Nos. 21-7000 / 21-4031

In the United States Court of Appeals for the Sixth Circuit

COMMONWEALTH OF KENTUCKY, ET AL.,

Petitioners

v.

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

Respondents

In re MCP No. 165, OSHA Covid Rule, No. 21-7000

§§

BRIEF OF AMICUS CURIAE SMALL BUSINESS ASSOCIATION OF MICHIGAN IN SUPPORT OF EMERGENCY MOTION TO STAY EMERGENCY TEMPORARY STANDARD

BUTZEL LONG, P.C.
KURTIS T. WILDER
JOSEPH E. RICHOTTE
STEVEN R. EATHERLY
150 W. Jefferson Ave., Ste. 150
Detroit, Michigan 48226
(313) 225-7000
wilder@butzel.com
richotte@butzel.com
eatherly@butzel.com
Counsel for Amicus Curiae
Small Business Association of Michigan

CORPORATE DISCLOSURE

The Small Business Association of Michigan ("**SBAM**") is a nonprofit corporation and has no parent company. No publicly owned corporation owns 10% or more of the stocks of SBAM.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Small Business Association of Michigan ("**SBAM**"), the only statewide and state-based association that focuses solely on the needs of Michigan's small business community, has advocated for Michigan's small businesses since 1969. SBAM's members are as diverse as the state's economy, ranging from accountants to appliance stores, manufacturers to medical, and restaurants to retailers.

Although SBAM supports vaccination against COVID-19 ("**Covid**") and encourages its members to encourage employees to become vaccinated, it opposes vaccine mandates. Government at all levels should refrain from implementing rules, laws, or guidelines that require business owners to collect or verify the vaccine status of employees or customers. Small business owners know best how to provide a safe environment for their employees and customers.

The IFR will inflict irreparable harm on small businesses covered by its terms—businesses that are already struggling because of other government mandates imposed in the name of public health.

SBAM's covered members will likely lose many employees who refuse to get vaccinated and be tested weekly. An October 2021 survey from the Kaiser Family Foundation found that 5% of all adults would quit their jobs if subject to a vaccine or

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* No party or party's counsel authored any portion of this brief in whole or in part. In addition, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person, other than amicus, its members, and its counsel, contributed money that was intended to fund preparing or submitting the brief.

testing mandate, while 9% of all adults would quit if subject to a vaccine mandate without a testing option. That translates into potentially 7.4–13.3 million workers quitting or being fired over vaccine mandates. Hamel, et al., KFF COVID-19 Vaccine Monitor: October 2021, Kaiser Family Foundation (Oct. 28, 2021), https://perma.cc/W4P5-FMQW. The costs of losing this many workers are only compounded by the workforce shortages and low labor force participation rates currently hobbling the country.

OSHA baldly asserts its "confidence" that employers meeting the 100-person threshold "will have sufficient administrative systems in place to comply quickly with the ETS," 86 Fed. Reg. 61402 (Nov. 5, 2021), but that confidence is misplaced. SBAM's nonhealthcare members covered under the IFR would be starting from scratch on creating and implementing a testing and recordkeeping program. Most businesses have not implemented, let alone contemplated, a testing or vaccine program, which only underscores the governmental overreach. The IFR's detailed requirements will impose substantial compliance costs in terms of policies and procedures, signage, employee and nonemployee screening, recordkeeping, training, legal review, and other requirements. Covered members must also provide paid time for employees to get vaccinated and paid sick leave for any recovery. These hard costs flow directly to the employers. Although employers may pass the costs of testing to employees, as a practical matter, small businesses will be forced to shoulder those costs or risk losing unvaccinated employees and exacerbating labor shortages. Small businesses hit especially hard during the pandemic, and now facing labor shortages and inflation, cannot afford absorb such compliance costs.

OSHA may well exude similar confidence for even smaller businesses after the 60-day comment period. Those businesses would face even greater compliance costs and be even less capable of affording staggering fines for noncompliance. Yet even now small businesses that fall outside the IFR cannot escape its negative effects. They often rely on supply chains and logistical systems dominated by larger employers, which have been under tremendous stress and labor shortages of their own. Additional employees exiting the workforce over objections to the mandate will further cripple small businesses that have struggled to survive over the past couple years.

And then there is the matter of severe penalties for violating the unlawful IFR. Employers are liable for up to $70,000 in civil fines per violation, 29 U.S.C. § 666(a), and they face six months' imprisonment if the violation results in death, *id.*, at § 666(e). Moreover, because OSHA lacks the resources to enforce the IFR, it has publicly announced that it will rely upon employee whistleblowers. CBS News, Whistleblowers to play key role in enforcing Biden vaccine rule (Nov. 9, 2021), https://perma.cc/68V7-HPAF. Even assuming a small business could weather such fines, this method of enforcement would irreparably damage workplace morale.

