

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.

**MOTION OF ALSCO, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN
OPPOSITION TO EMERGENCY APPLICATIONS FOR A STAY OR INJUNCTION
PENDING CERTIORARI REVIEW; FOR LEAVE TO FILE WITHOUT 10 DAYS'
NOTICE; AND FOR LEAVE TO FILE IN PAPER FORMAT**

ON APPLICATIONS FOR STAY OF ADMINISTRATIVE ACTION AND PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AlSCO, Inc. (“AlSCO”) moves for leave to file a brief as *amicus curiae* in opposition to the Emergency Applications seeking a stay or injunction pending review of the Sixth Circuit’s decision dissolving a stay of Respondent Occupational Safety and Health Administration’s (“OSHA”) Emergency Temporary Standard (“ETS”). AlSCO respectfully moves for leave to file the enclosed brief in 8.5- by 11- inch format via electronic filing and without ten days’ advance notice to the parties of AlSCO’s intent to file. By email on January 4, 2022, AlSCO sought consent from the parties to file its brief in opposition to the emergency applications. Union Petitioners consented to the filing. Applicants Ohio, et. al, and Respondents in both petitions took no position. As of January 6, 2022, the remaining parties had not responded.

AlSCO is an industry-leading, international textile rental services company headquartered in Salt Lake City, Utah. AlSCO maintains 72 branches and employs roughly 8,000 employees across 43 states in the U.S. and, thus, is subject to the ETS. Its business model depends on many of its employees regularly visiting health care facilities, hotels, and restaurants within 150 miles of each branch and others working shoulder-to-shoulder laundering textiles, uniforms, and floor mats.

In its ongoing pursuit of workplace safety, AlSCO has made substantial efforts to encourage its employees to become vaccinated, including offering financial incentives and time off, conducting additional lotteries with multiple prizes of \$10,000 and \$25,000, and pleading with employees to become vaccinated during a tour to branches with low vaccination rates. Despite this, AlSCO’s national

vaccination rate is insufficient, with several branches at dangerously low vaccination rates. Without more, AlSCO cannot meaningfully mitigate the workplace threat of COVID-19.

AlSCO's proposed brief as *amicus curiae* illustrates the grave danger of COVID-19 presents to businesses like AlSCO, which AlSCO is trying to mitigate through vaccination. It will demonstrate that voluntary incentives are not enough. In the face of a pandemic that has claimed the lives of more than 800,000 Americans and infected 56 million others, businesses like AlSCO cannot hope to operate safely or productively without the widespread vaccination the ETS requires. The ETS' compliance costs are a small price to pay for safety and success, and far lower than the economic harms to AlSCO that the virus has wrought. The scourge of the pandemic in the workplace plainly authorizes the ETS.

Respectfully submitted,

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Dated: January 6, 2022

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<i>Herd Immunity: Will We Ever Get There?</i> , YALE MEDICINE (May 21, 2021), https://www.yalemedicine.org/news/herd-immunity	15

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<i>What You Need to Know</i> , MAYO CLINIC (Aug. 28, 2021), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808	15
<i>White House: 90% of Federal Workers, Military Have Gotten at Least One COVID Shot</i> , ABC NEWS (Nov. 22, 2021), https://abcnews.go.com/Health/white-house-90-federal-workers-military-covid-shot/story?id=81327464	22
<i>Workplace Vaccine Mandates Expected to Accelerate, Willis Towers Watson Survey Finds</i> , WILLIS TOWERS WATSON (Sept. 1, 2021), https://www.willistowerswatson.com/en-US/News/2021/09/workplace-vaccine-mandates-expected-to-accelerate-wtw-survey-finds	11

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INTEREST OF *AMICUS CURIAE*¹

For 132 years, AlSCO has strived to promote a healthy and safe workforce. For AlSCO, the Petitions for Review and associated motions for stay concern AlSCO's ability to continue to provide a safe workplace for its employees. AlSCO supports the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard, COVID-19 Vaccination and Testing Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021), (the "ETS") and urges the Court to uphold it and deny the emergency applications for stay or injunction pending certiorari review.

