No. _____

In the Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

EMERGENCY APPLICATION OF TWENTY-SIX BUSINESS ASSOCIATIONS FOR IMMEDIATE STAY OF AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

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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IDENTITY OF PARTIES & CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Applicants (the "Business Associations") state that no individual Applicant has any parent corporation, and that no publicly held company owns any portion of any Applicant. Applicants further state as follows:

National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. As of November 13, 2021, NFIB's membership includes 290,564 businesses spanning all industries and operations, including firms with hundreds of employees.

American Trucking Associations, Inc. is the national association of the trucking industry. Its members include individual trucking companies and 50 affiliated state trucking organizations, which together represent over 30,000 motor carriers of every size, type, and class.

National Retail Federation is the world's largest retail trade association. The retail industry contributes $3.9 trillion to the nation's annual gross domestic product; NRF has represented this industry for over a century.

FMI – The Food Industry Association is a voluntary trade organization that represents more than 1,225 food retailer and wholesaler members operating nearly 40,000 retail food stores across the United States.

National Association of Convenience Stores is the leading trade association dedicated to advancing convenience and fuel retailing. It serves as a trusted advisor to over 1,500 retailer and 1,600 supplier members.

National Association of Wholesaler-Distributors advocates for the wholesale-distribution industry. Its members include individual companies and a

federation of associations that collectively represent more than 30,000 employers that have more than 150,000 places of business and that operate in every state.

International Warehouse and Logistics Association is a trade association that promotes the general business interests of persons, firms and corporations engaged in public and contract warehousing and related services.

International Foodservice Distributors Association is the premier trade association for the $300-billion foodservice-distribution industry. Its member companies play a critical role in the foodservice supply chain, delivering products to more than one million professional kitchens every day.

National Propane Gas Association is the national trade association representing the nation's propane industry. NPGA's members include 2,800 small and large businesses in all fifty states, as well as affiliated state and regional associations.

Brick Industry Association is the only trade association in the nation devoted specifically to the clay brick industry. BIA represents the legislative and regulatory interests of its members on Capitol Hill, at the White House, with Executive Branch departments, and before federal agencies.

American Bakers Association is the voice of the wholesale-baking industry. It has worked since 1897 to increase protection from costly government actions. ABA's members include more than 300 companies with a combined 1600+ facilities.

Kentucky Petroleum Marketers Association is a nonprofit trade association founded in 1926. KPMA currently represents approximately 170 members, and its members own or supply more than 3,000 retail fueling facilities.

Kentucky Trucking Association is a trade association that represents the interests of and serves as the voice for Kentucky's trucking industry. Founded in 1962, KTA exists to ensure that the public and policymakers have a complete understanding of the trucking industry and the issues that affect that industry.

Louisiana Motor Transport Association represents trucking and related industry companies throughout Louisiana and the nation, and its membership includes every type of motor carrier in Louisiana.

Michigan Petroleum Association has served the state's independent petroleum marketers since 1934. MPA exists to promote a cooperative spirit by which marketers across the state can best achieve their common goals.

Michigan Association of Convenience Stores was established by MPA in 1986 to serve the interests of Michigan's convenience-store industry on the legislative front and in other matters of concern to convenience-store operators. Together, MPA and MACS count over 400 companies as members, with over 1,500 retail locations. Members employ over 15,000 people statewide and in each of Michigan's 83 counties.

Michigan Retailers Association is the unified voice of Michigan's retail industry. MRA serves 5,000 member businesses that manage 15,000 stores and websites across the state. Through its expanding national network, MRA serves businesses of all types in all 50 states and the District of Columbia.

Michigan Trucking Association has represented Michigan's for-hire trucking companies and private company fleets since 1934. MTA offers federal and state transportation-regulations assistance, legislative representation, and other trucking-related guidance.

Mississippi Trucking Association represents the Mississippi motor carrier industry and serves as the voice of trucking in Mississippi on behalf of over 300 members firms.

Ohio Grocers Association is a non-profit trade association representing approximately 400 grocers, wholesalers, brokers, and associate members through legislative and regulatory efforts. OGA has served the Ohio food industry for over 100 years.

Ohio Trucking Association gives its members a platform to voice concerns to legislators and other policy makers. OTA exists to enhance its members' public image and economic growth by promoting safety, innovation, and professionalism.

Tennessee Chamber of Commerce and Industry serves as the primary voice of diverse business and manufacturing trade interests on major employment and economic issues. TCCI has over 350 members, which include state and local economic developers, construction companies, manufacturing companies and other industries.

Tennessee Grocers & Convenience Store Association is the only trade association that represents all segments of Tennessee's 200,000-job food industry. TGCSA's members include retail grocery and convenience store operations, food industry wholesalers, manufacturers, distributors, and suppliers.

Tennessee Manufacturers Association serves as the unified voice of Tennessee manufacturers, and it advocates for legislation that benefits businesses of all sizes. TMA works to develop and implement policies that benefit manufacturers in Tennessee while promoting a sound and viable economic environment.

Tennessee Trucking Association is one of the oldest state trucking associations in the nation. It exists to serve the state's motor carriers with excellence and integrity while advancing highway safety.

Texas Trucking Association is the unified voice for the trucking industry in Texas, and its 1,000-plus members range from small businesses to Fortune 500 companies.

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TO THE HONORABLE BRETT M. KAVANAUGH,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Applicants are twenty-six trade associations ("the Business Associations") representing a broad range of retail, wholesale, warehousing, transportation, travel, logistics, and commercial interests that are directly harmed by the Occupational Safety and Health Administration's ("OSHA") "COVID-19 Vaccination and Testing; Emergency Temporary Standard." 86 Fed. Reg. 61,402 (Nov. 5, 2021) (the "ETS"). Together they represent hundreds of thousands of businesses, which in turn employ millions of Americans and contribute trillions of dollars annually to the Nation's economy. They respectfully request an immediate stay of the ETS.

At issue is whether OSHA has statutory authority to create an immediately effective vaccine-and-testing regime for all businesses with 100 or more employees, thereby reaching "two-thirds of all private-sector workers," *id.* at 61,403, or over 25% of the population, *id.* at 61,475. The ETS "is not an everyday exercise of federal power." *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing* at 12 (6th Cir., Dec. 15, 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). On the contrary, OSHA "claims authority to require 80 million Americans—in virtually every type of American business there is—to obtain a COVID-19 vaccine or, in the alternative, to undertake a weekly COVID-19 test and wear a mask throughout each workday." *Id.*

OSHA contends that it has authority to promulgate the ETS without public notice and comment based upon a novel reading of an obscure statutory provision, 29 U.S.C.

§ 655(c), that provides only a narrow emergency power. *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality).

The major-questions doctrine bars OSHA's attempt to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (cleaned up). Courts routinely reject statutory interpretations that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *Id.* Yet that is precisely the interpretation on which the ETS rests. As the Fifth Circuit recognized, *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021)—and as Chief Judge Sutton emphasized in his opinion for himself and seven other judges dissenting from the denial of initial hearing en banc in the Sixth Circuit—Congress did not provide anything close to clear authority for the extraordinary power OSHA asserts, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). The Sixth Circuit's contrary opinion, *In re: MCP No. 165, Occupational Safety and Health Administration Rule on Covid-19 Vaccination and Testing, 86 Fed. Reg. 61402*, __ F.4th __ (6th Cir. 2021), creates a split of authority that only this Court can resolve.

