
In the Supreme Court of the United States

The Heritage Foundation,

Applicant,

v.

Douglas Parker, Assistant Secretary of Labor for Occupational Safety and Health; Occupational Safety and Health Administration; Martin J. Walsh, Secretary of Labor; and United States Department of Labor,

Respondents.

**Heritage Foundation's Emergency Application for Stay of
Agency Action Pending Judicial Review, and
for an Administrative Stay and Petition for a Writ of Certiorari Before
Judgment**

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme
Court of the United States and Circuit Justice for the Sixth Circuit

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QUESTION PRESENTED

Did the Occupational Safety and Health Administration (“OSHA”) exceed its lawful statutory and constitutional authority by issuing the Emergency Temporary Standard (“ETS”) on November 5, 2021, entitled: “COVID-19 Vaccination and Testing; Emergency Temporary Standard.” *See* Federal Register at 86 Fed. Reg. 61,402 (hereinafter “Vaccine Mandate”).

CORPORATE DISCLOSURE STATEMENT

Applicant, The Heritage Foundation, has no parent corporation and issues no stock.

Dated: December 18, 2021.

PROCEEDINGS AND DECISIONS BELOW

On November 5, 2021, OSHA issued an emergency temporary standard (ETS) requiring certain employees to be vaccinated or take weekly tests and wear face coverings. 86 Fed. Reg. 61402. In a different lawsuit from this Action, the United States Court of Appeals for the Fifth Circuit issued orders on November 6 and 12, 2021, that stayed enforcement of the ETS. *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021); *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33117 (5th Cir. Nov. 6, 2021).

On November 16, 2021, the judicial panel on multidistrict litigation designated the United States Court of Appeals for the Sixth Circuit to review the petitions challenging the ETS under 28 U.S.C. § 2112(a)(3).

On November 29, 2021, this Action was initiated with a Petition for Review filed under 29 U.S.C. § 655(f) in the United States Court of Appeals for the District of Columbia (the jurisdiction in which Applicant is located). *Heritage Found. v. Parker*, Case No. 21-1247 (D.C. Cir. filed Nov. 29, 2021). On December 3, 2021, the D.C. Circuit transferred the case to the Sixth Circuit.

On December 6, 2021, this Action was docketed as Sixth Circuit Case Number 21-4149, and was included among thirty-seven consolidated cases under the caption *In re: MCP No. 165, Occupational Safety and Health Administration Rule on COVID-19 Vaccination and Testing, 86 FED. REG. 61402*, Case No. 21-7000. The Petitioners and consolidated case numbers include the following:

- MASSACHUSETTS BUILDING TRADES COUNCIL, et al. (21-7000);

- BENTKEY SERVICES, LLC (21-4027);
- PHILLIPS MANUFACTURING & TOWER COMPANY, et al. (21-4028);
- COMMONWEALTH OF KENTUCKY, et al. (21-4031);
- ANSWERS IN GENESIS, INC. (21-4032);
- SOUTHERN BAPTIST THEOLOGICAL SEMINARY, et al. (21-4033);
- BST HOLDINGS, LLC, et al. (21-4080);
- REPUBLICAN NATIONAL COMMITTEE (21-4082);
- ASSOCIATED BUILDERS AND CONTRACTORS, INC., et al. (21-4083);
- MASSACHUSETTS BUILDING TRADES COUNCIL (21-4084);
- UNION OF AMERICAN PHYSICIANS AND DENTISTS (21-4085);
- ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (21-4086);
- NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO (21-4087);
- STATE OF MISSOURI, et al. (21-4088);
- UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (21-4089);
- STATE OF INDIANA (21-4090);
- TANKCRAFT CORPORATION, et al. (21-4091);

- NATIONAL ASSOCIATION OF HOME BUILDERS (21-4092);
- JOB CREATORS NETWORK, et al. (21-4093);
- UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL/CIO-CLC, et al. (21-4094);
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- KENTUCKY PETROLEUM MARKETERS ASSOCIATION, et al. (21-4117);
- AARON ABADI (21-4133);
- HERITAGE FOUNDATION (21-4149);
- NORTH AMERICA'S BUILDING TRADES UNIONS (21-4152); and

- SCOTT BEDKE, et al. (21-4157).

