No. 21A____

In the Supreme Court of the United States

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021

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

EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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The petitioners below included the applicants here: the States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming

Other petitioners below included: AAI, Inc.; Aaron Abadi; Aaron Janz; AFT Pennsylvania; American Bankers Association; American Family Association, Inc.; American Federation of Labor-Congress of Industrial Organizations; American Road and Transportation Builders Association; American Trucking Associations, Inc.; Answers in Genesis, Inc.; Asbury Theological Seminary; Associated Builders and Contractors of Alabama, Inc.; Associated General Contractors of America, Inc.; Bentkey Services, LLC, d/b/a Daily Wire; Beta Engineering, LLC; Betten Chevrolet, Inc.; Brad Miller; Brick Industry Association; BST Holdings, LLC; Burnett Specialists; Cambridge Christian School, Inc.; Choice Staffing, LLC; Christian Employers Alliance ; Christopher L. Jones; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho Senate; Corey Hager; Cox Operating, LLC; David John Loschen ; Denver Newspaper Guild, Communications Workers of America, Local 37074, AFL-CIO; Dis-Tran Steel, LLC; Dis-Tran Packaged Substations, LLC; Doolittle Trailer Manufacturing, Inc.; Doyle Equipment Manufacturing Company; DTN Staffing, Inc.; Fabarc Steel Supply, Inc.; FMI – The Food Industry Association; Georgia Highway Contractors Association; Georgia Motor Trucking Association; Greg Abbott, Governor of Texas; Gulf Coast Restaurant Group, Inc.; Guy Chemical Company, LLC; Heritage

Foundation; Home School Legal Defense Association, Inc.; HT Staffing, Ltd.; Independent Bankers Association; Independent Electrical Contractors – FWCC, Inc.; International Foodservice Distributors Association; International Warehouse and Logistics Association; Jamie Fleck; Jasand Gamble; Job Creators Network; Julio Hernandez Ortiz; Kentucky Petroleum Marketers Association; Kentucky Trucking Association; King's Academy; Kip Stovall; Lawrence Transportation Company; Leadingedge Personnel Services, Ltd.; Louisiana Motor Transport Association; Massachusetts Building Trades Council; Media Guild of the West, the News Guild-Communications Workers of America, AFL-CIO, Local 39213; MFA, Inc.; MFA Enterprises, Inc.; MFA Oil Company; Michigan Association of Convenience Stores; Michigan Petroleum Association; Michigan Retailers Association; Michigan Trucking Association; Miller Insulation Company, Inc.; Mississippi Trucking Association; Missouri Farm Bureau Services, Inc.; Missouri Fam Bureau Insurance Brokerage, Inc.; National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO; National Association of Convenience Stores; National Association of Home Builders; National Association of Wholesaler-Distributors; National Federation of Independent Business; Natural Products Association; National Propane Gas Association; National Retail Federation; North America's Building Trades Unions; Oberg Industries, LLC; Ohio Grocers Association; Ohio Trucking Association; Optimal Field Services, LLC; Pan-o-Gold Banking Company; Phillips Manufacturing & Tower Company; Plastic Corporation; Rabine Group of Companies; Republican

National Committee; Riverview Manufacturing, Inc.; Robinson Paving Co.; RV Trosclair, LLC; Ryan Dailey; Sadie Haws; Samuel Albert Reyna; Scotch Plywood Company, Inc.; Scott Bedke, in his official capacity as Speaker of the Idaho House of Representatives; Service Employees International Union Local 32BJ; Sheriff Sharma; Signatory Wall and Ceiling Contractors Alliance; Sioux Falls Catholic Schools, d/b/a Bishop O'Gorman Catholic Schools; Sixarp, LLC; Sixty-Sixth Idaho Legislature; Southern Baptist Theological Seminary; Staff Force, Inc.; Tankcraft Corporation; Tennessee Chamber of Commerce and Industry; Tennessee Grocers and Convenience Store Association; Tennessee Manufacturing Association; Tennessee Trucking Association; Terri Mitchell; Texas Trucking Association; Tony Pugh; Tore Says LLC; Trosclair Airline, LLC; Trosclair Almonaster, LLC; Trosclair and Sons, LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton, LLC; Trosclair Claiborne, LLC; Trosclair Donaldsonville, LLC; Trosclair Houma, LLC; Trosclair Judge Perez, LLC; Trosclair Lake Forest, LLC; Trosclair Morrison, LLC; Trosclair Paris, LLC; Trosclair Terry, LLC; Trosclair Williams, LLC; Union of American Physicians and Dentists; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; United Food and Commercial Workers International Union, AFL/CIO-CLC; Waterblastings, LLC; Wendi Johnston; and Word of God Fellowship, Inc. d/b/a Daystar Television Network.

The respondents, who were also the respondents below, are the Occupational Safety and Health Administration; the Department of Labor; Douglas L. Parker, in his official capacity as Assistant Secretary of Labor of Occupational Safety and

Health; James Frederick, in his official capacity as Deputy Assistant Secretary of Labor of the Occupational Safety and Health Administration; Martin J. Walsh, in his official capacity as the Secretary of Labor; Joseph R. Biden, President of the United States; and the United States of America.