SBAM has 1,411 members with more than 100 employees. Many members have workforces that seasonally exceed that number. Members *not* yet covered under the IFR face uncertainty because OSHA is considering whether to apply its mandate to small businesses with fewer than 100 employees. See IFR Preamble, Section I.B, 86 Fed. Reg. 61403–61404. If OSHA does so, it would currently affect 27,270 SBAM members. Accordingly, all SBAM members, including those with fewer

than 100 employees, have a keen interest in being heard on the question of OSHA's authority to impose its vaccine mandates.[1]

[1] On November 17, 2021, petitions for initial hearing *en banc* under Appellate Rule 35(c) were filed in three of the consolidated cases. Nos. 21-4027 (Doc. 32), No. 21-4028, (Doc. 20), and 21-4033 (Doc. 21). On November 21, 2021, the *en banc* case manager issued a letter to counsel indicating respondents should submit a consolidated response to all three petitions no later than November 30, 2021. Albeit procedurally rare, the Sixth Circuit has previously granted similar initial hearings *en banc*. See, e.g., *Gratz* v. *Bollinger*, 277 F.3d 803 (CA6 2001) (Mem). SBAM supports the Sixth Circuit hearing the consolidated petitions *en banc* to avoid any unnecessary delays in guidance to its members and small businesses.

ARGUMENT

I. The IFR fails to meet the statutory requirements for an ETS.

OSHA may only bypass the normal rulemaking process for six months with an ETS if it "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. §655(c)(1). This is "extraordinary power" that "should be delicately exercised, and only in those emergency situations which require it." *Florida Peach Growers Ass'n* v. *U.S. Dep't of Labor*, 489 F.2d 120, 129–30 (CA5 1974).[2] The burden is on OSHA to prove its standards are valid, *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (plurality opinion), and to support its factual findings and its policy decisions with substantial evidence. 29 U.S.C. §655(f); *AFL-CIO* v. *OSHA*, 965 F.2d 962, 970 (CA11 1992).

A. OSHA has not met the grave danger standard.

Courts have interpreted "grave danger" to mean an "incurable, permanent, or fatal hazard," see *Florida Peach Growers*, 489 F.2d, at 132, and have suggested it must be a danger likely to materialize within the six-month period when an ETS is effective. *Asbestos Info. Ass'n* v. *OSHA*, 727 F.2d 415, 422 (CA5 1984).

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[2] OSHA has rarely used its ETS authority in the past—not since the courts struck down its ETS on asbestos in 1983. Congressional Research Servs., Occupational Safety and Health Administration (OSHA): COVID-19 Emergency Temporary Standards (ETS) on Health Care Employment and Vaccinations and Testing for Large Employers (Nov. 10, 2021), https://crsreports.congress.gov/product/pdf/ R/R46288 (last accessed Nov. 21, 2021).

The IFR erroneously assumes that the unvaccinated pose a grave danger to themselves if they become infected. As discussed fully below, age and natural immunity are the most significant predictors of future outcomes, facts which OSHA ignores or downplays. See *infra* nn. 4–6. And Covid poses little danger to unvaccinated workers younger than age 35 or those with natural immunity. See *infra* nn. 10–16. Yet, OSHA is willing to accept higher risks of hospitalization and death for older vaccinated workers without a prior Covid infection compared to their younger or naturally immune colleagues who are unvaccinated.

Having adopted an overbroad framework, OSHA has failed to prove that a "grave danger" exists within the meaning of the OSH Act.

The small risk of poor Covid outcomes for certain unvaccinated employees in highly vaccinated populations or those who have recovered from Covid undercuts any asserted "grave danger" where OSHA accepts a higher risk for older vaccinated workers. As the Fifth Circuit noted:

> The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, 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….
>
> The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

BST Holdings, —F.4th—; 2021 WL 5279381, at*6; slip op., at 13 (emphases in

original). Studies confirm the Fifth Circuit's concerns and go further than the examples that the court provided.

1. Covid poses little risk to younger, healthy workers regardless of vaccination status and still lower risk to older vaccinated workers.

While the virus poses a substantial risk for workers of an advanced age, it poses significantly less risk for workers between the ages of 16–35. And the risk for the younger age cohort is far from a grave danger. It is lower than the mundane task we undertake everyday to get to work: driving.