The Respondents in these consolidated cases include: Occupational Safety & Health Administration, U.S. Department of Labor; Douglas L. Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health Administration; James Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health Administration; Martin J. Walsh, Secretary, U.S. Department of Labor; Joseph R. Biden, President of the United States of America; and the United States of America.

On December 17, 2021, a panel of the Sixth Circuit issued an order under 28 U.S.C. § 2112(a)(4) to dissolve the stay that had been issued by the Fifth Circuit. *In re: MCP No.165*, Case Nos. 21-7000 et al., 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021) (hereinafter “MCP No. 165”). Applicant is aware of the following related proceedings that have been initiated with this Court:

- Application for stay in GUY CHEMICAL COMPANY, LLC et al. (6th Cir. No. 21-4093);
- Emergency application for immediate stay of agency action pending disposition of petition for review in TEXAS TRUCKING ASSOCIATION, et al. (6th Cir. No. 21-4080) and KENTUCKY PETROLEUM MARKETERS ASSOCIATION, et al. (6th Cir. No. 21-4117);
- Application for stay in OBERG INDUSTRIES, LLC, et al. (6th Cir. No. 21-4028);

- Application for stay and petition for a writ of certiorari before judgment in SOUTHERN BAPTIST THEOLOGICAL SEMINARY, et al. (6th Cir. No. 21-4033), CHRISTIAN EMPLOYERS ALLIANCE, et al. (6th Cir. No. 21-4088), and KING'S ACADEMY & CAMBRIDGE CHRISTIAN SCHOOL, INC., et al. (6th Cir. No. 21-4097);
- Emergency application for a stay in BST HOLDINGS, LLC, et al. (6th Cir. No. 21-4080); and
- Emergency stay application and petition for a writ of certiorari before judgment in COMMONWEALTH OF KENTUCKY, et al. (6th Cir. No. 21-4031).

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**To the Honorable Brett M. Kavanaugh,
Circuit Justice for the United States Court of Appeals for the Sixth Circuit**

In accordance with Supreme Court Rule 22 and 23 and the All Writs Act, 28 U.S.C. § 1651, Applicant, The Heritage Foundation, respectfully requests an immediate stay of Respondent’s Occupational Safety & Health Administration’s emergency temporary standard (“Vaccine Mandate”), COVID-19 Vaccination and Testing Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021), pending the disposition of Applicant’s petition for review.

In the alternative, the Court should treat this application as a petition for writ of certiorari before judgment, grant certiorari forthwith, and issue a stay pending resolution of the petition before the Vaccine Mandate goes into effect.

INTRODUCTION

On November 5, 2021, OSHA issued a sweeping public health Vaccine Mandate requiring all employers of 100 or more employees to “develop, implement, and enforce a mandatory COVID-19 vaccination policy” and require any workers who remain unvaccinated to “undergo [weekly] COVID-19 testing and wear a face covering at work.” 86 Fed. Reg. 61402. The Vaccine Mandate affects “more than 84 million workers” or “two-thirds of all private-sector workers in the nation.” 86 Fed. Reg. 61403. If upheld, the Vaccine Mandate will fundamentally change the relationship between employer and employee by forcing employers to compel and regulate the personal medical decisions of their employees. The Vaccine Mandate will

also impose significant financial and other burdens on private employers and result in predictable economic chaos.

The Vaccine Mandate exceeds OSHA's authority and is, by the government's own prior admissions, unnecessary. As the Fifth Circuit recently observed, just last year, OSHA indicated that it "would not be necessary for OSHA to issue an ETS to protect workers from infectious diseases' because 'OSHA lacks evidence to conclude that all infectious diseases to which employees may be exposed at a workplace constitute a 'grave danger' for which an ETS is an appropriate remedy.'" *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *14-15 (5th Cir. Nov. 12, 2021) (citing Letter from Loren Sweatt, Principal Deputy Ass't Sec'y, OSHA, to Richard L. Trumka, President, AFL-CIO at 3 (May 29, 2020)). In June of this year, OSHA again evaluated the issue and declined to apply its ETS for healthcare employers to all other workplaces. 86 Fed. Reg. 32,376 (June 21, 2021).