The ETS will inflict irreparable harm upon hundreds of thousands of businesses across the retail, wholesale, warehousing, transportation, travel, logistics, and commercial industries that collectively employ millions of Americans. It will impose substantial, nonrecoverable compliance costs on those businesses. Those businesses will be faced with either incurring the costs of testing for the millions of employees who refuse to be vaccinated—and passing those costs on to consumers in the form of

yet higher prices at a time of record inflation—or imposing the costs of testing upon their unvaccinated employees, who will quit en masse rather than suffer additional testing costs each week. The resulting labor upheaval will devastate already fragile supply chains and labor markets at the peak holiday season.

OSHA acknowledges the certainty that those opposed to vaccination and government-mandated testing will quit their jobs rather than submit, leaving many businesses with no choice but to shut their doors or reduce operations, hours, and service. Amtrak's president, for example, recently testified that "service reductions will be necessary" due to "a relatively high percentage of unvaccinated employees" whom the service would be required to terminate by January, 4, 2022, under the vaccine mandate that applies to federal contractors.[1] The Business Associations' members are in an even worse position, because while the ETS and the federal-contractor mandates take effect the same day, companies such as Amtrak have had since September to prepare—approximately twice the time that the ETS gives. The

[1] *Leveraging IIJA: Plans for Expanding Intercity Passenger Rail: Hearing on H.R. 3684 Before the H. Subcomm. On Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transp. & Infrastructure,* 117th Cong. 11 (2021) (statement of Stephen Gardner, President, Amtrak), https://transportation.house.gov/imo/media/doc/Gardner%20Testimony1.pdf. A few days later, Amtrak sought to ameliorate these "service impacts" by making a testing option "temporarily available" after a "federal district court decision halted the enforcement of the Executive Order for federal contractors." Marybeth Luczak, *Amtrack: Updated Vaccine Policy Allows Employee Testing, Eliminates Service Impacts,* Railway Age, (Dec. 14, 2021), https://www.railwayage.com/passenger/intercity/amtrak-updated-employee-vaccine-policy-allows-testing-eliminates-service-impact/?RAchannel=news (quoting Memorandum from Stephen Gardner to All Amtrak Employees, *Covid-19 Vaccination Mandate – Testing Option Now Temporarily Available* (Dec. 14, 2021)).

ETS will also cause additional irreparable harms, including lost profits, lost sales to competitors who have fewer than 100 employees, and loss of customer goodwill.

A likelihood of success and irreparable harm are all that 5 U.S.C. § 705 requires for a stay pending review, but the equities also favor a stay. As the Administration has insisted, businesses must begin preparing immediately to implement OSHA's directive[2]—even while the Government has delayed the similar directives that apply to its own employees[3] and contractors.[4] The Fifth Circuit's stay of this unlawful action was vacated today by the Sixth Circuit, where all challenges to OSHA's ETS have been transferred and consolidated. Chief Judge Sutton filed a comprehensive opinion for himself and seven other judges dissenting from the Sixth Circuit's 8–8 order denying initial hearing en banc, and explaining why the ETS should remain stayed.

Under this Court's Rule 23.2, this Court is the only remaining option for a stay, and unless this Court immediately stays the effective date of the ETS, OSHA's

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[2] Press Secretary Jen Psaki responded to a question about the impact of the Fifth Circuit's stay on the timing for ETS compliance by answering that there was no such impact. "Let me be very clear: Our message to businesses right now is to move forward . . . . That was our message after the first day [sic] issued by the Fifth Circuit. That remains our message and nothing has changed. . . . So, we are still heading towards the same timeline." Press Briefing by Press Secretary Jen Psaki (Nov. 18, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/18/press-briefing-by-press-secretary-jen-psaki-november-18-2021/.

[3] Erich Wagner, *Biden Administration Delays Vaccine Mandate Penalties Until 2022*, Government Executive (Nov. 29, 2021), https://www.govexec.com/workforce/2021/11/biden-administration-delays-vaccine-mandate-penalties-until-2022/187128/.

[4] Courtney Bublé, *White House Clarifies Contractor Vaccination Deadline*, Government Executive (Nov. 12, 2021), https://www.govexec.com/management/2021/11/white-house-clarifies-contractor-vaccination-deadline/186793/.

unlawful action will begin to inflict significant and irreparable harms to the economy as the country hurtles through the holiday season.

Restoring the pre-ETS status quo does not require this Court to question the efficacy of COVID-19 vaccines, which are undeniable marvels of modern medicine. But the reality is that tens of millions of Americans remain unpersuaded. The ETS is the Administration's attempt to address this societal dilemma—not by making tests freely available, and not even by directly regulating individual conduct, but instead by conscripting business into enforcing a regime of mandatory vaccination or masking-and-testing that will achieve the Government's ultimate purpose.

The Business Associations' members have distributed and administered hundreds of millions of doses of the vaccines for tens of millions of Americans. They have encouraged and incentivized their employees to get vaccinated against COVID-19. But the goal of getting more Americans vaccinated does not allow the Executive Branch to use regulatory fiat to achieve a significant social, economic, and political change via the limited "emergency" power that Congress authorized. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. This Court should therefore immediately stay OSHA's unlawful action, pending disposition of the Business Association's petition for review.

OPINION BELOW

OSHA's ETS is published at 86 Fed. Reg. 61,402 (Nov. 5, 2021) and is included as Appendix 1 to this Application. The Fifth Circuit's November 6, 2021, order granting a stay pending further order is unpublished at 2021 WL 5166656 and is included as Appendix 2. The Fifth Circuit's November 12, 2021, opinion and order

granting a stay of the effective date of the ETS is published at 17 F.4th 604 and is included as Appendix 3.

On December 15, 2021, a divided Sixth Circuit issued a published order denying initial hearing en banc. That court split 8–8, with Chief Judge Sutton, joined by seven judges, dissenting, noting that they would keep the stay in place. Judge Bush also wrote separately to dissent from the denial of en banc review, while Judge Moore filed a concurring opinion. The denial order and the accompanying opinions are included with this Application as Appendix 4. The Sixth Circuit's December 17, 2021, opinion and order dissolving the Fifth Circuit's stay is published and is included with this Application as Appendix 5. Judge Stranch authored the opinion for the court, with Judge Gibbons concurring and Judge Larsen dissenting.

Under this Court's Rule 23.2, and given the Sixth Circuit's panel decision and en-banc refusal, this Court is the only remaining option for a stay.

JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1), and it has authority to grant the Applicants relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS

Pertinent statutory provisions are included with this Application as Appendix 6.

STATEMENT

OSHA's emergency temporary standards are a unique creature of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-671. The OSH Act allows OSHA to establish an emergency temporary standard if "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). When applicable, OSHA may issue temporary directives that take effect immediately, without the ordinary notice-and-comment procedure required for nearly every other federal regulation. *Id.* These temporary standards are effective for six months, and at the end of the six-month period they must be revoked or replaced with a more permanent standard subject to ordinary notice-and-comment procedure. *Id.* § 655(c)(2)-(3).

On September 9, 2021, the President announced that he would direct OSHA to issue an emergency temporary standard requiring all employers with "100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." The White House, *Vaccinating the Unvaccinated*, https://www.whitehouse.gov/covidplan/ (last visited December 14, 2021).