Founded in 1889, AlSCO is a family owned and managed business that has grown to operate seventy-two branches across thirty-seven states, with approximately 8,000 U.S. employees and independent contractors. AlSCO operates in seventeen other countries around the world, including those hit hard by COVID-19 such as Brazil. As a U.S. employer with more than 100 employees, AlSCO is subject to the ETS.

AlSCO provides its customers clean textiles, including tablecloths and napkins, uniforms and shop towels, patient gowns and bedding, as well as mops and floor mats through a pick-up and delivery system. Unlike a laundry, AlSCO owns most of the textiles it washes, leasing those textiles to its customers. AlSCO's customers span different service industries and include restaurants, bars, hotels, hospitals, automobile repair shops, and factories.

¹ Under Rule 37.6 of this Court, AlSCO states that no party or party's counsel authored this brief in whole or in part or contributed any money to fund the preparation or submission of this brief. No person other than AlSCO made any monetary contribution to fund the preparation or submission of this brief.

AlSCO's laundry employees often must stand shoulder-to-shoulder to operate heavy machinery. AlSCO's sales, marketing, delivery, and management employees frequently conduct on-site visits to current and prospective customers' businesses to ensure quality service and customer satisfaction. Thus, many of AlSCO's employees are at high risk for contracting COVID-19.

Roughly 17% of AlSCO's U.S. employees have contracted the virus, disrupting productivity, incurring millions of dollars in medical bills and lost time, and consuming nearly a hundred and fifty thousand employee work hours. The pandemic has also negatively impacted AlSCO's customers.

AlSCO has made substantial efforts to get its employees voluntarily vaccinated. Yet despite financial incentives and the exhortations of management and fellow co-workers, AlSCO's vaccination rates are well below acceptable levels. In several branches, the rates are dangerously low. Without the ETS, there are no indications this will change.

Safety in the workplace is a top AlSCO priority. AlSCO's safety program—in all areas, not just those related to COVID-19—depends on guidance from OSHA, and the pressure of its oversight. AlSCO, and the people it employs, rely upon direction from OSHA to work safely and dependably serve customers. OSHA's ETS will mitigate COVID-19 in a way AlSCO has not been able to—and in many states cannot—achieve through its own measures.

SUMMARY OF ARGUMENT

The Petitioners’ argument, adopted by the Fifth Circuit—that staying or invalidating the ETS does no irreparable harm—ignores the staggering reality of the COVID-19 pandemic. *See In re MCP NO. 165*, No. 21-4027, 2021 WL 5989357, at *3 (6th Cir. Dec. 17, 2021) (“Without addressing any of OSHA’s factual explanations or its supporting scientific evidence concerning harm, the Fifth Circuit summarily concluded that ‘a stay will do *OSHA* no harm whatsoever’ . . .”). But as recognized by the Sixth Circuit, AlSCO, like most employers across the U.S.,² cannot afford to ignore that reality.

The need for OSHA’s ETS is plain from the various harms AlSCO and its employees have suffered at the hand of the pandemic. The grave danger of COVID-19 to AlSCO’s employees is apparent from the infections, hospitalizations, and deaths within AlSCO’s ranks. And the financial loss to AlSCO, both in terms of employee productivity and lost business, is readily quantifiable in the millions of dollars. Without the ETS, AlSCO faces a workplace safety battle it cannot win. AlSCO’s encouragement measures are not sufficient alone and, in many states, AlSCO is *prohibited* from adopting a vaccine mandate. The devastating reality of the pandemic both justifies and necessitates the ETS and the Court should therefore deny the emergency applications for a stay or injunction of the ETS.