OSHA's Mandate represents a gross abuse of power and is a far cry from the "delicate exercise" permitted in very "limited situations." *In re Int'l Chm. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (per curiam) (quoting *Pub. Citizen Health Rsch. Grp. v. Aucler*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)). The Mandate clearly encroaches on the police power of states expressly reserved by the Tenth Amendment. It also exceeds the federal government's authority under the Commerce Clause. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). Allowing the *ultra vires* Mandate to stand would impermissibly "compel citizens to act as the Government would have

them act.” *Id.* at 554-55. “That is not the country the Framers of our Constitution envisioned.” *Id.* at 554.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit had jurisdiction under 29 U.S.C. § 655(f) and 28 U.S.C. § 2112(a)(3). The Sixth Circuit panel’s order and decision to dissolve the Fifth Circuit’s stay was issued on December 17, 2021. *In re: MCP No. 165*, No. 21-7000, 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021).

This Court has jurisdiction under 28 U.S.C. § 1254(1), and it has authority to grant the Applicant relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a). Additionally, this document is filed under Supreme Court Rule 11 (Certiorari to a United States Court of Appeals Before Judgment) and Rule 22 (Applications to Individual Justices).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Vaccine Mandate is included in the Appendix.

The Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, provides that Congress shall have the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

The Tenth Amendment to the United States Constitutions provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

STATEMENT OF THE CASE

In June 2021, OSHA evaluated the hazard it now asserts exists and *specifically rejected* proposals to apply an ETS for healthcare workers to all other workplaces. 86 Fed. Reg. 32,376 (June 21, 2021). Notwithstanding this precedent, on September 9, 2021, President Biden announced that his patience was “wearing thin” with unvaccinated Americans.¹ Asserting the need to protect vaccinated workers from unvaccinated co-workers—a statement that is in direct conflict with evidence cited by OSHA to support the Mandate²—President Biden announced that he would use the Department of Labor to implement his “plan to require more Americans to be vaccinated, to combat those blocking public health.”³

In response, OSHA took two months to enact the “emergency” standard at issue in this case. White House Chief of Staff Ron Klain specifically acknowledged in a retweet that the Mandate is “the ultimate workaround for the Federal [government] to require vaccinations.”⁴ On November 5, 2021, OSHA issued a sweeping Mandate requiring all employers of 100 or more employees to “develop, implement, and enforce a mandatory COVID-19 vaccination policy” and require any workers who remain

¹ President Biden, *Remarks at the White House* (Sept. 9, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

² 86 Fed. Reg. 61,409 (stating that “FDA authorized vaccines currently work well against all” of the variants of COVID-19); 86 Fed. Reg. 61,417 (“Vaccines remain highly effective against hospitalization and death.”).

³ *Remarks, supra* n.1.

⁴ Stemson, Brie, *Ron Klain’s Retweet of MSNBC Anchor’s ‘Ultimate Work-Around’ Post Was an Endorsement, Court Rules*, Fox News, Nov. 13, 2021, available at <https://www.foxnews.com/politics/ron-klain-retweet-msnbc-ultimate-work-around-endorsement-appeals-court>.

unvaccinated to “undergo [weekly] COVID-19 testing and wear a face covering at work.” 86 Fed. Reg. 61,402. This Mandate affects “more than 84 million workers” or “two-thirds of all private-sector workers in the nation.” 86 Fed. Reg. 61,403.

The Heritage Foundation is a covered, private employer subject to the Mandate that objects to being forced to compel and regulate the personal medical decisions of its employees. Heritage’s Petition for Review which is properly before the Sixth Circuit, requests that the Mandate be held unlawful and set aside. Petition at 5.

As noted, the Sixth Circuit recently dissolved the stay of the Mandate that had been issued by the Fifth Circuit. *In re: MCP No.165*, Case Nos. 21-7000 et al., 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021). This decision will allow the government to move forward with enforcement efforts against employers (such as Heritage) in the near future absent relief from this Court.

STANDARD OF REVIEW AND STATEMENT OF EXIGENCY

When deciding whether to issue a stay, “a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

REASONS FOR GRANTING THE APPLICATION

I. Applicant Heritage Foundation Has Made a Strong Showing That It Is Likely to Succeed On The Merits.

A. OSHA's Vaccine Mandate is an Unlawful Exercise of Statutory Authority.

Congress delegated to OSHA the authority to promulgate *occupational* health and safety rules that are reasonably necessary or appropriate to address a significant risk of harm in the workplace. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642-43 (1980); 29 U.S.C. §§ 652(8), 655(b). Any such standards must go through a notice-and-comment process. 29 U.S.C § 655(b). In limited and exceptional circumstances, the Secretary has been given the authority to bypass this process and issue an emergency temporary standard. This Court has warned, however, that Congress intended that power to be “narrowly circumscribed” and “repeatedly express[ed] concern about allowing the Secretary to have too much power.” *Indus. Union*, 448 U.S. at 651. The Vaccine Mandate implemented by OSHA is hardly the “delicate exercise” of this authority contemplated by Congress. *Int'l Chm. Workers Union*, 830 F.2d at 370 (quoting *Pub. Citizen Health Rsch. Grp. v. Aucler*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)).