Nearly two months later, on Friday November 5, 2021, OSHA published the emergency temporary standard at issue. 86 Fed. Reg. at 61,402. Among many requirements, this ETS requires most employers with 100 or more employees to determine the vaccination status of their employees by December 5, 2021—and to

then require unvaccinated employees to either get fully vaccinated by January 4, 2022, or submit to weekly COVID-19 testing. *Id.* Covered employers must "remove" any employees who fail to comply, and employers face staggering penalties of up to $13,653 per violation for failing to comply. *See id.* at 61,553. OSHA also requires covered employers to maintain databases of their employees' vaccine and testing statuses, and OSHA can inspect these records at any time. *See id.* OSHA's action also purports to preempt state law. *Id.* at 61,406.

On Saturday, November 6, 2021, the Fifth Circuit entered an order temporarily staying the effective date of the ETS pending further action by that court. *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021) (per curiam). On Tuesday, November 9, eleven of the Business Associations filed a joint petition for review with an accompanying stay motion and declarations in the Fifth Circuit. Those filings were docketed in the same case as several state and private petitioners on November 10. Those eleven petitioners moved that same day for expedited briefing on their motion for a stay or, in the alternative, to apply any stay granted to the other petitioners to the eleven Business Associations as well.

On Friday, November 12, 2021, the Fifth Circuit stayed the effective date of the ETS, granting relief to all petitioners with pending stay motions. *BST Holdings, LLC*, 17 F.4th at 619 & n.23.

On Tuesday, November 16, 2021, the Government notified the Judicial Panel on Multidistrict Litigation that petitions for review challenging the ETS had been filed in all twelve regional circuits and had been properly served, asking for the Panel to select at random a single circuit to decide all petitions for review pursuant to 28

U.S.C. § 2112(a). That same day the Judicial Panel on Multidistrict Litigation issued an order that consolidated in the Sixth Circuit the eleven Business Associations' petition for review and all other pending petitions for review. The Fifth Circuit sua sponte transferred all petitions for review to the Sixth Circuit, and that Court docketed the eleven Business Associations' transferred petition (along with all other Fifth Circuit petitions) as No. 21-4080. On Friday, November 19, the Sixth Circuit consolidated that case and all other petitions for review with No. 21-7000.

On Tuesday, November 23, the other fifteen Business Associations filed a joint petition for review in the Sixth Circuit, asking the Court to consolidate their petition with the petition of the other eleven Business Associations. They also joined in support of the stay that the Fifth Circuit had previously entered. The Sixth Circuit docketed these petitioners as parties in No. 21-4117, and that Court then consolidated the case with No. 21-7000 on November 24, 2021.

Also on November 23, 2021, the Government filed an "Emergency Motion to Dissolve Stay" asking the Sixth Circuit to "dissolve the Fifth Circuit's stay." Resp's Emerg. Mot. to Dissolve Stay at 52, No. 21-7000 (Nov. 23, 2021). Several petitioners filed petitions asking the Sixth Circuit to initially consider the Government's emergency motion en banc. On December 15, 2021, the Sixth Circuit denied the petitions for initial hearing en banc. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, (6th Cir., Dec. 15, 2021) (hereinafter *In re: MCP No. 165*, En Banc Order). Chief Judge Sutton, joined by seven other judges, dissented from the denial and would have kept the stay in place. *In re: MCP No. 165*, En Banc Order at 3, 9 (Sutton, C.J., dissenting).

Following briefing and without oral argument, on December 17, 2021, the Sixth Circuit vacated the Fifth Circuit's stay of the ETS and denied all other consolidated petitioners' pending motions to stay. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, (6th Cir., Dec. 17, 2021) (hereinafter *In re: MCP No. 165*, Slip Op.).

ARGUMENT

This Court should immediately stay the effective date of OSHA's ETS. Under 5 U.S.C. § 705, this Court "may issue all necessary and appropriate process to postpone the effective date of an agency action." *See* 28 U.S.C. §§ 1254, 2101; *Chamber of Com. v. EPA*, 577 U.S. 1127 (2016) (granting pre-judgment application to stay federal agency action pending conclusion of litigation, where planning for compliance had to begin immediately and would cause irreparable harm if not enjoined).

Applicants satisfy all the stay factors: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [upholding OSHA's ETS]; and (3) a likelihood that irreparable harm will result from the denial of a stay."[5] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "[B]alanc[ing] the equities and weigh[ing] the relative harms to the applicant and to the respondent" also favors issuing a stay. *Id.*; *see also Nken v. Holder*, 556 U.S. 418,

[5] Applicants are "trade association[s]" that can raise their members' interests, particularly when seeking injunctive relief. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see, e.g.*, *Chamber of Com. v. EPA*, 577 U.S. at 1127 (granting sixteen trade associations' stay application raising their members' interests and irreparable harms).

426 (2009) (discussing the "four factors" that make up the "traditional standard for a stay" (internal quotation omitted)).

I. There is a Reasonable Probability that Four Justices Would Vote to Grant Review, and a Fair Prospect That a Majority Would Declare the ETS Unlawful.

A. If the Sixth Circuit were to uphold the legality of the ETS, there is a reasonable probability that four justices would vote to grant review.

There are at least three reasons this Court is likely to grant a writ of certiorari.

First, there is a square conflict of authority between the Fifth Circuit and the Sixth Circuit. As explained above, the Fifth Circuit granted Applicants, among others, a stay of the ETS, concluding that Applicants had satisfied each of the stay factors. Specifically, the Fifth Circuit held that "the major questions doctrine confirms that the [ETS] exceeds the bounds of OSHA's statutory authority." 17 F.4th at 617; *see id.* at 619 (Duncan, J., concurring) (emphasizing that petitioners are "virtually certain to succeed" under this Court's cases involving the major-questions doctrine). After the order of the Judicial Panel on Multidistrict Litigation transferring the case from the Fifth Circuit to the Sixth Circuit, the Sixth Circuit, by contrast, concluded that the major questions doctrine does not apply, reasoning that "OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority." *In re: MCP No. 165*, Slip Op. at 15; *but see id.* at 53 (Larsen, J., dissenting) ("[T]his emergency rule remains a massive expansion of the scope of [OSHA's] authority.").

Because all challenges to the ETS are consolidated before the Sixth Circuit, the split here is therefore as well developed as it can be, is clean given the direct conflict on the major questions doctrine, and is ripe for this Court's review.

Second, OSHA's contention that use of its emergency authority is "necessary" to address a worldwide pandemic is suspect under this Court's recent jurisprudence. Specifically, in *Alabama Association of Realtors*, this Court addressed the CDC's assertion of authority to impose a nationwide eviction moratorium as "necessary" in light of the pandemic, observing that a "necessary" requirement cannot permit a "breathtaking amount of authority" not otherwise found in the authorizing statute. 141 S. Ct. at 2489. So too here, where OSHA's invocation of its emergency authority arrogates to itself power never-before found in the statute, as discussed below.

Third, the impact of the OSHA ETS cannot be overstated. The regulation directly affects one quarter of Americans and indirectly effects almost everyone in one way or another, and it will have profoundly harmful economic consequences that ripple through countless businesses and industries. The ETS's unlawfulness is therefore an issue of grave national importance that warrants this Court's review.