The following parties were proposed intervenors below: Chuck Winder, in his official capacity as President Pro Tempore of the Idaho State Senate; Scott Bedke, in his official capacity as Speaker of the House of Representatives of the State of Idaho; Jose A. Perez; and Nancy C. Perez.

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

Neither Congress nor the Executive Branch has been bashful about testing the limits of its authority. For that reason, a "lack of historical" precedent is often "the most telling indication" that Congress lacked the power to pass a law, or that an agency lacked the power to promulgate a regulation. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

This case involves a historically unprecedented administrative command. Relying on a decades-old statute pertaining to workplace dangers—the "Emergency Provision," 29 U.S.C. §655(c)—OSHA promulgated a rule regulating the private healthcare decisions of tens of millions of Americans. *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). This rule—call it the "Vaccine Mandate"—will "require roughly 80 million workers to become vaccinated or face a weekly self-financed testing requirement and a daily masking requirement." App.B-6 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). No Administration in history has issued a comparable mandate.

This case does not present the question whether vaccines or vaccine mandates are wise or desirable. Instead, it presents the narrow questions whether OSHA had authority to issue the Mandate, and whether it lawfully exercised whatever authority it had. After all, "our system does not permit agencies to act unlawfully," even during a pandemic and "even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of*

Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (*per curiam*). Here, the Emergency Provision's text confirms what the lack of historical precedent suggests: OSHA lacked the power to issue the Vaccine Mandate. Because the State petitioners will likely prevail on the merits, and because they have satisfied the remaining stay-pending-review factors, this Court should stay the Vaccine Mandate. *See* App.A-39–A-57 (Larsen, J., dissenting); App.B-6–B.32 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); App.B-33–B-42 (Bush, J., dissenting from the denial of initial hearing *en banc*). The Court should also enter an administrative stay immediately, allowing it time to review the filings in this emergency posture. Absent a stay, the Vaccine Mandate will take full effect on January 4, 2022.

In addition and in the alternative, the Court should treat this application as a petition for certiorari before judgment and grant immediate review of the Vaccine Mandate's legality.

OPINIONS BELOW

The Fifth Circuit stayed the Vaccine Mandate pending review. Its decision is published at *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021).

The Sixth Circuit denied initial *en banc* hearing on December 15, 2021. Its order, and several opinions respecting the order, are not yet published in the Federal Reporter. But they are reproduced as Appendix B.

The Sixth Circuit dissolved the stay on December 17, 2021. Its opinion is not yet published, but is reproduced as Appendix A to this application.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. §§1331 and 2101(f). It has authority to grant certiorari before judgment under 28 U.S.C. §1254(1).

STATEMENT

1. Congress passed the Occupational Safety and Health Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b). The Act created OSHA and empowered the Secretary of Labor to standardize, through OSHA, health and safety standards in worksites across the country. The standard-setting process is deliberate and technical. As of 2012, it took on average 93 months for OSHA to develop, consider, and finalize each of its standards. U.S. Government Accountability Office, *Workplace Safety and Health*, GAO-12-330, at 8 (Apr. 2012), https://perma.cc/J4Q8-FXWW.

In extremely limited circumstances, the Secretary can issue an "emergency temporary standard" without going through this process. 29 U.S.C. §655(c). The "Emergency Provision" allows OSHA to do so only if: (1) "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards"; and (2) the "emergency standard is necessary to protect employees from such danger." *Id.* As this demanding standard suggests, "Congress intended to restrict the use of emergency standards, which are promulgated without any notice or hearing." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 651 n. 59 (1980) (plurality op.). And the demanding test has served this function. Before issuing the standard at issue here, OSHA had

issued only ten emergency standards. Six were challenged. Just one of those six survived judicial review. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021).

The Occupational Safety and Health Act leaves room for States to play a role in the enforcement of occupational health and safety laws—but emergency standards handcuff state discretion. If a "State … desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," it "shall submit a State plan for the development of such standards and their enforcement." 29 U.S.C. §667(b). When a State chooses to have its own program, it must generally "establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions." *Id.* §667(c)(6). And, of particular importance here, the State Plan's standards must be "*at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated under section 655"—the same section that contains the Emergency Provision. *Id.* §667(c)(2) (emphasis added). Thus, once the Secretary issues an emergency temporary standard, States with approved plans must adopt those standards too.

2. On November 5, 2021—almost a year after vaccines became available to the public, and about two months after President Biden declared that he would mandate vaccines because his "patience" with unvaccinated Americans was "wearing thin," *see*

Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://perma.cc/YJW3-K3AX—OSHA issued an emergency temporary standard. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402-01 (Nov. 5, 2021). This standard, the "Vaccine Mandate," applies to most employers with 100 or more employees, including States with State OSHA Plans. *Id.* at 61551, 61462, 61506. And it saddles these employers with heavy burdens pertaining to employees and vaccines. Each employer must: "determine the vaccination status of each employee"; "require each vaccinated employee to provide acceptable proof of vaccination status"; "maintain a record of each employee's vaccination status"; and "preserve acceptable proof of vaccination." *Id.* at 61552. Employees who refuse to vaccinate must obtain an approved test once every seven days—a test that employers may require employees to pay for. *Id.* at 61530, 61532. Employers must "keep" unvaccinated employees who do not produce test results "removed from the workplace." *Id.* at 61532. And employers must "maintain a record" of test results. *Id.* Unvaccinated employees must be required to wear masks at work, except in extraordinarily limited circumstances. *Id.* at 61553.