29 U.S.C. § 655(c)(1) governing OSHA's implementation of an ETS provides as follows:

The Secretary shall provide . . . for an emergency temporary standard to take immediate effect . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

While there is much debate and disagreement regarding OSHA’s authority and history of regulating infectious diseases, it is without debate that OSHA has never exercised any such authority by *mandating* vaccination. It is a gross misstatement to suggest that “vaccination and medical examinations are both tools that OSHA historically employed to contain illness.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349, at *25. There is a significant difference between requiring employers to *offer* the protection of a vaccine to employees who have been specifically exposed in the workplace and requiring employers to *mandate* one for all employees who face similar exposure outside of work. The OSH Act “authorizes OSHA to regulate only the *employer’s* conduct at the worksite,” *see id.*, at *82 (quoting *Steel Joint Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1167 (D.C. Cir. 2002)), and not – as it has done here – to regulate the *employee’s* conduct both inside and outside the worksite. “Here, employers, not employees, control any non-vaccine option in the first instance; and OSHA has been candid that it has stacked the deck in favor of vaccination.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349, at *85 (Larsen, J. dissenting) (citing 86 Fed. Reg. at 61,437). “It is one thing to tell a worker to don a mask at the start of a hazard-filled shift and doff it at the end. It is quite another to tell a worker to vaccinate on the basis of a risk that exists whether he is on the clock or off and that amounts to a medical procedure that cannot be removed at the end of the shift.” *In re: MCP No. 165*, No. 2021 U.S. App. LEXIS 37024 at *9 (6th Cir. Dec. 15, 2021) (Sutton, J., dissenting).

1. *The major questions doctrine undisputedly applies here.*

The Sixth Circuit's determination that the major questions doctrine is inapplicable here is erroneous. It is without dispute that OSHA's Vaccine Mandate "bring[s] about an enormous and transformative expansion in [the agency's] regulatory authority," and has "vast 'economic and political significance.'" *Util. Air Regul. Grp.*, 573 U.S. at 324. While the Sixth Circuit cited to various OSHA regulations to support its assertion that there is precedent for regulating viruses, even by way of immunization, the decision wholly failed to acknowledge the limits also spelled out in some of these same regulations.

For example, OSHA cited 29 C.F.R. § 1910.1020⁵ to suggest that the definition of toxic substances or harmful physical agents includes viruses. This same regulation, however, also clarifies that "[e]xposure' . . . does *not* include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace *in any manner different from typical non-occupational situations.*" 29 C.F.R. 1910.1020(c)(8) (emphasis added). This fact, coupled with the lack of defined terms within the statutory language, severely undermines any determination that the "statutory language unambiguously grants OSHA authority" for the Vaccine Mandate. *MCP No. 165*, 2021 U.S. App. LEXIS 37349 at * 28.

The Sixth Circuit's attempt at distinguishing this Court's recent ruling in *Alabama Association of Realtors v. U.S. Department of Health and Human Services*,

⁵ Respondents' Emergency Motion to Dissolve Stay (hereinafter "Gov't Mot.") (Doc. 52), at 10 (citing 29 C.F.R. 1910.1020(c)(13)).

141 S. Ct. 2485, 2490 (2021) (per curiam) merely because it involved a different agency is also unpersuasive. There, the Court considered several factors relevant in vacating the stay upholding the moratorium. In fact, the Court noted that irrespective of whether the text was or was not ambiguous, the “sheer scope of the CDC’s claimed authority,” and the financial impact of the moratorium were sufficient to trigger the major questions doctrine. *Id.* at 2489. The Court added that the moratorium’s “intrusion into an area that is the particular domain of state law” was yet another reason for careful scrutiny necessitating “exceedingly clear language” from Congress. *Id.* (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”) (quoting *United States Forest Service v. Cowpasture River Preservation Assn.*, 140 S. Ct. 1837, 207 L. Ed. 2d 186, 204 (2020)).