Because significant factors favoring certiorari are met here, there is at least a reasonable probability that at least four members of this Court would vote to grant plenary review.

B. There is a fair prospect that a majority of this Court would declare the ETS unlawful.

The ETS exceeds Respondents' statutory authority for at least two reasons. First, OSHA could have initiated notice-and-comment procedures months ago instead of imposing an immediately effective "emergency" rule. Therefore, this unusual procedure is not "necessary." 29 U.S.C. § 655(c). Rather, Congress's inclusion of the word "necessary" makes clear that an ETS is within OSHA's statutory limits only

when the ETS contains "indispensable or essential measures," not "whatever [OSHA] determines is useful or beneficial." *In re: MCP No. 165*, En Banc Order at 19 (Sutton, C.J., dissenting).

Second, under the major-questions doctrine, Congress did not give OSHA "unprecedented" power to overhaul the American economy via an emergency, temporary standard. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Congress has "narrowly circumscribed [OSHA's] power to issue temporary emergency standards" and has "repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 651. As this Court has admonished, "[i]n the absence of a *clear* mandate in the [Act], it is unreasonable to assume that Congress intended to give [OSHA] . . . unprecedented power over American industry." *Id.* at 645 (emphasis added).

1. OSHA was required to use regular notice-and-comment procedures instead of waiting months to issue an "emergency" action.

Under the Occupational Safety and Health Act, standards must rely on substantial evidence vetted through notice and comment. 29 U.S.C. § 655(b); *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 639, 642. Congress granted only *limited* "emergency" powers to OSHA, in 29 U.S.C. § 655(c), for the potential exigency of protecting workers from a new or newly recognized workplace danger. *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984).

OSHA must demonstrate that issuing an ETS is "*necessary*" to protect workers from a grave danger before invoking the exceptionally limited "emergency" power. 29 U.S.C. § 655(c)(1) (emphasis added). This emergency power must be "delicately

exercised," *Fla. Peach Growers Ass'n, Inc. v. DOL*, 489 F.2d 120, 129 (5th Cir. 1974), and used only as "an unusual response to exceptional circumstances," *Dry Color Mfrs. Ass'n, Inc. v. DOL*, 486 F.2d 98, 104 n.9a (3d Cir. 1973), not as an excuse to avoid notice and comment. OSHA "cannot use its ETS powers as a stop-gap measure." *BST Holdings*, 17 F.4th at 616 (internal quotations omitted). As this Court recently made clear in another case involving agency action during the pandemic, a statutory delegation of power based on a "necessary" requirement cannot permit a "breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

"In the face of the many less intrusive options available to [OSHA], the idea that a national vaccinate-or-test mandate for 80 million workers is necessary is hard to maintain." *In re: MCP No. 165*, En Banc Order at 21 (Sutton, C.J., dissenting). There is nothing necessary about avoiding the rulemaking process for a virus that has now been circulating in the country for almost two years and for which vaccines have been available to all adults for over six months. The Delta variant began spreading rapidly almost six months ago. OSHA could have initiated notice-and-comment procedures for a workplace standard months ago, too. Yet OSHA's delay—coupled with a months-long refusal to initiate notice-and-comment—confirms that OSHA cannot possibly justify its determination that forgoing notice and comment is "necessary."

Employers and the public have amassed a wealth of knowledge about how to limit the spread of COVID-19 in their workplaces and how to encourage vaccination, and they are now using that knowledge to combat COVID-19. Their input on such a monumental regulatory decision is therefore critical.

By analogy, an agency cannot forgo notice and comment under the Administrative Procedure Act's "good cause" exception, 5 U.S.C. § 533(b)(B), when it becomes aware of an emergency with enough time for informal rulemaking but chooses instead to wait and invoke the exception. *See, e.g.*, *Air Transp. Ass'n of Am. v. DOT*, 900 F.2d 369, 379 (D.C. Cir. 1990) ("[T]he FAA is foreclosed from relying on the good cause exception" where "[t]he agency waited almost nine months before taking action"), *vacated on other grounds*, 498 U.S. 1077 (1991); *Env'tl Def. Fund v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (per curiam) (rejecting as "baseless" the argument that "outside time pressures forced the agency to dispense with APA notice and comment procedures" where agency waited eight months); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) ("[W]e cannot sustain the suspension of notice and comment to the general public" where "[t]he Department waited nearly seven months" and therefore "found it quite possible to consult with the interested parties it selected."). So too here.

But even more is required of OSHA here: a reviewing court "must take a 'harder look' at OSHA's action than [it] would if [it] were reviewing the action under the more deferential arbitrary and capricious standard [under] the Administrative Procedure Act." *Asbestos Info. Ass'n*, 727 F.2d at 421. This harder-look review dictates that OSHA's delay precludes use of an emergency power to impose a sweeping, immediately effective standard without prior public input where it was not necessary to do so. *See In re: MCP No. 165*, En Banc Order at 21 (Sutton, C.J., dissenting).

2. Under the major-questions doctrine, Congress did not clearly authorize OSHA to commandeer businesses into implementing a COVID-19 vaccine, testing, and tracking mandate covering 84 million Americans.

If Congress wants to delegate a "vast expansion" of an administrative agency's power, then Congress must "speak with the requisite clarity to place that intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020). As Chief Judge Sutton emphasized in his opinion for himself and seven other judges dissenting from the denial of initial hearing en banc, "[t]he challengers should prevail" because "[a] clear-statement rule applies to this wide-ranging and unprecedented assertion of administrative power, and the Secretary of Labor has failed to show that Congress clearly delegated this authority to him." *In re: MCP No. 165*, En Banc Order at 11 (Sutton, C.J., dissenting). All the factors this Court uses to identify "major" questions rebut OSHA's claimed authority to issue the ETS.

First, courts view skeptically "'an agency claim[] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.'" *UARG*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). OSHA has invoked § 655(c) only ten times in the Act's 51-year history. Nine of these were in the late 1970s and early 1980s, seven were challenged in court, and five of these challenged actions were blocked by courts. *BST Holdings, LLC*, 17 F.4th at 609. One recent challenge remains pending, and only a single challenge was rejected:

- In 1971, OSHA issued unchallenged emergency temporary standards for asbestos dust exposure in the workplace. 36 Fed. Reg. 23,207 (Dec. 7, 1971).

- In 1973, OSHA issued emergency temporary standards limiting workplace exposure levels for certain organophosphorus pesticides. 38 Fed. Reg. 10,715 (May 1, 1973). The Fifth Circuit vacated that standard several months after it had taken effect. *Fla. Peach Growers Ass'n*, 489 F.2d at 132.
- Also in 1973, OSHA issued an emergency temporary standard limiting workplace exposure levels for certain carcinogens. 38 Fed. Reg. 10,929 (May 3, 1973). The Third Circuit vacated this action as to the two carcinogens challenged. *Dry Color*, 486 F.2d 98.
- In 1974, OSHA issued an unchallenged emergency temporary standard limiting exposure levels for vinyl chloride. 39 Fed. Reg. 12,342 (April 5, 1974).
- In 1976, OSHA issued an emergency temporary standard creating workplace protections for certain diving operations. 41 Fed. Reg. 24,272 (June 15, 1976). The Fifth Circuit stayed the rule pending review. *Taylor Diving & Salvage Co. v. DOL*, 537 F.2d 819, 819 (5th Cir. 1976) (per curiam).
- In 1977, OSHA issued an emergency temporary standard reducing the allowable workplace exposure levels and setting monitoring requirements for benzene. 42 Fed. Reg. 22,516 (May 3, 1977). The Fifth Circuit stayed the standard. *Am. Petrol. Inst. v. OSHA*, 581 F.2d 493, 493 (5th Cir. 1978).
- In 1977, OSHA issued an unchallenged emergency temporary standard limiting workplace exposure levels for 1,2 Dibromo-3-chloropropane. 42 Fed. Reg. 45,535 (Sept. 9, 1977).
- In 1978, OSHA issued an emergency temporary standard reducing allowable workplace exposure levels for vinyl cyanide. 43 Fed. Reg. 2,586 (Jan. 17, 1978).