The Vaccine Mandate gave employers until December 6 to comply with most of the standard's requirements. *Id.* at 61554. Employers have until January 4 to comply with weekly testing requirements for not-fully-vaccinated employees. *Id.*

States, for their part, face deadlines of their own. The adoption of the emergency temporary standard by State Plans, the Mandate says, "must be completed within 30 days of the promulgation date of the final Federal rule." *See id.*

at 61506 (citing 29 C.F.R. §1953.5(b)). Further, "State Plans must notify Federal OSHA of the action they will take" by November 20, 2021. *Id*.

3. Numerous parties, including the State petitioners here, challenged the Vaccine Mandate in circuit courts across the country. (The Occupational Safety and Health Act requires that parties file their challenges to emergency temporary standards directly in circuit courts of appeals. 29 U.S.C. §655(f).) Many of those parties sought an immediate stay of the Vaccine Mandate pending judicial review. The parties that sued in the Fifth Circuit succeeded. That court issued an order staying the Vaccine Mandate and enjoining OSHA from taking any steps to enforce or implement it. *BST*, 17 F.4th at 619.

A few days later, the judicial panel on multidistrict litigation selected the Sixth Circuit to hear and resolve the challenges to the Vaccine Mandate. As a result, and as required by 28 U.S.C §2112(a)(3), all of the pending challenges were transferred to and consolidated in the Sixth Circuit. The Fifth Circuit formally transferred *BST* to the Sixth Circuit the next day, on November 17. On November 23—*eleven days* after the Fifth Circuit stayed the Vaccine Mandate—OSHA moved the Sixth Circuit to dissolve that stay. *See Respondents' Emergency Motion to Dissolve Stay*, No. 21-7000, Doc. 69 (6th Cir.).

On the evening December 17, 2021—two days after the Sixth Circuit denied petitions for an initial *en banc* hearing, *see* App.B—a divided Sixth Circuit panel granted OSHA's motion and dissolved the stay. App.A. Judge Larsen dissented. She

would have left the stay in place. App.A-39–A-57 (Larsen, J., dissenting). The States filed this application early the next morning.

REASONS TO GRANT THE APPLICATION

This case comes to the Court because, a year and a half into this pandemic, the Executive Branch claimed to have discovered a power to regulate the private healthcare decisions of American workers. After President Biden announced his plan to mandate vaccinations through an emergency temporary standard, it took OSHA almost two months to issue that standard. The "emergency" standard, for its part, will not even go into full effect until January. Given the immensely important issues the case presents, and given the likelihood that the States will prevail on the merits, maintaining the *status quo ante* a bit longer is amply justified. The Court should immediately stay enforcement of the Vaccine Mandate pending final judgment. In addition, the Court should grant certiorari before judgment and resolve this case on an expedited basis. Finally, the States seek an immediate administrative stay, which would give this Court a chance to review the many filings in this matter before ruling on the stay request.

I. The Court should stay the Vaccine Mandate's enforcement pending review

In deciding whether to issue a stay, this Court considers "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418,

434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id.*

Here, each factor favors a stay.

A. The States will likely prevail on the merits

OSHA promulgated the Vaccine Mandate under the "Emergency Provision," which states:

> The Secretary shall provide … for an emergency temporary standard to take immediate effect … if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be 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). For at least five reasons, OSHA exceeded its power under this provision when it promulgated the Vaccine Mandate. *First*, COVID-19 is not an occupational danger that OSHA may regulate. *Second*, COVID-19 does not present the type of "grave" danger that the statute requires. *Third*, the Vaccine Mandate does not satisfy the Emergency Provision's necessity requirement. *Fourth*, the challenged standard is not a "temporary" response to an "emergency." *Finally*, various interpretive principles—the major-questions doctrine, the federalism canon, and the constitutional-doubt canon—require the States' reading.

1. COVID-19 is not an occupational danger that OSHA may regulate

"First, as a threshold matter, the Occupational Safety and Health Act gives the Secretary power to address only *occupational* health and safety risks." App.B-6 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). It does not apply "to all hazards that might affect employees at some point during the 16 hours of each

weekday and the 48 hours of each weekend when they are not at work, whether the hazard arises from a coronavirus of one sort or another, a virulent flu, traffic safety, air pollution, vandalism, or some other risk to which people are equally exposed at work and outside of work." *Id.* Because COVID-19 (at most worksites) presents the latter sort of risk, it falls outside the Emergency Provision's scope.

a. The goal of statutory interpretation is to "interpret the words consistent with their ordinary meaning ... at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quotation omitted). This case therefore calls on the Court to consider how ordinary English speakers would understand the phrase "grave danger from exposure to substances or agents … or from new hazards" as that phrase appears in a sentence about risks to which "*employees* are exposed." In that context, ordinary English speakers would understand the phrase as referring to dangers presented by work, not those presented by human life generally. Thus, the Emergency Provision is best read to reach dangers to which employees are exposed *because* they are employees—work-related dangers, like mercury exposure in a manufacturing plant—not to dangers presented by the mere fact of existence.