In a meta-analysis, researchers at the Harvard Chan School of Public Health and Dartmouth University considered the infection fatality rates of individuals with a median age of 35 presented in seven separate studies conducted throughout Western Europe and North America. They concluded that the infection fatality rate for those individuals ranged between 0.01% and 0.09% (median of 0.03%).[3] The review noted that the annualized risk of fatality in an automobile accident for that same age range was 0.012%. *Id.* During the deadlier period of the pandemic, Oxford University developed the QCovid Risk Assessment Tool, which calculates the risk to an individual based on age and health status.[4] QCovid Risk Assessment uses underlying data to assess risk based on older, less effective treatment options both in

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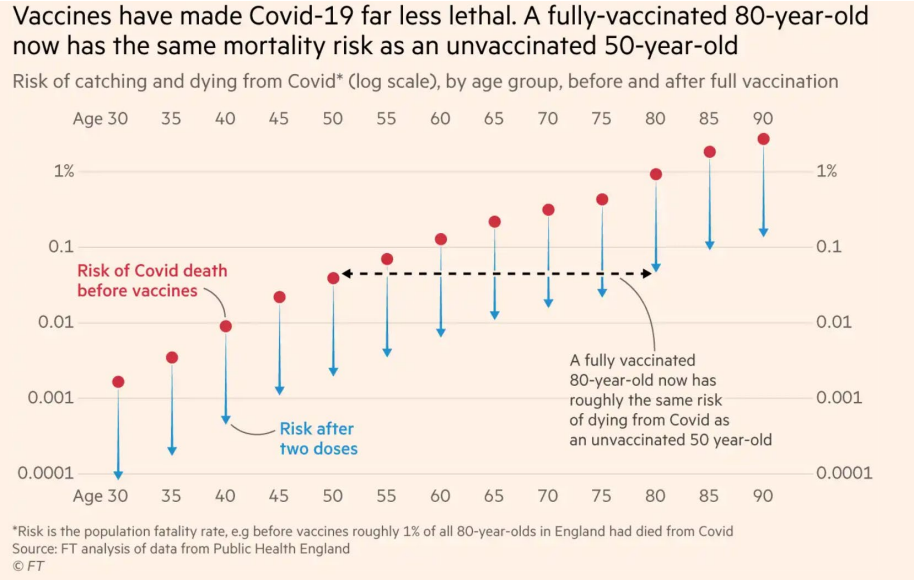
[3] Levin, et al., Assessing the age specificity of infection fatality rates for COVID-19: systematic review, meta-analysis, and public policy implications. Eur. J. Epidemiol. (Dec. 8, 2020), https://link.springer.com/article/10.1007/s10654-020-00698-1.

[4] QCovid Risk Assessment, Univ. of Oxford, https://qcovid.org/ Calculation.

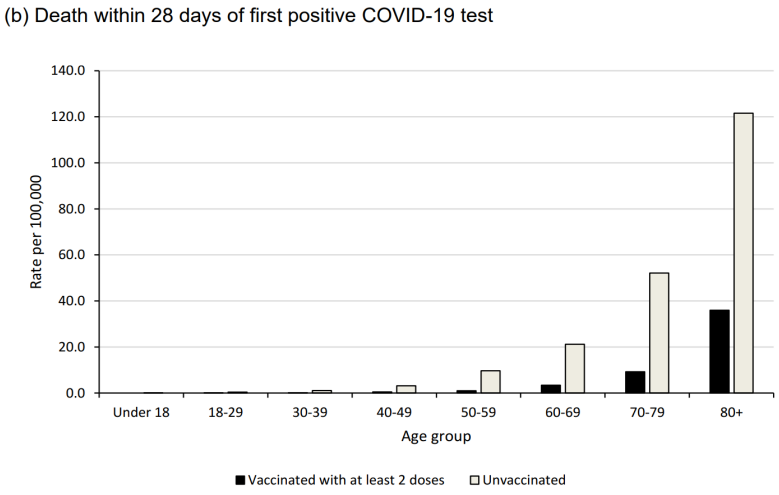
hospital and prior to admission. Even then it finds that a healthy, unvaccinated 35-year-old had roughly a 0.0006% chance of dying with Covid, *id.*, meaning such workers are five times more likely to die in a car crash on the way to work than from Covid—that is, assuming they first contracted the virus. Such a low risk does not equate to the type of grave danger that the ETS requires.