The Sixth Circuit denied a stay request. *Vistron v. OSHA*, No. 78-3027, 6 OSHC 1483 (6th Cir. Mar. 28, 1978).

- In 1983, OSHA issued an emergency temporary standard reducing workplace asbestos exposure levels. 48 Fed. Reg. 51,086 (Nov. 4, 1983). The Fifth Circuit stayed, and then vacated, that standard. *Asbestos Info. Ass'n*, 727 F.2d at 415.
- And in June 2021, OSHA issued an emergency temporary standard establishing workplace safety standards for health care workers designed to protect them from COVID-19 exposures. 86 Fed. Reg. 32,376 (June 21, 2021). The action was challenged, and that case remains pending and held in abeyance. *See* Order, *United Food and Com. Workers & AFL/CIO v. OSHA*, D.C. Cir. No. 21-1143, Dkt. 1914330 (D.C. Cir. Sept. 15, 2021).

OSHA's action is a novel use of its emergency authority. OSHA has traditionally focused its prior emergency temporary standards on the narrow task of lowering the permissible exposure levels for workplace toxins such as: asbestos, 48 Fed. Reg. at 51,086; vinyl cyanide, 43 Fed. Reg. at 2,586; benzene, 42 Fed. Reg. at 22,516; and certain pesticides, 38 Fed. Reg. at 10,715. *See In re: MCP No. 165*, En Banc Order at 27 (Sutton, C.J., dissenting) (discussing "work-anchored" nature of OSHA's prior regulations); *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 642-43 (OSH Act "empowers the Secretary to promulgate standards, not for chemicals and physical agents generally, but for 'toxic materials' and 'harmful physical agents'" (emphasis omitted)).

In fact, before OSHA issued the June 2021 ETS for health care workers, OSHA had never attempted to apply its emergency power to an airborne virus in any manner, let alone via a vaccine mandate—despite the millions of workers every year

who get the flu (and the tens of thousands who die from it) and the widespread availability of the flu vaccine. And even though prior OSHA emergency temporary standards were narrower in scope, almost all the legal challenges to these more cabined emergency actions still succeeded. The instant challenge should likewise succeed, as no regulation premised on OSHA's emergency temporary standard power "has even begun to approach the size or scope" of this ETS. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Second, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* (quoting *UARG*, 573 U.S. at 324, *in turn* quoting and citing *Brown & Williamson*, 529 U.S. at 160). "Such broad assertions of administrative power demand unmistakable legislative support." *In re: MCP No. 165*, En Banc Order at 6 (Sutton, C.J., dissenting). The OSH Act "does not clearly give [OSHA] power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the individual goes to work and may face the hazard in the course of the workday." *Id.* at 7.

In § 655(c), Congress authorized OSHA to protect "employees" from exposure to emergent grave dangers in the workplace. Congress did not give OSHA power to impose emergency mandates and monitoring on 84 million employees for a known, omnipresent danger that presents no unique hazard to the identified workplaces. OSHA's interpretation would drastically expand its authority in novel ways over "entire[]" industries—indeed, all of them (and treating them all the same). *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). This expansion

would give OSHA emergency authority over "a significant portion of the American economy." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159.

This Court has previously recognized the inherent limits on OSHA's power by repeatedly explaining that the agency's authority is limited to regulating risks from particular "workplaces." *Indus. Union Dep't, AFL-CIO,* 448 U.S. at 641, 642, 650. That is why "the Secretary must make a finding that the *workplaces in question* are not safe." *Id.* at 642 (emphasis added). Put differently, "the narrow exception for emergency rulemaking . . . [applies] only to dangers arising out of 'work or work-related activities,' not all hazards working people may face in their daily lives." *In re: MCP No. 165*, En Banc Order at 16 (Sutton, C.J., dissenting) (quoting *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984)).

This limit on OSHA's power tracks Congress's statement of findings and declaration of purpose in the Act, which focuses on "injuries and illnesses arising out of *work situations*." 29 U.S.C. § 651(a) (emphasis added). Congress sought to ensure "healthful working conditions and to preserve our human resource[]" by "encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment." *Id.* § 651(b), (b)(1).

The limit is also borne out in the OSH Act's emergency temporary standard provision and in OSHA's consistent practice implementing that provision over its first fifty years. OSHA's emergency power applies uniquely to workplace dangers faced by "employees." 29 U.S.C. § 655(c)(1). And OSHA's practice has consistently been to use its ETS authority to regulate new or newly discovered emergencies in particular types of workplaces or specific industries. This ETS, by contrast, is an unprecedented, one-

size-fits-all mandate for every business (with 100 or more employees) across the entire economy. It is implausible, in light of the OSH Act's text and structure and OSHA's own practice, that Congress would delegate to OSHA the emergency power to address global pandemics that affect everyone, everywhere, all of the time (whether at work or not). *Cf. Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not create power. Emergency does not increase granted power.").

Congress knows how to direct an agency to address such worldwide communicable diseases. It directed the FDA to govern vaccine approval, including emergency use. 21 U.S.C. § 360bbb-3. The Federal Food Drug and Cosmetic Act of 1938 granted the Commissioner of Food and Drugs authority over "drug[s]," 21 U.S.C. § 355(a), and that agency also regulates "biologics," 42 U.S.C. § 262(a). And Congress directed the CDC to address "the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). Importantly, the OSH Act specified that OSHA's delegated power did not displace other agencies' authority "to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). Yet displacement is inevitable if OSHA takes power to regulate communicable disease introduction and transmission.

Indeed, Congress knows how to authorize OSHA to address communicable diseases in the workplace, having in 1991 directed OSHA to promulgate a "final occupational health standard concerning occupational exposure to bloodborne pathogens." Act of Nov. 26, 1991 Pub. L. No. 102-170, tit. I, § 100(b), 105 Stat. 1107, 1113-1114 (1991). "Instead of helping the [OSHA]'s cause, a comparison between the 1991 rule and the 2021 rule undermines it." *In re: MCP No. 165*, En Banc Order at

27 (Sutton, C.J., dissenting). The Government argued below that this congressional action explained that OSHA could generally address pathogens. But this does not provide any support for the use of OSHA's *emergency* authority. And if the Act already authorized the substantive outcome (addressing bloodborne pathogens), Congress would not have needed to provide further express authority. Here, Congress similarly could have enacted a law expressly directing OSHA to promulgate a final rule concerning occupational exposure to COVID-19. But it has not done so.