² *Over 90% of U.S. Employers Surveyed Require or Encourage Covid-19 Vaccinations*, THE ROCKEFELLER FOUNDATION (Sept. 14, 2021), <https://www.rockefellerfoundation.org/news/over-90-percent-us-employers-require-encourage-covid-19-vaccinations/>; *Workplace Vaccine Mandates Expected to Accelerate, Willis Towers Watson Survey Finds*, WILLIS TOWERS WATSON (Sept. 1, 2021), <https://www.willistowerswatson.com/en-US/News/2021/09/workplace-vaccine-mandates-expected-to-accelerate-wtw-survey-finds>.

ARGUMENT

I. COVID-19 PRESENTS A GRAVE DANGER IN ALSCO'S WORKPLACES.

AlSCO's workforce faces the grave danger of COVID-19 on a daily basis.

Unlike those Americans that can work from home to avoid the constant threat of the pandemic, most members of AlSCO's workforce are in close contact with co-workers or customers as they do their work. For example, AlSCO's laundry workers are frequently in close quarters because they are required to operate heavy machinery as a team when laundering items like table linens, sheets, and floor mats. Without the team effort, the task could not be accomplished. As another example, AlSCO's delivery personnel visit various customers' business locations each day, interacting with them in their workplaces as they stock new linens and collect soiled linens.

All considered, the risk of COVID-19 exposure to AlSCO's workforce enters from multiple vectors: from co-workers, from customers, and from the public those customers serve. As OSHA's ETS states, AlSCO's employees "have little ability to limit contact with co-workers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure" to the virus. *See* 86 Fed. Reg. at 61408; *see also In re MCP NO. 165*, No. 21-4027, 2021 WL 5989357, at *11-12 (summarizing OSHA's evidence of heightened risk in the workplace).

Unsurprisingly, companies like AlSCO with "many employees gathered in the same location," have "larger" and "longer" outbreaks of the virus. 86 Fed. Reg. 61403, 61412-15 (detailing "studies and reports" of outbreaks in AlSCO and it's

customers' industries, including restaurants, hospitality, warehousing, offices, delivery services, cleaning services, and healthcare). *See also In re MCP NO. 165*, No. 21-4027, 2021 WL 5989357, at *12 (exemplifying that majorities of states' outbreaks occur within workplaces). Yet, without the vital efforts of AlSCO's employees, AlSCO's business would cease to exist. Moreover, without vaccinations, several branches would have had to shut down. Thus, mitigating the spread of COVID-19 is of critical importance to the wellbeing and success of AlSCO's workforce.

Yet, despite safety measures undertaken by AlSCO, COVID-19 has taken a dramatic toll on AlSCO's workforce. In the U.S. alone, at least 1,340 AlSCO employees have contracted the virus. Masking and social distancing where possible is not enough. And just as the ETS described, AlSCO's "workers are being hospitalized with COVID-19." 86 Fed. Reg. 61549. AlSCO employees and their dependents have incurred at least \$1,416,343 in medical expenses (excluding testing costs) on AlSCO's self-insured plan from at least 4,976 separate medical claims related to COVID-19.

Elsewhere in the world where AlSCO operates, outbreaks of the virus have all but stalled operations as the virus has taken its toll on workers, just as the ETS describes. *See* 86 Fed. Reg. 61446. Devastatingly, two AlSCO employees in Brazil have died, 15 were hospitalized, and 1,048 had to be quarantined due to COVID. Without additional safety measures like the ETS, AlSCO fears similar outcomes in the U.S.

These fears are strong, especially for AlSCO branches with low vaccination rates. Although nationally AlSCO's vaccination rate fluctuates around 79.5%, certain

individual branches maintain rates of only 11% (Durham, NC) 39% (St. George, UT), 40% (Naples, FL), 47% (Pensacola, FL & Billings, MT), 52% (Wichita Falls, TX), 55% (San Antonio, TX), and 60% (Milwaukee, WI) to name a few.