Nor does it present a grave danger when OSHA accepts the equal or higher risk that Covid poses to older vaccinated workers. The Financial Times conducted a broad analysis of infection fatality rates around the world and found that, while Covid vaccines conferred strong protection from severe disease outcomes, vaccines only reduce the risk of death for an average 55-year-old to that of an average *unvaccinated* 35-year-old because of the extremely age-dependent nature of Covid fatalities.[5] This chart illustrates the comparative risk by age-group and vaccine status:



[5] Why are fully vaccinated people testing positive for Covid? Financial Times (Jul. 28, 2021), https://www.ft.com/content/0f11b219-0f1b-420e-8188-6651d1e749ff#comments-anchor.

The reality of this extremely age-dependent mortality risk is observed in the weekly COVID-19 Vaccine Surveillance Reports compiled by the U.K. Health Security Agency and Office of Health Improvement and Disparities (formerly Public Health England).[6] These reports include tables indicating the rates of Covid, emergency department visits, and deaths among the vaccinated and unvaccinated across age cohorts, allowing for a direct assessment of the protection afforded by vaccines. *Id.* They consistently show that the Covid death rate among vaccinated people in their 50s is comparable to that of unvaccinated people in their 30s: about 1.5 deaths/ 100,000 population, thus, confirming the Financial Times analysis. *Id.* This chart illustrates the U.K.'s data:



While this information is gathered in the U.K., it is the best available data from a country that closely resembles the U.S., particularly in the context of Covid. The

[6] U.K. Health Security Agency, COVID-19 Vaccine Weekly Surveillance Reports (Weeks 39 to 46) (last updated Nov. 18, 2021) (last accessed Nov. 22, 2021), https://www.gov.uk/ government/publications/covid-19-vaccine-weekly-surveillance-reports.

U.S. does not have a unified public health apparatus that allows for this type of uniform data collection. Indeed, the CDC has acknowledged that it relies on "passive and voluntary reporting, and data may not be complete or representative" to surveil for breakthrough cases.[7]

While OSHA does not quantify the acceptable level of disease mortality, the IFR, at best, only works to reduce the risk of Covid-related hospitalization and death that *some* workers faced before vaccination to the level of other unvaccinated workers. Thus, using the Fifth Circuit's example, all else equal, an unvaccinated 28-year-old prison janitor is simply less vulnerable to Covid than a vaccinated 62-year-old prison janitor. Yet OSHA is willing to accept the danger to the vaccinated 62-year-old prison janitor. It seems improbable that OSHA would be willing to accept a grave danger to workers over a certain age. Instead, when placed in context, the IFR is clearly overbroad, seeking to impose vaccines on a group for which Covid undisputedly does not present a grave danger. The ETS would disproportionately impact workers under 40, who will predominately represent the unvaccinated in most workplaces.[8]

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[7] CDC COVID-19 Vaccine Breakthrough Case Investigations Team, COVID-19 Vaccine Breakthrough Infections Reported to CDC—United States, January 1–April 30, 2021 (May 28, 2021), https://perma.cc/RGT8-GLUM.

[8] Showing vaccination status by group in Ohio and Michigan, clearly showing that individuals over the age of 50 are fully vaccinated at higher rates compared to younger groups. Ohio Dept. of Health, COVID-19 Dashboard, COVID-19 Vaccination Rate by Key Age Groups (last accessed Nov. 21, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/covid-19-vaccine/vac-rate-breakdown-key-age-groups; Michigan COVID-19 Vaccine Dashboard, Age/Sex

2. Covid poses little to no risk to workers with natural immunity.

As of October 2, 2021, the CDC estimates that nearly 150 million people—roughly half of all Americans—have been infected with Covid.[9] Rather than ignore natural immunity, as it did with the age-based analysis described above, OSHA spends many pages claiming that the protection of natural immunity is either unknown or insufficient. Instead of looking to studies that measure the actual disease outcomes that are relevant to the standard of "grave danger," OSHA relies heavily on a few studies that highlight markers of immunogenicity (i.e., antibody titers). The use of antibody titers as a proxy for protection against poor disease outcomes is not a practice that is held ubiquitously by policymakers or researchers.

As Dr. Matthew Memoli, Director of the Laboratory of Infectious Diseases Clinical Studies at the NIH, explained with respect to the FDA's reliance on measurements of spike protein-specific antibodies as an indicator of protective immunity, it "only has to do with very specific antibodies to a very specific region of the virus [the spike]. Claiming this as data supporting that vaccines are better than natural immunity is shortsighted and demonstrates a lack of understanding of the complexity of immunity to respiratory viruses."[10] Dr. Memoli also explained that

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(last accessed Nov. 21, 2021), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_103214_103272-547150--,00.html.