The Vaccine Mandate checks all of these same boxes. Indeed, “it is hard to think of a more apt comparison.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349, at *89. (Larsen, J. dissenting). Just like the CDC, OSHA has sought to address a small minority of Americans’ hesitation to get vaccinated – by issuing a sweeping and unprecedented mandate applicable to all employers with 100 or more employees.⁶ OSHA estimates that its Vaccine Mandate will affect approximately 26 million

⁶Notably, Congress has given several other agencies power related to determining the safety, efficacy, and proper methods for distribution of the vaccine, yet none of these agencies are authorized to mandate a vaccine. OSHA – which has no such express power regarding vaccines – certainly lacks that authority too.

unvaccinated Americans and many who have low levels of exposure and risk, 86 Fed. Reg. 61,424, and cost anywhere between \$2,000 to \$900,000 per entity, with a total cost of \$3 billion. *Id.* at 61,493. “[T]he Government’s read of [§655(b) and its other regulations] would give [OSHA] a breathtaking amount of authority,” with little, if any limit. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. If “occupational” hazards that justify OSHA regulation include the transmission of diseases, then OSHA would have authority to superintend, through employers, the health care of every employee in America, a truly enormous arrogation of power by OSHA. Indeed, under that same logic OSHA would have power to regulate, through employees, a host of other potential contributing factors to the spread of disease, such as diet and other lifestyle matters. After all, failure to vaccinate is not itself a pathogen, but at most may be a contributing factor to disease acquisition and transmission.

Precedent and constitutional principles cannot be tossed aside to justify OSHA’s overreach.

2. *OSHA has failed to demonstrate grave danger and necessity.*

OSHA must also demonstrate “grave danger,” *and* “necessity” to justify an ETS with “substantial evidence.” *Asbestos Info. Ass’n v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984). It fails to do so on both fronts.

OSHA expressly admits that COVID–19 is not exclusively an occupational disease, 86 Fed. Reg. 61411, and that only “unvaccinated employees face a ‘grave danger.’” Gov’t. Motion, at 5. Unvaccinated workers make up less than 22% of the population. *See BST Holdings, L.L.C*, 2021 U.S. App. LEXIS 33698, at *16 n. 16 (citing CDC, Covid Data Tracker, <https://covid.cdc.gov/covid-data->

tracker/#datatracker-home) (noting that OSHA estimates that approximately seventy-eight (78) percent of Americans age 12 and above are fully or partially vaccinated, and bear little risk of contracting the virus, much less suffering severe illness); 86 Fed. Reg. 61402, 61402-03 (“COVID-19 vaccines authorized or approved by the [FDA] effectively protect vaccinated individuals against severe illness and death from COVID-19.”).

OSHA “cannot state with precision the total number of workers in our nation who have contracted COVID-19 at work.” 86 Fed. Reg. at 61,424. “And it has not identified any particular rate or risk of workplace exposure to COVID-19.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349 at *83 (Larsen, J. dissenting). While OSHA continues to assert there is “extensive evidence of ‘workplace transmission,’” *see* 86 Fed. Reg. 61411, the studies relied upon by OSHA fail to support this assertion. *See id.* at 61411-12 (citing studies which did *not* confirm that the virus was contracted in the workplace, but, instead, only stated that there was “plausible” evidence of transmission in a shared location *other than a household*). Further, “outbreaks” were identified in many cases if even *2 cases* of COVID–19 occurred within 14 days of each other. *Id.* at 61412-13 (citing reports by select state health departments, as well as a published peer- reviewed study, which defined “outbreak” or “cluster” similarly such as “two or more laboratory confirmed COVID-19 cases” that “is not a household exposure”). Notably, the reporting of many of these “outbreaks” failed to take into account factors that OSHA admits contribute to the spread of the virus – such as remaining within six feet of infected persons for at least fifteen minutes and having

inadequate air ventilation and sanitation practices. 86 Fed. Reg. 61409.⁷ As Judge Larsen noted, there “is no example of a court accepting generalized statistics like these totally untied to the workplace.” *Id.* (citing *Asbestos Info.*, 727 F.2d at 425-26).