II. THE ETS IS NECESSARY TO PROTECT ALSCO'S EMPLOYEES FROM GRAVE DANGER.

Despite AlSCO's best efforts, it appears that absent a vaccine mandate like the ETS, AlSCO will be unable to bring its vaccination rates to acceptable levels. As soon as vaccines were available, AlSCO offered \$100 or an extra day of vacation to vaccinated employees. Three AlSCO executives embarked on a vaccination encouragement tour in August to the company's branches with low vaccination rates. In each location, management pleaded with all employees to become vaccinated and listened to their concerns. The interactions were heart wrenching. One production worker in Pensacola explained her brother was on a ventilator. In tears she asked her colleagues to be vaccinated.

AlSCO also launched a "Vax to the Future" lottery effort to encourage vaccination. In September, AlSCO held a drawing for newly vaccinated employees, with four winners receiving \$10,000 each. In October, AlSCO held a drawing for all employees vaccinated since December 2020, with four winners receiving \$25,000 each.

Unfortunately, these incentives have not been enough. For example, a receptionist at AlSCO's headquarters lost her thirty-two-year-old pregnant daughter to the virus. Subsequently, the receptionist got vaccinated and now tries to convince

other employees to become vaccinated, too. But it took the death of her daughter, not just AlSCO's incentives, for her to get the shot.

While AlSCO's incentives did encourage some employees to become vaccinated, the encouragement was not sufficient for AlSCO to reach an 80% national vaccination rate, let alone to reach the 94% vaccination rate which could be the secure measure of safety. See *Herd Immunity and COVID-19 (Coronavirus): What You Need to Know*, MAYO CLINIC (Aug. 28, 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808> (stating highly contagious diseases, like measles, require a 94% herd immunity level to "interrupt the chain of transmission"); Carrie Macmillan, *Herd Immunity: Will We Ever Get There?*, YALE MEDICINE (May 21, 2021), <https://www.yalemedicine.org/news/herd-immunity> (adding that polio required a 80% immunity threshold and stating the more infectious COVID-19 variants require a higher immunity threshold percentage).

Rather, despite AlSCO's measures, the vaccination rates in many branches continue to mirror the general population's vaccination rate in surrounding communities. For example, AlSCO's St. George, Utah branch has a rate of 39%. But that is not markedly different than the rate of its surrounding community of 45.4%. See *COVID-19 Data, Vaccines*, UTAH DEPARTMENT OF HEALTH (last visited Jan. 3, 2022), <https://coronavirus.utah.gov/case-counts/> (reporting data for Southwestern Utah). As another example, AlSCO's Pensacola, Florida branch has a rate of 47%, while the surrounding community has a rate of 53%. See *Escambia County, FL*

COVID-19 Vaccine Tracker, NAPLES DAILY NEWS (last visited Jan. 3, 2022), <https://data.naplesnews.com/covid-19-vaccine-tracker/florida/escambia-county/12033/>.

While disheartening, this data is consistent with research tracking the effectiveness of voluntary incentive measures on vaccination. Research shows that overall, voluntary incentives do not have a significant enough impact for rates to depart from public vaccination trends. See Harsha Thirumurthy et al., *Association Between Statewide Financial Incentive Programs and COVID-19 Vaccination Rates* (Sept. 3, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912786 (“there was no significant difference in vaccination trends between states with and without incentives”). Further, “rising ‘COVID fatigue’ has made voluntary incentives less common. 86 Fed. Reg. 61444. The stubborn reality is that neither carrots nor sticks are sufficient to meaningfully affect vaccination rates in the workplace. For this reason, it is unsurprising the ETS deems nonregulatory options “inadequate.” 86 Fed. Reg. 61444.

Further, without the ETS, in some states, Alcoa’s hands are tied as to what measures it can take to adopt a voluntary vaccine mandate of its own.³ For example, in Utah, where Alcoa is headquartered, the state legislature, at least partly in response to OSHA’s ETS, passed a bill that grants a “personal belief” exemption to all employees subject to a private vaccine mandate. See S.B. 2004, 2nd Spec. Sess.

³ Starting January 10, 2022, Alcoa will attempt to require employees to either test and mask or vaccinate as the ETS contemplates. However, numerous state laws may result in challenges to Alcoa’s health and safety policy.

