionally burdensome, many employees who oppose vaccination will seek employment from businesses where the ETS is inapplicable.

Employers are caught between Scylla and Charybdis when it comes to testing-and-masking or vaccination. If they offer testing and masking as an alternative, they bear all the significant costs of testing. In a historically tight labor market they will be unlikely to pass those costs on to employees without losing them (and in some

states and situations they will be prohibited from doing so by law). Application 26-27. Furthermore, tests right now are already "difficult . . . to reliably obtain," so it is uncertain at best that testing will be a feasible option. App. 311 (Decl. of Sullivan).

And if employers require vaccination, they will suffer the wrath of their workforce that refuses, for whatever reasons, to get vaccinated. Respondents point to "empirical data" suggesting that vaccine mandates do not cause significant attrition. Resp. 78. But the limited studies that OSHA relies on suffer from sample bias—they come solely from the healthcare sector. *See* 86 Fed. Reg. at 61,474 n.42. This does not disprove the walk-offs that the Business Associations' members expect to see based on surveys and on their individual experiences with their employees. Application 31.

Respondents argue that employee attrition is "offset" by the benefits that employers will see "from the reduction in workplace COVID-19 outbreaks." Resp. 78. But OSHA's ETS said only that it "*may*, on net, help ameliorate absenteeism by reducing illnesses." 86 Fed. Reg. at 61,474 (emphasis added). Such a speculative benefit cannot "outweigh" the ETS's undeniable harms. Resp. 78. And even if Respondents were right (they are not) that the number of employees who will leave their employment rather than get vaccinated is only in the 1-3% range modeled in the healthcare sector, *see* 86 Fed. Reg. 61,475 n.42, the twin problems of the tight labor market and the supply chain crises facing business mean that even *that* level of disruption would inflict irreparable injury upon business. Application 30-32.

Respondents next argue that the ETS's nearly $3 billion in stated compliance costs are only "modest" or "routine." Resp. 79. Even if $3 billion was not well beyond what anyone would consider a routine cost of regulation, businesses will incur those

costs during a matter of only a few *months*, not years or decades—and OSHA "drastically underestimated" them. Application 26-27.

The Government remarkably complains that the Business Associations have not provided any "data to substantiate" OSHA's underestimation—just purportedly "boilerplate" declarations. Resp. 79. These declarations are not boilerplate, and they are tailored to each association's (and member's) experiences dealing with COVID-19. More fundamentally, had OSHA subjected its cost and feasibility projections to the notice-and-comment process instead of claiming an emergency, it would have been able to evaluate data beyond the Business Associations' sworn declarations.

Meanwhile, OSHA altogether ignored the *details* the Business Associations provided in their dozen declarations supporting the extensive testing costs unaccounted for by OSHA's ETS. Application 28-29. And because most states *require* employers "to pay the cost of a medical examination"—such as a COVID test—that is necessary "as a condition of employment," *e.g.*, Ky. Rev. Stat. § 336.220, these testing costs hardly are speculative. Even where state law does not require an employer to pay for testing, the labor market's law of supply and demand will have the same effect if businesses want to retain their employees. Application 27.

Respondents' final contention (Resp. 79) on this point, that businesses can assert "impossibility" as a defense in a future enforcement action, is no comfort at all. It gives businesses a meaningless "choice" between "*potentially* huge liability" for non-compliance that ultimately does not count as an impossibility and "suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

III. The Balance of the Equities Favors a Stay.

Under 5 U.S.C. § 705, a stay of agency action is warranted to prevent irreparable harm, and this Court need go no further.[13] Regardless, a stay of the ETS is appropriate under the balance of the equities and the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

To begin, "[b]ecause OSHA's authority extends only to regulating the workplace, the equities embedded in the stay factors do not extend to the costs to society of having unvaccinated Americans. They extend only to the risks to workers and companies." *In re: MCP No. 165*, En Banc Order, App. 213 (Sutton, C.J., dissenting). The *companies* that the Business Associations represent face immediate, irreparable harm absent a stay. *See supra* Part II. Meanwhile, the unvaccinated *workers* at those companies face the consequences of "their own choices." *In re: MCP No. 165*, Panel Op., App. 282 (Larsen, J., dissenting). "Vaccines are freely available, and unvaccinated people may choose to protect themselves at any time." *Id.* at 282-83.