Necessity is another hurdle OSHA is unable to clear. The Sixth Circuit asserts that “OSHA is not required to investigate every business to show that COVID-19 is present in each workplace nor that every worker will experience the same risk.” OSHA is required, however, to demonstrate the measure implemented is actually necessary. As the Fifth Circuit noted, OSHA’s extreme measures are not proven to be necessary and do not account for “workplace controls” that, if put into place, might achieve the same goal. *BST Holdings, LLC*, 2021 U.S. App. LEXIS 33698, at *16.

Consider, for example, that under the Mandate, “a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on.” *Id.* Also consider that the Mandate covers “all employers with a total of 100 or more employees *at any time this section is in effect.*” Fed. Reg. 61504 (emphasis added). In determining the number of employees, however, employers must include all employees across all of their U.S. locations, regardless of employees’ vaccination status or where they perform their work. Part-time employees count towards the company total, but independent contractors do not.

⁷ See also Fed. Reg. 61404 (indicating that “distancing, barriers, ventilation and sanitation” are “workplace controls against SARS-CoV-2 transmission”).

Id. at 61513. As OSHA acknowledges, “[i]f an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.” *Id.* at 61514.

Section 655(g) provides that the Secretary must “give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.” 29 U.S.C. § 655(g). Despite that language, and as the Fifth Circuit noted, there was no regard given to the needs of different industries or environments. This is hard to reconcile with OSHA’s earlier pronouncement that “the best approach for responding to the pandemic is to . . . issue detailed, industry-specific guidance” because such guidance is generally “more effective than promulgating a rigid set of requirements for all employers in all industries based on limited information,” *BST Holdings, LLC*, 2021 U.S. App. LEXIS 33698, at *19 (citing Letter from Loren Sweatt, Principal Deputy Assistant Sec’y, OSHA, to Richard L. Trumka, President, AFL-CIO at 3 (May 29, 2020)). Additionally, OSHA previously stated:

Based on substantial evidence . . . an ETS is not necessary both because there are existing OSHA and non-OSHA standards that address COVID-19 and because an ETS would actually be counterproductive. . . to address all employers and to do so with the requisite dispatch . . . OSHA’s time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility.

Id. at 16 (citing OSHA D.C. Circuit Brief at 16, 17, 21, 26).

Overbroad solutions like the ETS are not ‘necessary,’ or ‘indispensable,’ means of curing the ill.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349 at *75 (Larsen, J. dissenting); *see also Asbestos Info.*, 727 F.2d at 426-27 (noting that OSHA failed to

show that the ETS was “necessary” when other means were available “to achieve projected benefits”).

B. The Sixth Circuit Was Wrong; The Constitutional Concerns and Infringements Are Clear Here.

1. OSHA’s mandate exceeds the federal government’s authority under the Commerce Clause.

The Sixth Circuit exalted form over substance in concluding that the Vaccine Mandate is consistent with the Commerce Clause. The court’s conclusion is premised on the false belief that the ETS regulates employers. It does so in name only. As a White House Chief of Staff Ron Klain admitted, the ETS is a “work-around” of the Constitution, whose sole goal was to coerce vaccination of employees. The ETS’ target is employee behavior, not employer behavior.

Under the Sixth Circuit’s reasoning, the Commerce Clause would permit wide-reaching governmental mandates of all kinds so long as they were accomplished by regulating employers. There would be no definitive limit to OSHA’s authority to require businesses to take steps to protect employees from workplace dangers, even when those steps force employees, not employers, to take a vaccine.

Mandating a vaccine is hardly comparable to requiring employees to fill out paperwork or wash their hands while at work. Further, and aside from the obvious difference between requiring employers to *offer* the option of a vaccine to employees (as OSHA did in 1991 to deal with bloodborne pathogens)⁸ and *mandating* the same, there are two other distinctions worth noting that set OSHA’s regulation of a

⁸ See 29 C.F.R. § 1910.1030.

bloodborne pathogen apart from the vaccine mandate. First, “OSHA followed a notice-and-comment rulemaking process and did not resort to an emergency temporary standard. Second, Congress took the extraordinary step of rewriting the regulation in 2000, leaving no doubt that it intended for the agency to exercise that authority.”⁹

This Court has made clear that it will not construe the Commerce Clause in a manner “to permit Congress to regulate individuals precisely *because* they are doing nothing” because it would then “open a new and potentially vast domain to congressional authority.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (*NFIB*). Just as declining to buy health insurance is noneconomic activity, *id.*, “[a] person’s choice to remain unvaccinated and forgo regular testing is noneconomic inactivity.” *BST Holdings*, 17 F.4th at 617.