(Utah Nov. 16, 2021), <https://le.utah.gov/~2021S2/bills/static/SB2004.html>. The scope of that exemption is not defined and, practically, operates to reduce any vaccine mandate to a matter of mere employee preference. Other states have made similar moves,⁴ often in tandem with their Attorney Generals challenging the ETS and other federal vaccination measures.⁵

⁴ See, e.g., H.B. 218, Reg. Sess. (Ohio Nov. 18, 2021), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb218/RH/01/hb218_01_RH?format=pdf (passing Ohio House of Representatives and including “personal conscience” exemption);

H.B. 1B, Spec. Sess. B (Fla. Nov. 18, 2021), <https://www.flsenate.gov/Session/Bill/2021B/1B/BillText/er/PDF> (allowing employees to “opt out” of mandates for a variety of reasons);

S.B. 9014, 3rd Spec. Sess. (Tenn. Nov. 12, 2021), <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB9014&GA=112> (prohibiting requirements for proof of vaccination for “any reason”);

Exec. Order GA-40 (Tex. Oct. 11, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf (including “personal conscience” exemption);

H.B. 702, Reg. Sess. (Mont. July 1, 2021), (making vaccination status a protected class for purposes of employment nondiscrimination), <https://leg.mt.gov/bills/2021/billpdf/HB0702.pdf>.

⁵ These state actions are dangerous to the health and safety of workers. Further, these actions and lawsuits challenging pandemic safety measures endanger the lives of their very proponents. See, e.g.:

Michelle Boorstein, *Marcus Lamb, Head of Daystar, a Large Christian Network that Discouraged Vaccines, Dies After Getting Covid-19*, THE WASHINGTON POST (Nov. 30, 2021), <https://www.washingtonpost.com/religion/2021/11/30/marcus-lamb-daystar-covid-vaccine-medical-freedom/> (describing the death of Petitioner Word of God Fellowship, Inc.’s (dba Daystar) founder as a result of COVID-19);

Bryan Schott, *Utah A.G. Sean Reyes Tests Positive for COVID-19*, SALT LAKE TRIBUNE (Nov. 22, 2021), <https://www.sltrib.com/news/politics/2021/11/22/utah-ag-sean-reyes-tests/>;

Dennis Romboy, *Utah Attorney General Sean Reyes Tests Positive for COVID-19*, DESERET NEWS (Nov. 22, 2021), <https://www.deseret.com/utah/2021/11/22/22796354/utah-attorney-general-sean-reyes-tests-positive-covid19-vaccine-mandate-lawsuit/>;

Bryan Schott, *Top Utah Republican Has COVID-19*, Salt Lake Tribune (Nov. 19, 2021), <https://www.sltrib.com/news/politics/2021/11/19/top-utah-republican-has/>.

These actions, regardless of their ultimate legality, undermine the efforts of businesses like AlSCO who are seeking to protect their workforce through vaccination. The likelihood that employees will become vaccinated as a voluntary measure if these measures prevail is slim. Further, these actions signal to employees that AlSCO's safety measures, including those OSHA required in this and other contexts, are up for debate according to the whims of every individual. For this reason, if AlSCO ignores one threat to workplace safety, it surrenders its entire commitment to workplace safety.⁶

III. THE HARM COVID-19 IMPOSES ON ALSOCO'S WORKFORCE AND BUSINESS IS FAR GREATER THAN THE COMPLIANCE COSTS OF THE ETS.

Much has been made of the compliance cost the ETS will impose on employers. Indeed, both the challengers of the ETS and the Fifth Circuit place great weight on the administrative and recordkeeping costs the ETS requires. They also rely heavily on the speculative observation that employees will flee from employers subject to the ETS rather than be vaccinated. *See In re MCP NO. 165*, No. 21-4027, 2021 WL 5989357, at *19 (6th Cir. 2021) ("The injuries Petitioners assert are entirely speculative."); *Br. of Standard Process Inc. as Amicus Curiae in Supp. of Emergency Appl. for Administrative Stay and Alternative Pet. for Writ of Cert. Before J.*, at 4 (Dec. 29, 2020) (relying upon employer's own estimation that

⁶ If this Court is inclined to grant Petitioners' applications for a stay of the Sixth Circuit's decision, the Court should limit that stay so it does not extend to the ETS' mask and testing requirements or to the ETS' preemptive effect on state and local law which might otherwise prohibit a private employer from voluntarily adopting a vaccine, mask, or testing policy of its own.