[9] CDC, Estimated COVID-19 Infections, Symptomatic Illnesses, Hospitalizations, and Deaths in the United States (Oct. 2, 2021) (last accessed November 22, 2021), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html.

[10] Block, Vaccinating people who had COVID-19: Why doesn't natural immunity count in the US?, The BMJ 2021:374:n2101 (Sept. 13, 2021),

the vaccines induce only anti-spike antibodies, meaning they only create antibodies against one particular piece of the virus, whereas previous infection by the whole virus "would likely offer a broader based immunity." *Id.*

Likewise, Dr. Jeffrey Klausner, a professor of clinical medicine at University of Southern California and a former CDC medical officer, conducted a systematic review of 10 studies of reinfection and concluded that prior infection offered substantial protection that is "is high and similar to the protective effect of vaccination." *Id.* Dr. Antonio Bertoletti, a professor of infectious disease at Duke-NUS Medical School has conducted research indicating a robust T-cell dependent immune response that is present regardless of disease severity, independent of any anti-spike antibodies, and which allows the patient to mount a "highly functional virus specific cellular immune response."[11]

Further undercutting OSHA's understanding of antibody titers as good predictors of disease outcome and thus proxies for determining "grave danger," is research out of University College London indicating that some individuals without known Covid infections are able to mount a robust T-cell mediated innate immune response to the SARS-CoV-2 virus, resulting in an aborted infection.[12]

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https://perma.cc/T8JZ-U6BX.

[11] Le Bert, et al., Highly functional virus-specific cellular immune response in asymptomatic SARS-CoV-2 infection, J. Experimental Med. (Mar. 1, 2021), https://perma.cc/8BXV-CT5E.

[12] Swadling, et al., Pre-existing polymerase-specific T cells expand in abortive seronegative SARS-CoV-2. Nature (Nov. 10, 2021), https://www.nature.com/articles/s41586-021-04186-8.

Just days before OSHA released the IFR, the CDC released an explainer titled "Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity," in which it stated that "[a] systematic review and meta-analysis including data from three vaccine efficacy trials and four observational studies from the U.S., the U.K., and Israel found no significant difference in the overall level of protection provided by infection as compared with protection provided by vaccination; this included studies from before and since the Delta variant became the predominant variant."[13] The CDC was referring to an Israeli study demonstrating that vaccinated individuals without known Covid infections had roughly a 13-fold increased risk of breakthrough infection compared to individuals who had a prior Covid infection.[14] A review of this study by the Johns Hopkins University Bloomberg School of Public Health noted that its strengths included: (1) Israel's high rate of vaccination (mainly Pfizer); (2) its robust public health databases, which represent a large portion of the population; and (3) its matched design, which allowed it to attempt to "control for other factors that may affect Covid reporting in these individuals."[15] Strong evidence of effective post-infection immunity from observational studies is augmented by the

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[13] CDC, Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity (Oct. 29, 2021), https://perma.cc/7DVK-6NQF.

[14] Gazit, et al., Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections, medRxiv (Aug. 24, 2021) (preprint), https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.

[15] Johns Hopkins University Bloomberg School of Public Health (Sept. 10, 2021), https://ncrc.jhsph.edu/research/comparing-sars-cov-2-natural-immunity-to-vaccine-induced-immunity-reinfections-versus-breakthrough-infections/

discovery of robust post-infection antibody-related immunity that has recently been estimated to remain at sufficient levels to protect against severe disease for "several years."[16] OSHA's argument against providing exemptions to workers with natural immunity is unavailing. Extrapolating from the CDC's estimation of individuals with prior Covid infections, it is likely that more than half of the workers who have chosen to remain unvaccinated have natural immunity. Thus, between natural immunity and age, there is an ever-shrinking group for which Covid arguably presents a "grave danger" in the workplace.

For these reasons, the IFR fails to meet the legal standard of "grave danger" at this time, as required for an ETS under the OSH Act.

B. OSHA has not shown that the ETS is necessary.

Even if Covid met the "grave danger" requirement, the ETS is not necessary to protect employees from such danger. The emergency temporary standard is "OSHA's most dramatic weapon in its enforcement arsenal." *Asbestos Info. Assn.*, 727 F.2d, at 426. OSHA must show that the ETS is "necessary" to protect employees from grave danger. "Necessary" is defined as "needed for some purpose or reason; essential." Black's Law Dictionary (11th ed. 2019). The necessity standard is a significantly higher threshold than the standard governing permanent

[16] Wei, et al., Anti-spike antibody response to natural SARS-CoV-2 infection in the general population, Nature Commn'cs (Oct. 29, 2021), https://perma.cc/PAD9-7SRE; Zhang, et al., One-year sustained cellular and humoral immunities of COVID-19 convalescents, Clinical Infectious Diseases (Oct. 5, 2021), https://perma.cc/E4VD-CLSL.