That is perhaps because the proper role of the federal government and the States in responding to COVID-19 is the subject of "earnest and profound debate across the country," making the "oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (citation and internal quotation omitted). OSHA's action—which purports to preempt state law—will significantly disrupt countless industries, leading to even more supply-chain and labor shortages. This is a classic instance of an agency's regulatory action "involving billions of dollars" (at least) and "affecting the price of [many goods and services] for millions of people"; one would expect Congress to speak clearly if it had authorized an executive agency to wield such power. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Such transformative action cannot be achieved via "work-around." Callie Patteson, *Biden chief apparently admits vaccine mandate 'ultimate work-around'*, N.Y. Post (Sept. 10, 2021), https://tinyurl.com/s6fps5a2.

Moreover, the canon of constitutional avoidance compels application of the major-questions doctrine here to avoid serious concerns under the non-delegation doctrine. The "fundamental policy decisions" made by the ETS are "the hard choices, and not

the filling in of the blanks, which must be made by the elected representatives of the people." *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment); *accord id.* at 645-46 (Stevens, J., controlling op.); *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

A nationwide COVID-19 vaccine-and-testing mandate, monitoring, and tracking database is a fundamental policy decision. But the Government believes that OSHA's emergency powers apply even where a danger "is not a uniquely work-related hazard." 86 Fed. Reg. at 61,407. Such "open-ended grant[s]" of delegated power must be avoided. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 646 (Stevens, J., controlling op.). That is particularly true here, where there are substantial questions whether Congress's enumerated constitutional powers allow it to impose a vaccine mandate upon the vast working public. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 549-61 (2012) (holding that Affordable Care Act's health-insurance mandate is not a valid exercise of the Commerce Clause or the Necessary and Proper Clause). Although this Court has only rarely struck down statutes under the non-delegation doctrine, the doctrine still ensures that *Congress* retains its legislative responsibilities. OSHA has never previously interpreted its ETS authority to arrogate those responsibilities to itself.

Third (and finally), Congress is "especially unlikely" to have given OSHA expansive authority to address COVID-19, because OSHA has "no expertise" in combating a worldwide pandemic. *King*, 135 S. Ct. at 2489. OSHA, which is part of the Department of Labor, has expertise over job-related "working conditions" like industrial accidents and workplace hazards. 29 U.S.C § 651(b). By contrast, other

agencies—like the CDC and the FDA, both part of the Department of Health and Human Services—have expertise over public health, vaccines, and pandemics. Yet even the CDC and the FDA lack the "breathtaking amount of authority" over entire industries that OSHA claims here. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Although OSHA in June 2021 promulgated a separate COVID-19 emergency temporary standard for health-care workers, a challenge to that action remains pending. That action is also readily distinguishable. There, OSHA required certain protocols and equipment for use in healthcare workplaces because those specific workplaces had a higher exposure to infected COVID-19 patients than others. 86 Fed. Reg. 32,376. But OSHA has never used its emergency temporary authority to mandate vaccines, monitoring, and reporting throughout the entire economy.

The Sixth Circuit's foremost response to the major-questions doctrine is that the doctrine should not apply because the statutory text is unambiguous. *See In re: MCP No. 165*, Slip Op. at 16. But there are numerous "deficiencies" in OSHA's textual analysis of the Act. *BST Holdings*, 17 F.4th at 616. Even if the doctrine's utility were limited to resolving word-by-word ambiguities, the Fifth Circuit identified numerous opportunities for the doctrine's application here. *See id.* at 613-17. And the major-questions doctrine is not so limited. The doctrine counsels a "measure of skepticism" when agencies claim to discover previously "unheralded power." *UARG*, 573 U.S. at 324. It makes no difference whether the discovery inheres in a single word or in a greater-than-the-sum-of-its-parts interpretation of an entire statute. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. "[A]n emergency provision addressing workplace 'substances,' 'agents,' or 'hazards' that [OSHA] has used only ten times in the last 50

years and never to mandate vaccines" comes nowhere near the clarity required to authorize the ETS. *BST Holdings*, 17 F.4th at 619 (Duncan, J. concurring).

* * *

In sum, this ETS is precisely the kind of "unheralded" regulatory power that, if it is to be undertaken at all, starts with the Legislative Branch—not the Executive Branch. *UARG*, 573 U.S. at 324.

II. Absent a Stay, the Business Associations and Their Members Will Suffer Substantial Irreparable Harms.

The ETS will directly cause the Business Associations' members to suffer myriad irreparable injuries: enormous nonrecoverable compliance costs, loss of employees, lost profits, lost sales to competitors who are not subject to the ETS, and loss of goodwill and reputation control. *See* App. 7.A-L (Declarations of Beckwith, Gannon, Sullivan, Harned, Martz, Sarasin, DeHaan, West, Allen, MacKie, Stillman, and Demos); *See In re: MCP No. 165*, En Banc Order at 31-32 (Sutton, C.J., dissenting). These economic injuries will reverberate onto the public at large, and the evidence amply demonstrates that these harms will begin *now*, not next year.

A. The ETS imposes nonrecoverable compliance costs on businesses.

Applicants immediately face the "irreparable harm" of significant nonrecoverable compliance costs. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *see, e.g.*, *Chamber of Com. v. EPA*, 577 U.S. at 1127 (granting stay to prevent nonrecoverable compliance costs). These decisions established that unrecoverable costs impose irreparable harm. Nevertheless, some courts have stated that "courts are split on the question of whether compliance costs alone can constitute irreparable harm." *Cloud Peak Energy*

Inc. v. U.S. Dep't of Interior, 415 F. Supp. 3d 1034, 1040-42 (D. Wyo. 2019) (citing the Second, Third, and Seventh Circuits as answering "no," and citing the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits as answering "yes"). This Court's precedents squarely foreclose that argument. But if there is any doubt, that only means there is yet another certiorari-worthy issue presented by this Application—*i.e.*, whether nonrecoverable compliance costs can qualify as irreparable injuries.

Because federal agencies generally possess sovereign immunity from monetary damages claims, "a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). Sovereign immunity and other de facto barriers to monetary recovery against the government have long been sufficient to convert monetary costs into irreparable harm. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers) (paying an unconstitutional state tax is irreparable harm because "there is a substantial risk [that the Applicants] will not be able to obtain a refund if the tax ultimately is declared unconstitutional"); *Ledbetter v. Baldwin*, 479 U.S. 1309 (1986) (Powell, J., in chambers) (nonrecoverable administrative costs of complying with an unlawful court order to restructure state regulations is irreparable harm). Consequently, this lack of a "guarantee of eventual recovery" makes compliance costs here irreparable. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

And the direct costs of ETS compliance are significant. OSHA itself predicts that compliance will cost employers nearly $3 billion. 86 Fed. Reg. at 61,493. Based on their own review of the ETS's requirements, Applicants and their members have

concluded that "OSHA has drastically underestimated compliance costs, including recordkeeping for test results and vaccination status." App. 7.J at ¶27 (Decl. of MacKie). The ETS also will require "significant investments in human resources policy development and training," App. 7.C at ¶27 (Decl. of Sullivan). "The recordkeeping that the ETS requires will necessitate significant additional expense—both to perform and to keep secure (because the records contain sensitive health information)," and "OSHA's estimated costs for these measures are simply not realistic." App. 7.E at ¶26 (Decl. of Martz).