“employees will likely resign”). In doing so, the human cost of the pandemic is disregarded (*see* 86 Fed. Reg. at 61408 (the ETS will “save over 6,500 worker lives and prevent over 250,000 hospitalizations”)), as well as the devastating financial costs of operating a business during the pandemic. *See In re MCP NO. 165*, No. 21-4027, 2021 WL 5989357, at *19 (“these assertions ignore the economic analysis OSHA conducted”) (“the costs of delaying implementation of the ETS are comparatively high. Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs.”).

AlSCO will gladly trade the ongoing costs COVID-19 exacts on its business for the cost of compliance with the ETS. Besides what AlSCO has covered as a self-insurer for its employees’ and their dependents’ COVID-19 medical costs (\$1,416,343 plus \$385,375 for testing), it has also faced losses because of disrupted employee productivity. Since January 1, 2020, COVID-19 has cost AlSCO 148,199 lost employee hours in North America, which translates to \$2,415,025 in unproductive wages from COVID-19 screening, sick time, quarantining, and family care. *See also* 86 Fed. Reg. 61474 (“reduced absenteeism due to fewer COVID-19 illnesses and quarantines” means savings for employers). The ETS’ compliance cost of \$35 per employee or \$94 per unvaccinated employee,⁷ *see* 86 Fed. Reg. 61460-88, 61493,

⁷ To date, AlSCO, Inc. has spent \$385,375 on testing in the U.S., or \$48.26 per employee. Given that a quarter of AlSCO’s U.S. employees are unvaccinated, this indicates OSHA’s estimates are far more accurate than Petitioners are willing to admit.

pales in comparison to the COVID-19 harms AlSCO is already facing. This is true even when factoring in the cost of testing in rural and urban areas—both where AlSCO has widespread service. *See* Br. of Standard Process Inc. as *Amicus Curiae*, at 9-10 (contrarily asserting testing costs would be prohibitive in rural areas).

And, of course, the unprecedented economic fallout of the pandemic has hit AlSCO's customer base particularly hard. The need for linens in restaurants, bars, clubs, hotels, etc., even after most commercial restrictions have been lifted, has simply not returned to pre-pandemic levels because the public continues to fear frequenting high-contact establishments. Regardless of where and how AlSCO operates, AlSCO wants to deliver high quality services and products to its customers. Under the current conditions, AlSCO cannot do that.

Further, the specter of a mass employee exodus is simply overblown. For those who object to a vaccine mandate and are not eligible for the multiple exemptions the ETS provides employees—masking & testing, disability, religious, outdoor worker, isolated worker, work from home—research and experience demonstrate the vast majority of employees will not sacrifice their employment to avoid vaccination. *See* 86 Fed. Reg. 61474-75 (comparing 48-50% of survey respondents who planned to quit if vaccination were required with 1-3% of employees who actually quit); Dolores Albarracin et al., *Amid Challenges to Biden's Vaccine Mandate, Study Shows They Work*, THE HILL (Nov. 17, 2021), <https://thehill.com/opinion/healthcare/581613-amid-challenges-to-bidens-vaccine-mandate-study-shows-they-work> (“few employees are actually leaving their jobs

because of mandates . . . Fears of a backlash against vaccine mandates appear to be largely unfounded.”); Andrea Hsu, *Faced with Losing Their Jobs, Even the Most Hesitant Are Getting Vaccinated*, NPR (Oct. 7, 2021), <https://www.npr.org/2021/10/07/1043332198/employer-vaccine-mandates-success-workers-get-shots-to-keep-jobs>; *State of Fla. v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271 (11th Cir. 2021) (rejecting “speculative” declarations that “resignations would occur” because of a vaccine mandate).