The Sixth Circuit evaded *NFIB*’s import on the grounds that the ETS regulates employers, not individuals. Under the Sixth Circuit’s reasoning, however, the following scenarios described in *NFIB* would be permissible exercises under the Commerce Clause as long as employers were the tools used to enforce the mandates:

In the health care market, many Americans do not eat a balanced diet. . . . The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. . . . Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables.

⁹ Paul Larkin and Doug Badger The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for Covid-19 Vaccinations, *Admin. L. Rev. Accord*, 2021 (Nov. 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3935420, at 19-20.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures--joined with the similar failures of others--can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” The Federalist No. 45, at 293.

567 U.S. at 553-54 (internal citations omitted). In the present case, the government has promulgated a “work-around” to evade the Commerce Clause’s limitations. The Sixth Circuit’s failure to recognize it as such should not stand.

2. OSHA’s mandate violates the Tenth Amendment

“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.” *NFIB*, 567 U.S. at 533; *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“The Constitution created a Federal Government of limited powers.”). “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. Amend. X. This “balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties,’” and reduce “the risk of tyranny and abuse from either front.” *Gregory*, 501 U.S. at 458-59 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (other citations omitted). “The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the

concerns of public life, federalism protects the liberty of the individual from arbitrary power.’ *Bond v. United States*, 564 U.S. 211, 22 (2011).” *NFIB*, 567 U.S. at 536.

Through smallpox and other outbreaks of disease, the federal government has never imposed vaccination. Public health and safety regulation is traditionally left to the states. As this Court noted when it struck down the federal government’s attempts to require individuals to purchase a health insurance policy,

[T]he facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.

Id. at 536. As the Chief Justice recently observed, in the context of the government’s efforts to limit the spread of COVID-19, “[o]ur constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). The regulation of vaccines is no exception to this rule. *Jacobson* set a precedent for state – not federal – regulation of vaccines. This precedent has been adhered to by courts for more than one hundred years. *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *21 (citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson*, 197 U.S. at 25-26).

Accordingly, “courts must be certain of Congress’ intent before finding that federal law overrides this balance.” *Id.* Simply put, “[i]f Congress intends to alter the

usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute.*” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989) (emphasis added). *See also Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (“The background principles of our federal system belie the notion that Congress would use an obscure grant of authority to regulate areas traditionally supervised by the States’ police power”). While the agency continues to assert that its power is unmistakably clear here, its inability to cite to the text of the statute itself (rather than to the dictionary) or to any legal precedent to support such an assertion is fatal here.

OSHA’s “claim . . . of unheralded power to regulate a significant portion of the American economy,” must be rejected by this Court. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (plurality). To uphold OSHA’s Vaccine Mandate would be to significantly expand its power at the expense of the personal liberty of millions of American workers. As the Fifth Circuit noted, “courts ‘always have rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power.” *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *22 (citing *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas J., concurring)).

The Sixth Circuit wholly ignored the foregoing principles. Reverting instead to the false notion that the ETS regulates employers, the court mischaracterized petitioners’ Tenth Amendment claims as a dispute over whether “federal and state regulatory powers over economic activity are mutually exclusive.” *MCP No. 165*, 2021

U.S. App. LEXIS 37349, at *57. Not so. If an unauthorized administrative fiat compelling millions of Americans to choose between employment and vaccination does not violate the Tenth Amendment, the Amendment would be rendered meaningless.

II. The Balance of Equities Warrants a Stay.

The Sixth Circuit's finding that petitioners have not shown any injury that outweighs the injuries to the government and the public interest is without merit and wholly fails to consider the concerns of the individuals and employers who will be harmed by OSHA's mandate.

Of course, the government and the Sixth Circuit turn a blind eye to the various constitutional infringements arising from the abuse of power. Courts recognize that the "deprivation of a constitutional right 'constitutes irreparable injury sufficient to justify injunctive relief.'" *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *see also Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 579 (6th Cir. 2002) ("The public clearly has interest in vindicating constitutional rights.").