Consider, for example, the dangers posed by violent crime and regional air pollution. The former is a hazard, the latter a danger that arises from a substance or agent. Employees may well confront those risks at work. But OSHA possesses no broad emergency power to regulate violent crime or regional air pollution. For these risks do not typically arise from the work itself and would not naturally be described

as risks to which "employees are exposed." Dangers to which "employees are exposed" include only those typically described as "occupational dangers." As the Eleventh Circuit explained almost forty years ago, "for coverage under the Act to be properly extended to a particular area, the conditions to be regulated must fairly be considered *working* conditions, the safety and health hazards to be remedied *occupational*, and the injuries to be avoided *work-related*." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

Context bolsters the point. The Occupational Safety and Health Act, of which the Emergency Provision is a part, often refers to "substances," "agents," and "hazards," but always in connection with dangers arising from work. One provision requires the agency to make a report "listing … all toxic *substances in industrial usage*." 29 U.S.C. §675 (emphasis added). Another directs OSHA to develop "criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are *safe for various periods of employment*, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy *as a result of his work experience*." §669(a)(3) (emphasis added). Still another requires the government to conduct studies on "the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, transported *from the workplaces* of such workers." §671a(c)(1)(A) (emphasis added). It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is

used." *Reno v. Koray*, 515 U.S. 50, 56 (1995) (quotation omitted). And the just-discussed context makes it even more unnatural to read the Emergency Provision—the "most dramatic weapon in" OSHA's "enforcement arsenal," *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984)—as reaching beyond dangers that are fairly described as occupational in nature.

"The agency's regulations reflect this understanding too." App.B-17 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Chief Judge Sutton, in his opinion below, collected numerous examples of OSHA regulations demonstrating that the agency "in the past has understood its authority in [a] work-anchored way." *Id*. at B-18. To name just a couple, OSHA "requires employers to compensate employees for protective gear and tests needed for work safety," but makes an exception "for costs that are not specific to the workplace," such as "sunscreen or steel-reinforced boots." *Id*. (citing 29 C.F.R. §1910.132(h), (h)(2), (h)(4)(iii)). OSHA also requires employers to record the "amount of a toxic substance or harmful physical agent to which [any] employee is or has been exposed." 29 C.F.R. §1910.1020(e)(2)(i)(A)(1). This requirement does not apply, however, if "the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations." *Id*. §1910.1020(c)(8). Other examples reflecting this interpretation are easy to find. *See* App.B-18 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Agencies have every incentive to construe their powers broadly. Yet OSHA

has consistently linked its regulations to occupational dangers. That is as good a sign as any that OSHA's jurisdiction remains limited to dangers of that sort.

In the end, whatever "the health and safety challenges of today (air pollution, violent crime, obesity, a virulent flu, all manner of communicable diseases) or tomorrow (the impact of using the internet on mental health), the Secretary does not have emergency authority to regulate them all simply because most Americans who face such endemic risks also have jobs" where they "face those same risks on the clock." App.B-16 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

From this, it follows that the Vaccine Mandate is illegal. For the vast majority of covered employees, the COVID-19-related risk presented by work is the same risk that arises from human interaction more broadly. The virus's "potency lies in the fact that it exists everywhere an infected person may be—home, school, or grocery store, to name a few." App.A-49 (Larsen, J., dissenting). Because it is not an occupational danger, it is not the sort of danger that the Emergency Provision empowers OSHA to address.

b. The Sixth Circuit's majority opinion does not meaningfully engage with any of this. It defines "agent" and "substance" and "hazard," noting that SARS-CoV-2 and COVID-19 qualify. App.A-11. And it notes that OSHA can regulate (and has regulated) viruses and illnesses—including viruses and illnesses that one can contract both at work and outside of work. App.A-11–12. The States do not and have not disputed either point. Their argument is that the Emergency Provision speaks only to hazards and substances (like saws without safety guards or asbestos-containing

brake pads) that employees face because of their employment—not to hazards and substances (like violent crime or SARS-CoV-2) that employees confront at work only because they are "hazard[s] of *life* in the United States and throughout the world." App.B-37–B-38 (Bush, J., dissenting from the denial of initial hearing *en banc*). As explained above, the Occupational Safety and Health Act does not empower OSHA to regulate the latter sort of danger.

What is more, the States are happy to assume that viruses *are* a covered danger in some workplaces. For example, COVID-19 could be a workplace risk at a lab that works with SARS-CoV-2; in that setting, work itself would expose employees to a COVID-19-related danger. Similarly, "bloodborne pathogens" present a workplace danger to employees whose jobs require work with such pathogens. App.A-12. (And in any event, when OSHA promulgated its bloodborne-diseases standard, it trained its attention on *occupational* exposure, recognizing that the "risk attributable to occupational exposure is the difference between the risk faced by exposed workers and the background risk faced by the general population." 56 Fed. Reg. 64004, 64027 (Dec. 6, 1991). The Vaccine Mandate is not so focused.) Along the same lines, OSHA's "workplace sanitation and fire rules," address workplace risks—employees forced to work in unsanitary or unsafe conditions face risks *because of* their work. But no ordinary English speaker would describe the risk of contracting an endemic illness as a danger arising from work. Perhaps recognizing this defect in its argument, the Sixth Circuit notes OSHA's finding "that workplaces have a heightened risk of exposure to the dangers of COVID-19 transmission." App.A-13, 22; *see also* App.A-24.