For example, although much media attention and even litigation has been devoted to United Airlines’ vaccine mandate, its efforts have produced a workplace with a 99.7% vaccination rate. *United Airlines CEO Says Vaccine Mandate Helped Transform the Company’s Culture*, FORTUNE (Nov. 18, 2021), <https://fortune.com/2021/11/18/united-airlines-ceo-scott-kirby-covid-vaccine-mandate-employee-safety/>. Other entities boast similar results.⁸ See, e.g., *Covid Vaccine Mandate Led to 96 Percent of Tyson Workers Getting the Shot, Company Says*, NBC NEWS (Oct. 27, 2021), <https://www.nbcnews.com/news/us-news/covid-vaccine-mandate-led-96-percent-tyson-workers-getting-shot-compan-rcna3889>;

⁸ Alscio desires to adopt a national vaccine mandate that covers all its U.S. employees, much like the entities above have. Alscio has a number of employees that work at a branch in one jurisdiction, but who reside in another, meaning that employees working side-by-side in the same branch may be subject to different state or local vaccine requirements or prohibitions like those detailed *supra* n.3. Companies like United Airlines had the benefit of implementing their vaccine mandates before most of the state and local restrictions on vaccination mandates were implemented. Unlike companies the size of United Airlines that have such economic influence they can go toe-to-toe with state legislatures, see e.g., Hannah Miao, *Hundreds of Corporations, Business Leaders, Celebs Sign Statement Against Voting Restrictions*, CNBC (Apr. 14, 2021), <https://www.cnbc.com/2021/04/14/corporations-business-leaders-celebrities-sign-statement-against-voting-restrictions.html>, Alscio cannot ignore these state and local measures.

Meryl Kornfield & Annabelle Timsit, *Vaccine Mandates Stoke Fears of Labor Shortages. But Hospitals Says They're Working*, THE WASHINGTON POST (Oct. 16, 2021), <https://www.washingtonpost.com/health/2021/10/16/hospital-covid-vaccine-mandate/>; Anne Flaherty, *White House: 90% of Federal Workers, Military Have Gotten at Least One COVID Shot*, ABC NEWS (Nov. 22, 2021), <https://abcnews.go.com/Health/white-house-90-federal-workers-military-covid-shot/story?id=81327464>.

Indeed, mandates themselves, even in other contexts, are powerful, even when politically fraught. For example, the Affordable Care Act's individual mandate was widely successful at insuring Americans. Even after Congress eliminated the individual mandate's penalty in 2017, the normative effect of the mandate continued—it “did not drive healthy enrollees to drop their insurance.” *Eliminating the Individual Mandate Penalty Didn't Cause an Insurance Market 'Death Spiral,' Researchers Find*, ADVISORY BOARD (Jan. 8, 2020), <https://www.advisory.com/en/daily-briefing/2020/01/08/individual-mandate> (summarizing Rachel Fehr et al., *Individual Insurance Market Performance in 2019*, KAISER FAMILY FOUNDATION (May 13, 2020), <https://www.kff.org/private-insurance/issue-brief/individual-insurance-market-performance-in-2019/>).

AlSCO expects its workforce will be no exception to the trends of mandated vaccination. Although some of its employees may qualify for an exemption from the ETS or choose to leave AlSCO's employment, AlSCO expects most of its employees to become vaccinated rather than leave their roles. Having a workforce inoculated

against the grave danger of COVID-19 through the ETS will serve AlSCO and its employees far better by every indicator of success.

CONCLUSION

AlSCO is but one data point in a sea of employers navigating the grave danger of the pandemic. But AlSCO's experience is emblematic and demonstrates the justification and necessity for the ETS. The Court should deny the emergency applications for a stay or injunction pending certiorari review and ultimately uphold the validity of the ETS.

Respectfully submitted,

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Dated: January 6, 2022