Indirect costs, such as "testing-related costs [that] are not included in the [ETS's] main [cost] analysis," are equally substantial. 86 Fed. Reg. at 61,484. Most states require employers "to pay the cost of a medical examination" that is necessary "as a condition of employment." Ky. Rev. Stat. § 336.220; *see* Cal. Lab. Code § 222.5 (similar); 820 Ill. Comp. Stat. 235/1 (similar); Va. Code § 40.1-28 (similar). Although employers in some other states could theoretically require employees to pay for their own testing, that prospect is unlikely in this historically tight labor market.

Either way, employers would suffer irreparable injury: either they incur the testing costs themselves, or they pass those costs along to their employees, who then would be more likely to quit their jobs and look for work elsewhere. *Infra* Part II.B. And no matter who pays for the test itself, employers in every state must pay for "[t]ime spent by an employee in waiting for and receiving medical attention on the premises *or* at the direction of the employer during the employee's normal working hours." 29 C.F.R. § 785.43 (emphasis added); *see Sehie v. City of Aurora*, 432 F.3d 749, 751 (7th Cir. 2005) (affirming district court's ruling that "time . . . spent

attending and traveling to and from [employer-mandated] counseling sessions" was compensable under federal wage-and-hour laws, even though travel and sessions occurred outside of employee's "normal forty-hour work week").

It is almost inevitable then that testing alone will cost millions on top of OSHA's already-low direct-compliance estimates. App. 7.H at ¶22 (Decl. of West). The math is simple. By OSHA's own estimate, "6.3 million weekly tests will need to be given due to this ETS." 86 Fed. Reg. at 61,484. And, again using OSHA's own estimates, "the weekly weighted average testing cost per employee . . . is . . . $40.46." OSHA, *Costs Associated with Reasonable Accommodation: Testing, Face Coverings, and Determinations* 6 (Nov. 4, 2021), https://www.regulations.gov/document/OSHA-2021-0007-0488 ("*Costs*"); *see* 86 Fed. Reg. at 61,484 (citing *Costs*).

That means $254.8 million in testing costs alone every week—*i.e.*, *$4 billion* during the first four months of 2022. That amount alone more than doubles OSHA's official estimate of compliance costs. *See* 86 Fed. Reg. at 61,493. But even the doubled amount is very likely a significant underestimate. For one thing, the Business Associations' members anticipate that OSHA has underestimated the number of employees who will decline to be vaccinated, and therefore the number of tests that must be purchased. *See* App. 7.K at ¶¶12-14 (Decl. of Stillman). And for another, testing costs can reach much higher than the weighted average that OSHA calculated. *See, e.g.*, Zoe Malin, *How to shop for FDA-authorized home Covid test kits: A guide*, NBC Select (Aug. 2, 2021), https://www.nbcnews.com/select/shopping/best-home-covid-tests-ncna1275687 (surveying tests that cost between $19 and $119, with

an average price of $68); OSHA, *Costs* at 5 (relying on survey to generate per-test price estimate).

OSHA's error is even more consequential given the ETS's six-month duration. The amounts at stake will be incurred over an extremely short time period—largely before January 4, 2022, but within four months further at the latest—not the years- or even decades-long horizon often associated with regulatory costs.

Moreover, absent a stay, the Business Associations' members would start incurring those costs immediately. OSHA, *Fact Sheet: OSHA's Vaccination & Testing ETS: How You Can Participate* at 1, https://bit.ly/3qCiFG0 (last visited December 14, 2021) ("Employers must comply with most requirements within 30 days of publication and certain testing requirements within 60 days of publication."). They must "begin preparing immediately" to meet the requirements related to "recordkeeping, tracking, identifying and securing testing, and deploying mask-compliance solutions." App. 7.F at ¶28 (Decl. of Sarasin). Because employers "must begin *now* to procure tests," among other things, App. 7.E at ¶14 (Decl. of Martz), "[c]omplying with the ETS will force [employers to] . . . immediately incur unrecoverable compliance costs," App. 7.G at ¶23 (Decl. of DeHaan). Indeed, for employers to have the millions of tests necessary for the first week of January alone, they must order them imminently.

Businesses cannot conjure a compliant workplace on the day that the ETS becomes enforceable. Instead, the Business Associations' members must immediately begin reallocating scarce labor—and even hiring new employees—to perform the recordkeeping and other supervisory tasks that compliance requires. App. 7.L at ¶23

(Decl. of Demos). Said otherwise, "[f]rom the perspective of the [Applicants], there are serious irreversible costs if the emergency rule is immediately allowed to go into effect." *In re: MCP No. 165*, En Banc Order at 30 (Sutton, C.J., dissenting).

Noncompliance would cause penalties to amass at the rate of up to $13,653 per violation. *See* Memorandum from P. Kapust, Acting Dir. Directorate of Enforcement Programs, to OSHA Regional Administrators, *2021 Annual Adjustments to OSHA Civil Penalties* (DOL-OSHA-DEP-2021-0001) (Jan. 8, 2021). When the penalties for noncompliance are so steep, Applicants cannot afford to wait. *See Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) ("[R]espondents were faced with a Hobson's choice: continually violate the [law] and expose themselves to potentially huge liability; or . . . suffer the injury of obeying the law during the pendency of the proceedings and any further review.").

B. The ETS will cause businesses to lose employees, lose sales and profits, and reduce or cease operations.

The ETS will exacerbate the unprecedented labor shortage that businesses are facing. App. 7.A at ¶¶25-36 (Decl. of Beckwith); App. 7.D at ¶¶15-17 (Decl. of Harned); App. 7.E at ¶15 (Decl. of Martz); App. 7.J at ¶14 (Decl. of MacKie). Applicants' members report that that their "delivery partners . . . will be unable to meet demand due to the labor shortage." App. 7.C at ¶24 (Decl. of Sullivan); App. 7.D at ¶22 (Decl. of Harned). Indeed, it is widely reported that the trucking sector is already facing a shortage "of more than 80,000 drivers." App. 7.G at ¶22 (Decl. of DeHaan). Stores already have closed or reduced hours because of the tight labor market, which means

lost employee hours, pay, and sales. App. 7.A at ¶¶25, 36 (Decl. of Beckwith); App. 7.F at ¶14 (Decl. of Sarasin).

Studies show that between 38-50% of unvaccinated employees say they would rather quit than submit to vaccination mandates. 86 Fed. Reg. at 61,475. "In a recent survey . . . more than 74% of the respondents told [one Applicant] they expect to lose more than 10% of their workers as a result of the ETS. Almost 10% of the respondents expect to lose more than 50% of their workforce if the ETS [remains in] effect." App. 7.H at ¶13 (Decl. of West). Another survey showed that 92% of respondents expected "that employees would quit their jobs rather than undergo weekly testing." App. 7.K at ¶12 (Decl. of Stillman). The same survey reported the expectation that 22% of employees would quit rather than submit to weekly testing, and 32% would quit rather than submit to vaccination. *Id.* at ¶¶13-14.

OSHA acknowledged this risk, but claims that the "data suggests that the number of employees who actually leave . . . is much lower." 86 Fed. Reg. at 61,475. OSHA speculates that only 1-3% of total employees will quit because of the mandate. *Id.* But OSHA's 1-3% estimate relies on a single article that summarizes data from *health care workers*—in Vermont. *Id.* at n.42. Even if OSHA had tried to show that the study was representative, an additional 1-3% turnover *above* Applicants' general attrition rate—which is already higher because of the pandemic—is a significant loss. When so many jobs already are unfilled, "[e]ach additional resignation or termination creates an even greater negative impact . . . because remaining employees no longer have capacity to pick up the slack." Ex. 6.C at ¶19 (Decl. of Sullivan).