What it fails to appreciate is that the risk is (again, for most professions) not occupational in nature: the virus is transmitted at work because work is a place where people gather together. If that sufficed to constituted a workplaces risk, then the Occupational Safety and Health Act would cover every danger that humans face as a result of being alive.

2. COVID-19 does not present the type of "grave" danger that the statute requires

a. The word "grave," at the time of the Emergency Provision's passage, meant exactly what it means today: "very serious; dangerous to life." *Grave*, Webster's Third New International Dictionary (2003); *see also Grave*, The American Heritage Dictionary of the English Language (1973) ("Fraught with danger; critical"). While all dangers are (by definition) dangerous, the adjective "grave" requires more than mere danger—it requires especially serious danger. That insight is bolstered by the fact that the Emergency Provision uses the phrase "grave danger" in connection with the phrase "from exposure to substances or agents determined to be toxic or physically harmful." Under "the principle of *noscitur a sociis*," words in a statute are known by the company they keep. *BST*, 17 F.4th at 613 (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)). When the phrase "grave danger" appears alongside a phrase "connoting *toxicity* and *poisonousness*," the first phrase cannot reasonably be interpreted to include dangers (including "airborne virus[es]") that are "both widely present in society" and "non-life-threatening to a vast majority of employees." *Id*.

OSHA's own data show that COVID-19, while dangerous, presents no "grave" danger. For example, the Vaccine Mandate cites a study showing that unvaccinated individuals aged 16 or older—a group that includes elderly retirees, who are far more at risk than a typical worker—face a 0.6 percent chance of death if they contract COVID-19 and a 1.5 percent chance of being admitted to an intensive care unit. *See* Jennifer B. Griffin, et al., *SARS-CoV-2 Infections and Hospitalizations Among Persons Aged ≥16 Years, by Vaccination Status—Los Angeles County, California, May 1–July 25, 2021*, MMWR Morb Mortal Wkly Rep 2021; 70(34): 1172, https://perma.cc/4ZV3-94SA (relied upon at Vaccine Mandate, 86 Fed. Reg. at 61418). These risks are not significantly greater than the risks faced by *vaccinated* individuals who contract COVID-19; those individuals have a .2 percent chance of death and a .5 percent chance of being admitted to an intensive-care unit. *Id.* While unvaccinated workers are three times more likely to die or be hospitalized, a small risk trebled is still a small risk. So both groups face a small risk of serious illness.

This data dooms OSHA's case, because the agency *concedes* that fully vaccinated workers face no "grave" danger from COVID-19. 86 Fed. Reg. at 61434. OSHA has not explained how the higher-yet-still-small risk faced by unvaccinated workers crosses the line from a not-grave danger to a grave danger. Indeed, the risks to both groups are comparable to well-known risks that no one would describe as "grave." The odds of dying in a motor-vehicle crash at some point during one's life, for example, are 1 in 107 (.93 percent). *See Odds of Dying*, National Safety Council, https://perma.cc/3FTE-376P.

The "government's own data" create further problems for OSHA. Consider, for example, data showing "that the death rate for *unvaccinated* persons between the ages of 18 and 29 is roughly equivalent to that of *vaccinated* persons between 50 and 64." App.A-49 (Larsen, J., dissenting). "So an unvaccinated 18-year-old bears the same risk as a vaccinated 50-year-old. And yet," according to OSHA, "the 18-year-old is in grave danger, while the 50-year-old is not. One of these conclusions must be wrong; either way is a problem for OSHA's rule." *Id*.

OSHA's focus on the dangers faced by unvaccinated individuals gives rise to another problem: the agency cannot measure the existence of a "grave" danger by focusing exclusively on the subset of workers (the unvaccinated) most at risk from COVID-19. If it could, then almost any "substance" or "agent" could be said to pose a grave danger. Peanut butter, for example, creates immense danger for individuals with severe allergies. But surely OSHA could not justify a nationwide emergency standard regarding the workplace consumption of peanut butter on the ground that peanut butter creates a grave risk for this small subset of individuals. Similarly here, even if OSHA could establish that *unvaccinated* employees face a "grave" danger, the Mandate would still be illegal because OSHA has not shown that employees *in general* face a grave danger from COVID-19. (Conversely, OSHA cannot rely on purported harms from the virus to society at large—instead, it must home in on the risk presented in the workplace. *See* App.A-50 (Larsen, J., dissenting).) Because many elderly individuals are at the highest risk but also retired, population-wide

statistics cannot prove a grave danger to the workforce. The States address this point in greater depth below, when addressing whether the Mandate is "necessary.")