OSHA regulations, which must be only "reasonably necessary or appropriate." *American Petroleum Inst.*, 448 U.S., at 615. To meet that lower standard, OSHA must show that its regulations are "reasonably essential or at least reasonably efficacious in reducing a significant risk of material harm." *Texas Indep. Ginners Ass'n* v. *Marshall*, 630 F.2d 398, 410 (CA5 1980). Meeting the necessity standard for an ETS is obviously a higher burden—and for good reason, as "Congress intended a carefully restricted use of the emergency temporary standard." *Florida Peach Growers*, 489 F.2d, at 130 n.16. Otherwise, there would be significant federal executive overreach on private employers without any notice-and-comment period, such as the case here.

"The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees." *BST Holdings*, —F.4th—; 2021 WL 5279381, at*6; slip op., at 13.

Private sector businesses are not the main, or a significant source of outbreaks. As of November 15, 2021, Michigan reports 821 ongoing outbreaks. Michigan, Coronavirus: Outbreak Reporting, https://perma.cc/T2G9-JVHS (updated Nov. 15, 2021). Of those outbreaks, more than 80% are either exempt from the OSHA ETS (such as healthcare/assisted living) or are not related to private-sector business operations (e.g., K-12 schools, jails and prisons, and social or gatherings). The IFR can hardly qualify as "necessary" if it does not cover most of the recent and ongoing outbreaks.

Further, the scope of the IFR is only determined by the number of employees in a business, and not any workplace conditions that could relate to the degree of exposure to COVID or the risk of infection. Again, the OSH Act requires the ETS to be "necessary" (and not merely "necessary or appropriate") to protect against the danger in the workplace and not in society at large.

Even last year, before a vaccine was available to every working-age American, OSHA argued that an ETS to ensure the nationwide provision of personal protective equipment was unnecessary because "no 'one-size-fits-all' response would protect all the nation's workers equally." U.S. Dep't of Labor's Response at 31, *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324 (CADC Jun. 11, 2020). As OSHA recognized then, "adequate safeguards for workers could differ substantially based on geographic location, as the pandemic has had dramatically different impacts on different parts of the country." *Id.*, at 32. And such a "broad rule" would fail to consider that "what would be required of employers in diverse industries … is likely to differ in substantial ways." *Id.*, at 31–32. In short, by promulgating an ETS "meant to broadly cover all workers with potential exposure to COVID-19—effectively all workers across the country"—the Secretary has "provid[ed] very little assistance at all" while risking "counterproductive" vaccine hesitancy and worker shortages. *Id.*, at 30, 33. In addition, the President ordered OSHA to consider whether any ETSs related to COVID-19 were necessary. Exec. Order No. 13,999, 86 Fed. Reg. 7211 (Jan. 21, 2021). A resultant draft ETS, reportedly over 780 pages long, was never published.

For these reasons, OSHA has unlawfully overstepped its emergency statutory authority to pass the one-size-fits-all IFR.

C. Failing to meet the grave danger and necessary standards, and adopted without normal rulemaking procedures, the IFR is infirm under APA § 706(2).

OSHA rulemaking action is reviewable under APA § 706(2), 5 U.S.C. § 706(2). SBAM urges an emergency stay of the IFR on any of the separate and independent grounds set forth in APA § 706(2)(A), (B), or (D). The IFR, generally and in particular as to the small businesses that SBAM represents, is arbitrary and capricious, an abuse of its discretion, and not otherwise in accordance with law, in violation of § 706(2)(A); is in excess of its statutory authority, in violation of § 706(2)(B); and/or was taken without procedure as required by law, in violation of § 706(2)(D).

The scope of the IFR is arbitrarily determined by the number of employees in a business, and not any workplace conditions that could relate to the degree of exposure to Covid or the risk of infection. The rationale OSHA provided for its arbitrary selection of the 100-or-more employee threshold? Its bare assertion of "confidence" that employers who meet that threshold "will have sufficient administrative systems in place to comply quickly with the ETS." 86 Fed. Reg. 61402. That expression of confidence is not grounded in reality. Small businesses cannot comply with the substantial requirements imposed by the IFR by December 6, 2021. Small businesses attempting to recover from the pandemic can ill afford substantial compliance costs in terms of policies and procedures, signage, employee and nonemployee screening, recordkeeping, training, paid leave time for vaccinations or for recovery from vaccinations, and other requirements. Nor can small businesses afford the substantial penalties for non-compliance, both in civil fines or in criminal

convictions. Moreover, as discussed above in Parts II.A. and B., the IFR is overbroad and does not meet the statutory requirements for an ETS. Adopted as an IFR, there was no compliance with OSHA's normal rulemaking procedures.