OSHA has previously disclaimed authority to regulate dangers that present themselves "not due to performing work, but . . . due to [the employee's] act[s]." Letter from Richard E. Fairfax, Acting Director, Directorate of Compliance Programs, concerning Worker Exposure to Tobacco Smoke, (Oct. 26, 1998), https://www.osha.gov/laws-regs/standardinterpretations/1998-10-26 (agreeing that employers are not "responsible for controlling workers' exposure to their own tobacco smoke"). Because the protection that OSHA mandates is already freely and easily

[13] This Court can (and should) grant a writ of certiorari now, contrary to Respondents' insinuations (Resp. 85-86), because 5 U.S.C. § 705 recognizes this Court's "certiorari" jurisdiction to "postpone the effective date of an agency action."

available to any individual, the risks that unvaccinated employees have chosen to face cannot tip the balance of the equities in the Government's favor.

Moreover, just because OSHA lacks authority to impose this ETS does not mean that the fight against the pandemic is abandoned. Far from it. The President candidly and rightly admitted that "there is no federal solution" to COVID-19 and that the pandemic must be "solved at a state level."[14] Both state and local public health officials can be, and have been, actively fighting this pandemic. *See* Application 35-36. As Respondents acknowledge, "many States have established requirements for certain categories of workers to be vaccinated against COVID-19"—as have "many private employers." Resp. 53. Thus, although a stay would bar this single federal agency tasked with occupational standards from issuing an emergency rule overhauling the American economy, it would not prohibit the sorts of governmental and private actions occurring each day to resolve this pandemic.

IV. This Court Should Stay the ETS In Full.

In a final effort, Respondents ask this Court to stay "only the portion of the ETS concerning a vaccination requirement" and to leave in place "the ETS's requirement that employers implement a policy that requires unvaccinated employees to mask and test." Resp. 83-84. This alternative is illusory. If this Court declines to issue any stay, then OSHA will have authority to enforce penalties against any employer whose

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[14] The White House, *Remarks by President Biden at COVID-19 Response Team's Regular Call with the National Governors Association* (Dec. 27, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/27/remarks-by-president-biden-at-covid-19-response-teams-regular-call-with-the-national-governors-association/.

employees are neither vaccinated nor tested-and-masked. But if the Court limits OSHA to requiring testing and masking (unless an employee is vaccinated), then OSHA gets to the same place. For the purpose of a stay pending review, a vaccine mandate with a test-and-mask alternative is indistinguishable from a test-and-mask mandate with a vaccine alternative. Respondents' alternative therefore runs into the same statutory defects discussed above. *See supra* Part I.

Nor does Respondents' proposed modification eliminate the irreparable harms. Employers would still need to determine which employees are unvaccinated and thus subject to the modified requirements, divert resources toward compliance and securing tests, and either incur the costs of testing or impose those burdens on employees—which would encourage many of them to quit or change jobs. App. 373 (Decl. of Stillman) ("92% of the industry expects that employees would quit their jobs rather than undergo weekly testing[.]") All of this will result in further irreparable lost sales and business reputation. App. 375-80 (Decl. of Stillman).

* * *

The Business Associations support COVID-19 vaccines. Their members have proudly distributed and delivered hundreds of millions of doses of the COVID-19 vaccines for tens of millions of Americans.

The Business Associations do oppose Government forcing their members to become *de facto* public health officials. Respondents' conceit that the ETS gives employers the "choice" of how to protect their employees is another way of admitting that Respondents simply want to conscript businesses into doing something—requiring vaccination—that Respondents cannot (and will not) bear to do directly.

COVID-19 is a general, society-wide public health issue for the appropriate federal, state, and local public health agencies to address. It is not a distinctly occupational issue, and OSHA may not pass the buck to America's private employers. The federal Government instead should allow businesses to focus on doing their jobs: sustaining commerce during a worldwide pandemic for the benefit of all Americans. At the same time, state and local health officials can continue performing their jobs at finding public health solutions, with the support of the crucial federal resources offered by the President. *See supra* p.23.

CONCLUSION

The Court should grant the Business Associations' stay application. In the alternative, the Court may treat this application as a petition for writ of certiorari, grant the petition, and vacate OSHA's ETS.

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Respectfully submitted,

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