In the end, the Mandate is nothing more than a pretext for increasing the number of vaccinated Americans. *See* App.B-38 (Bush, J., dissenting from the denial of initial hearing *en banc*). The White House Chief of Staff thinks so. He publicly endorsed, on Twitter, the view that OSHA's "vaxx mandate … is the ultimate work-around for the Federal govt to require vaccinations." *BST*, 17 F.4th at 612 n.13 (citation and emphasis omitted). "In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements." *Id.* at 614; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019). Otherwise, courts would be made "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 139 S. Ct. at 2575 (quotation omitted).

That principle applies with special force here, where the agency's actions are inconsistent with its warnings of grave danger. If OSHA really believed that COVID-19 satisfied the "grave danger" standard, what could possibly justify limiting the Vaccine Mandate to companies with 100 or more employees? OSHA says it chose this number because the agency "is less confident that smaller employers" can implement the standard's requirements "without undue disruption." 86 Fed. Reg. at 61403. It is inconceivable that OSHA would take administrative ease into account in deciding whether small businesses must protect their employees from a risk—exposure to a highly lethal gas, for example—that was truly "grave." *See* App.B-27–B-28 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

b. The Sixth Circuit's discussion of "grave danger" ignores all of this. Indeed, one would be excused for mistaking its opinion for the Vaccine Mandate itself. The majority's primary mode of argument consists of quoting the Vaccine Mandate's findings regarding the illnesses and deaths that COVID-19 has caused. App.A-22–25. But all this does is prove a point not in dispute: no serious person denies that COVID-19 is dangerous. The question is whether that danger amounts to a "grave" danger to workers. On that, the majority has little to say. It never addresses OSHA's own data showing that both vaccinated employees (whom OSHA concedes are not in grave danger) and unvaccinated individuals face low risks of death and serious illness if they contract COVID-19. It never addresses the fact that *the government's own data* are inconsistent with a finding of "grave" danger across the broad sweep of employees the Mandate covers. App.A-49 (Larsen, J., dissenting). It accordingly never comes to grips with the reality that, on OSHA's own telling, the only workers who face a grave danger do so by "choice"—they have made a "personal medical decision for themselves." App.B-30 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). And it never addresses the fact that the vast majority of the American workforce is non-elderly, and thus faces a substantially lower risk.

It is true enough that courts must pay some degree of deference to an agency's expertise. App.A-23 (majority op.); *see also* App.A-38 (Gibbons, J., concurring). But in this context, as in so many others, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003). Courts must, at the very least, "inquire into whether OSHA 'carried out [its] essentially

legislative task in a manner reasonable under the state of the record before [it].'" *Asbestos Info. Ass'n/N. Am.*, 727 F.2d at 421. As the foregoing shows, it did not. Simply reciting the agency's findings and declaring them reasonable does not establish otherwise. That is all the Sixth Circuit's opinion does.

3. The Vaccine Mandate does not satisfy the Emergency Provision's necessity requirement

a. The Emergency Provision forbids the issuance of emergency temporary standards except in cases where they are "necessary." 29 U.S.C. §655(c)(1). Thus, OSHA must show not just that the emergency standard is a good idea or effective, but also that the agency has little practical choice except to regulate without first subjecting its regulation to notice and public comment. That is what "necessary" means: "needed for some purpose or reason; essential." *Black's Law Dictionary* 1241 (11th ed. 2019); *accord* App.B-19–B-20 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). This necessity requirement, which is more demanding than the "reasonably necessary or appropriate" standard applicable to most OSHA regulations, 29 U.S.C. §652(8); *see also Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615 (1980), shows that "Congress intended a carefully restricted use of the emergency temporary standard," *Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Lab.*, 489 F.2d 120, 130 n.16 (5th Cir. 1974).

Given the meaning of "necessary," one problem for OSHA stands out immediately: the Vaccine Mandate never finds that its requirements qualify as "necessary" in the relevant sense. Instead of concluding that the Mandate was "indispensable to address a grave danger," the Vaccine Mandate explains why its terms would be

"beneficial to protect workers and society as a whole." App.B-20 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). The absence of any such finding is a fatal defect. Because courts may not uphold agency actions based on reasons the agency never gave, *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), and because the Vaccine Mandate nowhere says that it is essential or indispensable to (rather than useful for) arresting a workplace danger, the Vaccine Mandate is unsupported and thus invalid.

Even if OSHA had declared the Mandate indispensable, however, that finding would not survive the slightest scrutiny. For one thing, because vaccines have become freely available to all workers who want them, the government need not mandate vaccines to make workers safe—workers can elect to take vaccines or not, and those who do will, as OSHA concedes, free themselves from any "grave" danger. It is hard to claim that a mandate is necessary "to protect unvaccinated working people from themselves" when those same workers could obtain a vaccine for free whenever they like. App.B-23 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

The Mandate's remarkable breadth also defeats any claim to necessity. With the Vaccine Mandate, OSHA irrationally requires the same thing of *every* covered workplace and worker. This means that workers who are significantly spaced out whenever they are inside (in a warehouse or garage or barn, for example) are treated the same as employees bunched together in close, poorly ventilated quarters. *BST*, 17 F.4th at 615. And it means that the Vaccine Mandate unnecessarily applies even

to workers who have acquired natural immunity. *Id.*; Attachment A-1, Indiana's Stay Mtn, Decl. of Dr. Bhattacharya, Doc.150, ¶23 (6th Cir.).