For these reasons, in addition to failing to comply with 29 U.S.C. §655, the IFR violates the APA.

II. The IFR is unconstitutional.

The Court need not address the IFR's constitutional infirmities since OSHA has overstepped its statutory authority for the reasons argued above. Courts are "obliged to avoid constitutional questions if an alternative interpretation of the statute 'though plainly not the best reading, is at least a possible one.'" *Bevan & Assocs., LPA, Inc.* v. *Yost*, 929 F.3d 366, 376–377 (CA6 2019) (quoting *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18 (2013)). The constitutional doubt doctrine requires that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237–238 (1998). "If a statute is susceptible of two plausible constructions, one of which would raise a multitude of constitutional problems, the other should prevail." *United States* v. *Erpenbeck*, 682 F.3d 472, 476 (CA6 2012).

To construe the OSH Act as permitting OSHA to impose the IFR on private employers would mean the Court would need to tackle these significant constitutional questions. The IFR exceeds Congress' powers under the Commerce Clause, U.S. Const. Art. 1, §8, cl. 3; it is an ultra-vires delegation of authority from Congress to

an executive agency; and it runs afoul of the major questions doctrine.

A. The IFR oversteps the Commerce Clause.

"[T]he Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity." *BST Holdings*, —F.4th—; 2021 WL 5279381, at*7; slip op., at 16.

The Commerce Clause grants Congress the authority "[t]o regulate Commerce … among the several States." U.S. Const. Art. I, §8, cl. 3. The Supreme Court "always ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *United States* v. *Morrison*, 529 U.S. 598, 618–619 (2000). The Court has allowed vaccination measures as exercises of state "police power" to protect public health and safety. In *Jacobson* v. *Massachusetts*, 197 U.S. 11, 24–25 (1905), the Court upheld a locally mandated $5 fine for those who declined a smallpox vaccine. It never suggested the federal government's enumerated powers include a power broad enough to justify issuance of a vaccine mandate. The *Jacobson* Court explained that the power to establish regulations to "protect the public health and the public safety" is included within the powers "which the state did not surrender when becoming a member of the Union under the Constitution." *Id.*, at 25. Granting OSHA the power to mandate vaccinations or weekly testing for tens of millions of Americans would surpass the Commerce Clause's authority by granting a federal executive

agency police powers control over public health.

Although the police power to impose vaccination mandates belongs to the states—not the federal government—SBAM nevertheless rejects that any such vaccine mandate on private employers is necessary or lawful under present circumstances and that small business owners know best how to provide a safe environment for their employees and customers.

B. Even if Congress has the power to enact a federal vaccine mandate, the IFR is an ultra vires delegation to OSHA.

It shocks the conscience that a federal executive agency can issue an emergency standard without any notice-and-comment period affecting millions of Americans' healthcare and their private employment. Even if the federal government had such police powers—and it does not—the IFR violates the separation of powers because Congress cannot delegate such overarching authority to the executive branch.

Derived from the Constitution's vesting of "all legislative Powers" in Congress, the nondelegation doctrine prohibits Congress from delegating those powers to other entities, such as administrative agencies. Congress cannot "confer[] authority to regulate the entire economy on the basis of" an overly vague standard, just as it cannot provide the agency "literally no guidance." *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 474 (2001) (citation omitted). "Congress … does not, one might say, hide elephants in mouseholes." *Id.*, at 468.

In applying the nondelegation doctrine, the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.*, at 475. Such unfettered power would likely require greater guidance than "such

regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." See *American Petroleum Inst.*, 448 U.S., at 645–646 ("[I]t is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view … A construction of the statute that avoids this kind of open-ended grant should certainly be favored."). In particular, in his concurrence in *American Petroleum Institute*, Justice Rehnquist reasoned that the phrase "to the extent feasible" in the OSH Act, 29 U.S.C. §655(e) would violate the nondelegation doctrine absent such narrow readings in a particular instance, because Congress (not federal agencies) makes social policy, because an agency requires an "intelligible principle" to exercise discretion, and because the courts must discern the intelligible principle as a measuring stick for judicial review. *American Petroleum Inst.*, 448 U.S., at 681–685.