OSHA's vaccine-or-testing mandate would make hiring and retention harder in a wide variety of sectors. *See* App. 7.A (Decl. of Beckwith); App. 7.B at ¶¶11-19 (Decl. of Gannon); App. 7.C at ¶17 (Decl. of Sullivan); App. 7.D at ¶19 (Decl. of Harned); App. 7.F at ¶21 (Decl. of Sarasin); App. 7.J at ¶17 (Decl. of MacKie). As one employer put it, "[w]e are already struggling to get and keep employees. This mandate will create an even larger challenge to keep our business open and operating." App. 7.K at ¶20 (Decl. of Stillman).

The Business Associations' members know they will lose employees if the ETS remains in effect because they have *already* encouraged vaccination through various incentives—including "paid time off," "bonuses of as much as $1,000," "gift cards and gas cards," and other measures. Ex. H at ¶9 (Decl. of West). Many workers have "told employers directly and unequivocally that they would choose to be fired if keeping their job required them to get vaccinated." App. 7.D at ¶13 (Decl. of Harned). As one employer explained: "I strongly support vaccinations, but the reality is that there is a percentage of my employees who are vehemently opposed to the covid vaccines, and no carrot or stick is going to change their mind." Ex. H at ¶19 (Decl. of West).

OSHA's alternative—weekly testing—is available only where tests are available and affordable, something that is far from the case in many locales. Ex. G at ¶25 (Decl. of DeHaan). One survey reported "that among those employers who have attempted to do so, only 28% are able to find adequate providers to ensure that weekly testing is available for their employees." App. 7.K at ¶17 (Decl. of Stillman). And even where testing is available, "[m]asking alone will result in employees quitting." App. 7.L at ¶32 (Decl. of Demos).

All this is happening at the worst possible time. Retailers are amid the holiday season, which generates a significant portion of their annual revenue. App. 7.E at ¶10, 15-21 (Decl. of Martz). And this season ordinarily requires the retail sector to employ additional workers. App. 7.J at ¶27 (Decl. of MacKie). Even if they can secure enough workers willing to accept forced vaccination or weekly testing, the ETS's recordkeeping obligations still reach more than $1 billion. *See* 86 Fed. Reg. at 61,490.

If truckers are "unable to meet demand," goods will not be delivered. App. 7.C at ¶24 (Decl. of Sullivan). If retailers must "delay expansions and product roll outs," goods will be difficult to purchase even aside from transportation issues. App. 7.E at ¶24 (Decl. of Martz). If grocers experience "diminish[ed] . . . ability . . . to meet the food needs of their communities," families will experience food insecurity. App. 7.F at ¶18 (Decl. of Sarasin). And if commercial kitchens cannot get food, "meal[s] away from home, whether at school, a hospital, or a military base, or on a cherished family night out," will become harder to come by. App. 7.I at ¶17 (Decl. of Allen).

"Without an adequate workforce—and strapped with compliance costs—[employers] will be forced to reduce their operations, forgo orders, and/or lose customers." App. 7.I at ¶22 (Decl. of Allen). "[A] reduced workforce will [also] decrease productivity and therefore injure the goodwill that [employers] have worked hard to earn from their customers." App. 7.D at ¶21 (Decl. of Harned). And businesses "will lose sales if they cannot meet customer demands" due to constraints in the labor and transport markets. App. 7.F at ¶19 (Decl. of Sarasin). "The ETS therefore places [employers] at a competitive disadvantage in an already constrained labor market." App. 7.H at ¶21 (Decl. of West).

For many of the Business Associations' members, the harms discussed above are threatening the very viability of their business. As several employers reported: "this could be catastrophic to our organization"; "[this] could put us out of business"; "[w]e already are 100 people short and these rules will close the stores due to lack of workers"; "it would bankrupt our company"; and, among many other similar reports "[the ETS] would be the most devastating event our company has ever experienced." App. 7.K at ¶19 (Decl. of Stillman).

III. The balance of the equities favors a stay.

Under 5 U.S.C. § 705, this Court need not go beyond the merits and irreparable harm to determine whether a stay is warranted. "It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors* 141 S. Ct. at 2490 (citation omitted). Enforcing an unlawful rule is not in the public interest, even in the context of a public health emergency. "Because OSHA's authority extends only to regulating the workplace, the equities embedded in the stay factors do not extend to the costs to society of having unvaccinated Americans. They extend only to the risks to workers and companies." *In re: MCP No. 165*, En Banc Order at 30 (Sutton, C.J., dissenting).

OSHA's ETS attempts to use brute regulatory power to impel vaccination of millions of Americans in December. Many of the Business Associations implored the Government to provide more time for compliance to avoid exacerbating each of the

societal problems.[6] But if the ETS remains in effect, it will cause irreversible and transformational economic harms. *See Chamber of Com.*, 577 U.S. at 1127.

A stay would not substantially burden the Government or the public interest. The Government has delayed its vaccination deadline for federal contractors to January 18. *Supra* n.4. It has also "delay[ed] until 2022 issuing suspensions and other serious penalties related to noncompliance" by federal employees. *Supra* n.3. If more time is appropriate to require millions of the Government's own employees and contractors to be vaccinated, then it cannot be inconsistent with the public interest to stay the ETS. A stay, moreover, would leave in place the Government's own authority to accomplish much of the work that the ETS shifts to employers. For instance, the Government could offer free or subsidized testing instead of pursuing a strategy that rests on the counterintuitive prediction that "prices will come down."[7]

Nor is the federal Government the only authority that can address the pandemic. Many states, such as Massachusetts, are using their police power to require vaccination. Some cities, such as New York City, are requiring vaccination in order to dine indoors at restaurants or engage in other activities, which may further encourage vaccination. And many private employers, depending upon their industry, workforce, and business realities may require vaccination on their own. Again, a stay

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[6] *See*, *e.g.,* Letter from David S. Addington, Executive Vice President and General Counsel, NFIB, to the Hon. Martin J. Walsh, Secretary of Labor (Sept. 14, 2021), https://assets.nfib.com/nfibcom/NFIB-Letter-David-Addington-9.15.21.pdf.

[7] Press Briefing by White House Coronavirus Response Coordinator Jeffrey Zients (December 10, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/12/13/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-72/.

of the unlawful ETS by this Court would not prohibit any of these efforts, which OSHA and the broader federal Government would be free to facilitate.

The balance of the equities therefore strongly weighs in favor of a stay of the ETS pending review.

CONCLUSION

For the foregoing reasons, the Business Associations respectfully request an immediate stay of the effective date of OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021).

In the alternative, this Court may treat this application as both a motion to stay and a petition for writ of certiorari before judgment; stay the ETS pending resolution of Applicants' petition for review; and set the case for expedited plenary review.

Dated: December 17, 2021

Respectfully submitted,

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In the Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

APPENDIX TO
EMERGENCY APPLICATION OF TWENTY-SIX BUSINESS ASSOCIATIONS FOR IMMEDIATE STAY OF AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

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