OSHA gave no consideration to a more narrowly tailored mandate. And there were obvious options available to it. "The record does not show that full vaccination or weekly testing is necessary on top of a" mask mandate "tailored" to particular industries and environments. App.B-21 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). OSHA "could focus any requirements on the workers most at risk—those over 65, those with pre-existing conditions most vulnerable to the virus," and so on. *Id.* "The Secretary could create exemptions for those least at risk, say cohorts from age 18 to 49, a population range that faces healthcare risks from COVID-19 at roughly the same level as the Secretary's own assessment of what is not a grave risk, with some slightly above and some slightly below." *Id.* (citing 86 Fed. Reg. at 61,434). "Or the Secretary could impose requirements that account for the many environments in which Americans work." *Id.* "But that is not what the rule does." *Id.* Instead, it imposes a uniform approach on "2 out of 3 private-sector employees in America, in a workforce as diverse as the country itself." *BST*, 17 F.4th at 615. That is the anthesis of a showing of necessity.

OSHA confuses necessity with efficacy. It trumpets the effectiveness of vaccines and masks, but it does little to explain why these specific measures are *required* to address the threat. Wearing a hazmat suit, for instance, might be an effective way to stem the spread of COVID-19. But no one would suggest that such a step is "necessary" to establish a safe workplace. The agency needs to tie the gravity

of the threat to the aggressiveness of the required measures and establish that no meaningfully less-restrictive means would suffice. It has not done that.

In the end, OSHA cannot prove that its Mandate is "necessary" to confront a "grave" risk when: (1) "the key population group at risk from COVID-19—the elderly—in the main no longer works"; (2) "members of the working-age population at risk—the unvaccinated—have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group"; and (3) "the remaining group—the vaccinated—does not face a grave risk by [OSHA's] own admission, even if they work with unvaccinated individuals." App.B-7 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). "Countless lesser and more focused measures were available to the Secretary." *Id.* So a "blunt national vaccine mandate for 80 millions workers with little regard to the relevant employment circumstances … was not necessary" in the sense demanded by the Emergency Provision. *Id.*

b. The Sixth Circuit recognized that a "necessary" standard is one "essential to reducing the grave danger" in question. App.A-25. Yet it denied that a standard must be "indispensable" to qualify as "essential." App.A-25–A-26 (quoting App.A-44 (Larsen, J., dissenting)). This makes little sense, as the words are synonyms. It appears the Circuit was equivocating—claiming to require a showing of necessity while actually applying an efficacy standard. App.A-45 (Larsen, J., dissenting). Though it never quite says so expressly, it seemingly accepted the proposition that, as long as the standard will work reasonably well, it need not be tailored to any meaningful degree. *Id.*; *accord* App.A-26–31. For example, although it incorrectly excuses

OSHA's failure to "account for the many environments in which Americans work," App.B-30 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); *see* App.A-29 (majority op.), it never even addresses OSHA's failure to consider less restrictive measures, such as a "tailored mask mandate," App.B-21 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Based on its flawed understanding of the phrase "necessary," and based on evidence showing that the Vaccine Mandate *might* be effective at stopping the spread of COVID-19 at worksites, the Sixth Circuit found the necessity requirement satisfied. Since the premise was flawed—"necessary" does not mean "unnecessary but effective"—the argument fails. (And the majority never does get around to addressing the *Chenery* problem discussed above. *See also* App.A-45 (Larsen, J., dissenting).)

4. The challenged standard is not a "temporary" response to an "emergency"

The Emergency Provision empowers OSHA to issue "emergency temporary standard[s]." 29 U.S.C. §655(c). But the Mandate does not qualify as a "temporary" standard, and it did not issue in response to an "emergency" in the relevant sense. *See* App.B-21–B-23 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

a. Begin with the lack of any emergency. "Whether one looks to the Secretary's strongly encouraged preference (vaccinate) or discouraged alternative (test and wear a mask), it is difficult to understand how on November 5, 2021, an 'emergency' suddenly took hold requiring the imposition of a vaccine-or-test mandate by January 4, 2022." *Id.* at B-22. Masks "are not a new idea"—they "have been a protective tool

from the outset." *Id.* "Given the wide availability of this option since the beginning," and given that today "fewer people face lethal risks from COVID-19," the view that a test-and-mask requirement is now required to respond to an "emergency" "sucks the concept dry of meaning." *Id.* And while vaccines are "newer," they "hardly are a revelation." *Id.* Anyway, their introduction would seem to run counter to OSHA's argument. Since the vaccines "alleviate the health risks from the pandemic rather than make them worse," the case for an emergency would appear lesser not greater. *Id.* What is the emergency that called for this standard to issue *in late 2021*? "Why now?" *Id.*