In *American Petroleum Institute*, OSHA argued that it was not required to establish a "significant risk" before promulgating a safety standard. *Id.*, at 646. The Supreme Court disagreed, holding that, if that view were correct, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional." *Ibid.* The Court therefore read the "significant risk" requirement into the Act. Similarly, the D.C. Circuit applied a saving construction to the OSHA statute that required the agency to conduct a cost-benefit analysis before implementing a new standard. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW* v. *OSHA*, 938 F.2d 1310, 1316 (CADC 1991). The D.C. Circuit rejected "OSHA's [contrary] proposed analysis" of the Act because it "would give

the executive branch untrammeled power to dictate the vitality and even survival of whatever segments of American business it might choose." *Id.*, at 1318.

C. The IFR violates the major questions doctrine.

"We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA* v. *Brown & Williamson*, 529 U.S. 120, 160 (2000)). Even when Congress articulates an intelligible principle, if Congress intends for an agency to answer "major questions" relating to a statute, *Brown & Williamson*, 529 U.S., at 159 (2000)—*i.e.*, a question of deep "economic and political significance" that is central to the statutory scheme—then Congress must clearly say so. *King* v. *Burwell*, 576 U.S. 473, 485–486 (2015). See also *U.S. Dept. of Homeland Sec.* v. *Regents of the Univ. of Cal.*, —U.S.—, 140 S. Ct. 1891, 1925 (2020) (THOMAS, J., concurring) ("[T]he major questions doctrine … is based on the expectation that Congress speaks clearly when it delegates the power to make 'decisions of vast economic and political significance.'").

When Congress intends to "upset federalism norms," it must "legislate[ ] clearly." *Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (CA6 2013) (SUTTON, J., concurring). While Congress may have the power to displace such norms, at least when it speaks clearly, it is by no means clear that "agencies [can] upset federalism norms when Congress legislates ambiguously." *Id.* As the Fifth Circuit highlighted, "[t]he Mandate derives its authority from an old statute employed in a novel manner, imposes nearly $3 billion in compliance costs, involves

broad medical considerations that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues." *BST Holdings*, —F.4th—; 2021 WL 5279381,at *8, slip op. at 17–18.

"Whether Congress could enact such a sweeping mandate under its interstate commerce power would pose a hard question," but "[w]hether OSHA can do so does not." *Id.*, at *9; slip op., at 22 (DUNCAN, J., concurring).

CONCLUSION

Simply put, OSHA has stepped far outside of its authority in trying to regulate public health by making younger workers get vaccinated to protect older workers who can protect themselves by getting vaccinated. SBAM therefore respectfully asks the Court to stay and then permanently enjoin the IFR.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: NOVEMBER 23, 2021

KURTIS T. WILDER

KURTIS T. WILDER
JOSEPH E. RICHOTTE
STEVEN R. EATHERLY
150 W. Jefferson Ave., Ste. 150
Detroit, Mich. 48226
(313) 225-7000
wilder@butzel.com
richotte@butzel.com
eatherly@butzel.com
Counsel for Amicus Curiae
Small Business Association of Michigan

DET2211512.9

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
COUNTY OF WAYNE) §

This amicus brief contains 5,582 countable words, excluding the parts of the document exempted by Appellate Rule 32(f), and therefore exceeds the limit of 5,200 words in Rule 27(d)(2). Concurrent with this brief, SBAM has filed a motion for leave to exceed the word limit.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: NOVEMBER 23, 2021

KURTIS T. WILDER

KURTIS T. WILDER
JOSEPH E. RICHOTTE
STEVEN R. EATHERLY
150 W. Jefferson Ave., Ste. 150
Detroit, Mich. 48226
(313) 225-7000
wilder@butzel.com
richotte@butzel.com
eatherly@butzel.com
Counsel for Amicus Curiae
Small Business Association of Michigan

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE) §

On this date, I caused the Brief Amicus Curiae of the Small Business Association of Michigan to be filed with the Clerk of the Court using the CM/ECF system, which will electronically service counsel of record.

There are no non-ECF participants in this case.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: NOVEMBER 23, 2021

KURTIS T. WILDER

KURTIS T. WILDER
JOSEPH E. RICHOTTE
STEVEN R. EATHERLY
150 W. Jefferson Ave., Ste. 150
Detroit, Mich. 48226
(313) 225-7000
wilder@butzel.com
richotte@butzel.com
eatherly@butzel.com
Counsel for Amicus Curiae
Small Business Association of Michigan