All other injury that will be incurred by employers and employees alike requires no speculation. As the Fifth Circuit noted, OSHA's rule reaches "two-thirds of all private-sector workers in the nation." 86 Fed. Reg. 61,402, 61,403. It compels covered employers to (1) make employees get vaccinated or get weekly tests at their expense and wear masks; (2) "remove" non-complying employees; (3) pay per-violation fines; and (4) keep records of employee vaccination or testing status. *BST*

Holdings LLC, 2021 U.S. App. LEXIS 33698, at *27 (Duncan, J. concurring) (succinctly summarizing the “vast economic and political significance” of OSHA’s overreach). Compliance costs are neither “speculative” nor *de minimis*, at an estimated cost ranging anywhere from \$2,000 to \$900,000. The record is notably “silent as to petitioners’ concerns, given that the emergency standard circumvents any public input.” *MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *93 (Larsen, J. dissenting). “Complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *24 (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment))).

In addition, employees themselves “face considerable jeopardy” due to an “irreversible vaccination, uncompensated testing costs, or a lost job.” *MCP No. 165*, 2021 U.S. App. LEXIS 37024 at *52 (Sutton, J., dissenting). If an otherwise unvaccinated individual complies with the mandate by receiving a vaccination, but the mandate is later determined to be unlawful, they are “irreparably harmed.” *MCP No. 165*, 2021 U.S. App. LEXIS 37349 at *92 (Larsen, J., dissenting). Although the court noted that masking and testing could prevent employers from firing employees, *id.* at *62-63, the decision never addressed the issue of whether businesses might be more inclined to eliminate positions rather than comply with OSHA’s onerous vaccination-or-testing mandate, which creates tangible irreparable harm for the individual. The irreparable harm justifies the granting of Applicant’s requested relief.

III. In the Alternative, This Court Should Grant Certiorari Before Judgment and Grant a Stay Pending the Resolution of This Petition.

In the alternative, this Court should grant a writ of certiorari before judgment. The matter before this Court is “of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” SCT R. 11; *see also Bush v. Gore*, 531 U.S. 1046 (2000) (treating application for stay as certiorari petition and granting same). This Court should also enter a stay of the Vaccine Mandate, before it goes into effect, pending the resolution of this case.

For the reasons stated above, the resolution of the legal issues involved in this case have national impact. Clarity on the legality of the Mandate from this Court is necessary. The complexity of the issues involved in this case has caused judges from the Fifth and Sixth Circuits to disagree on the likely constitutionality of the Mandate. *BST Holdings, L.L.C.*, 2021 U.S. App. LEXIS 33698; *In re MCP No. 165*, 2021 U.S. App. LEXIS 37349.

The Mandate is scheduled to go into effect two weeks from now, on January 4, 2022, and last for four months, until May 5, 2022. The national impact of the Mandate will be dramatic if it is allowed to go into effect while the legal proceedings continue. The Vaccine Mandate will impose around \$3 billion in compliance costs and impact more than 84 million employees (two-thirds of all private-sector workers in this country) and their employers. Fed. Reg. 61403; *MCP No. 165*, 2021 U.S. App. LEXIS 37024 at *17 (Sutton, J., dissenting from denial of initial hearing en banc).

As Judge Sutton of the Sixth Circuit correctly noted, “[t]his is an extraordinary case, suitable for an extraordinary procedure.” *Id.* Based on the legal issues involved and the timing of the Mandate, this Court should grant a writ of certiorari before judgment and issue a stay pending the resolution of this important case before the Vaccine Mandate goes into effect.

IV. An Administrative Stay Should Be Granted Immediately.

The Heritage Foundation also requests that an administrative stay of the Sixth Circuit’s order and Vaccine Mandate be entered immediately to preserve the status quo while this Court considers its application for a stay pending judicial review and/or its petition for a writ of certiorari before judgment. *See, e.g., Dep’t of Justice v. House Comm. on the Judiciary*, 2020 U.S. LEXIS 2846 (May 20, 2020) (granting stay of mandate pending filing and disposition of a certiorari petition). An administrative stay will permit time for the Court to consider Heritage Foundation’s submissions (and those of the numerous other Applicants) and protect businesses and employees across the country from being required to comply with the Mandate that is scheduled to go into effect just days from now, on January 4, 2022. These individuals and entities were not required to comply (or prepare to comply) with the Mandate pursuant to the Fifth Circuit’s stay until it was lifted on December 17 by the Sixth Circuit.

CONCLUSION

For the foregoing reasons, Applicant respectfully asks that this Court stay the Vaccine Mandate pending review before it goes into effect, grant certiorari before

judgment, or both, and enter an administrative stay immediately while it considers these matters.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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