Even if there were an emergency, a vaccine mandate is not "temporary" in any relevant sense. *Id.* Those who vaccinate will be vaccinated for good. While it is true that the Mandate will one day expire, that hardly makes the Mandate's effects temporary. To argue otherwise would "convey considerable insensitivity to those who, for reasons of their own, are reluctant to roll up their sleeves." *Id.* "By any measure, a vaccine injection is not temporary." *Id.* "A vaccine may not be taken off when the workday ends; and its effects, unlike this rule, will not expire in six months." App.A-51 (Larsen, J., dissenting).

b. The Sixth Circuit majority did not address the non-temporary nature of vaccination. It did address the "emergency" requirement. It stressed that, even if OSHA should have acted sooner, it would only "compound[] the consequences of the Agency's failure to act" to hold that "because OSHA did not act previously it cannot do so now." App.A-19 (quotation omitted). But the States are not making an estoppel

argument. Instead, they are pointing to OSHA's tremendous delay—and, in particular, its decision to do nothing until long *after* vaccines became widely available—as evidence that there is not at present any "emergency" calling out for action. The evidence of pretext, which the Sixth Circuit never addressed, casts further doubt on any "emergency" finding.

The Sixth Circuit also noted that OSHA identified an increased return to the workplace, along with the rise of Delta and other variants, as establishing an emergency. *Id*. People are returning to work because the situation is safer than it was—so that, if anything, suggests any emergency is waning. True, there are variants. But there always will be, as that is the nature of viruses. (OSHA has never claimed that vaccines will wipe the virus off the face of the Earth.) If *that* were enough to prove an emergency, it would portend an indefinite emergency. And if "human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Does 1–3 v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief).

5. The major-questions doctrine, the federalism canon, and the constitutional-doubt canon require the States' reading

Three interpretive principles require the Court to resolve any lingering ambiguity in the States' favor.

a. Major-Questions Doctrine

The major-questions doctrine compels the States' reading. *BST*, 17 F.4th at 617–18; *id*. at 619 (Duncan, J., concurring); App.B-13 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). This doctrine requires "Congress to speak

clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air*, 573 U.S. at 324 (quotation omitted); *see also Realtors*, 141 S. Ct. at 2489. The question whether Congress can conscript employers into serving as the muscle behind a mandate aimed at regulating private healthcare decisions certainly fits the bill. If Congress wanted to grant such immense power to an agency, it would have been much clearer about its intention to do so. *See Realtors*, 141 S. Ct. at 2489; App.B-13 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

The doctrine's application is especially clear in light of the unprecedented nature of the Vaccine Mandate. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Util. Air*, 573 U.S. at 324 (quotation omitted). Yet OSHA has never issued any remotely comparable rule in all its history. App.B-14 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Its inaction is not likely the product of self-restraint. Agencies consist of government officials, and government officials tend to test the limits of their authority. That is why our Constitution divides power between the branches, *see* The Federalist No. 51 (Madison), p.349 (Cooke, ed., 1961), and "why Lord Acton did not say 'Power tends to purify,'" *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Here, as is so often the case, a "lack of historical" precedent implies a lack of authority. *Free Enter. Fund*, 561 U.S. at 505 (quotation omitted).

OSHA has never denied that this case presents a major question. It has instead argued that the Emergency Provision *unambiguously* empowered the agency to issue the Vaccine Mandate. The Sixth Circuit majority agreed. *See* App.A-16. For all the reasons laid out above, that argument cannot be taken seriously. The same could be said of its argument that the Vaccine Mandate "is not an enormous expansion of [OSHA's] regulatory authority." App.A-15. "OSHA has never issued an emergency standard of this scope." App.A-52 (Larsen, J., dissenting). "Each of [the Mandate's] few predecessors addressed discrete problems in particular industries." *Id.* (collecting examples). With the Vaccine Mandate, however, OSHA "claims authority to impose a vaccinate-or-test mandate across 'all industries' on 84 million Americans (26 million unvaccinated) in response to a global pandemic that has been raging for nearly two years." *Id.* (quoting 86 Fed. Reg. at 61424). And, most critical of all, the Vaccine Mandate purports to regulate private healthcare decisions, rather than workplace safety alone. That is unprecedented.

b. Federalism canon

According to the federalism canon, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Realtors*, 141 S. Ct. at 2489 (quotation omitted). This clear-statement rule functions much like the major-questions doctrine, requiring Congress to "speak unequivocally" if it means for the federal government to assume powers traditionally wielded by States. App.B-14 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). The canon applies here because "the States, not the Federal Government, are the

traditional sources of authority over safety, health, and public welfare." *Id.*; *accord* App.B-33 (Bush, J., dissenting from the denial of initial hearing *en banc*).

If Congress wanted to empower OSHA to mandate vaccinations—and thus to "nullify all contrary state and local regulations" regarding vaccines—it needed to do so expressly. App.B-6 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). The Emergency Provision does not do so, as the foregoing shows.

The Sixth Circuit denied that its ruling creates any "federalism concerns." App.A-17. Why not? Because, although public health has "traditionally been a primary concern of state and local officials, Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health." *Id.* (quoting *Farmworker Just. Fund v. Brock*, 811 F.2d 613, 625 (D.C. Cir. 1987) (internal quotation marks omitted)). But that argument is circular, because it assumes that the Act applies in these circumstances—that it applies to public health rather than occupational health. The federalism canon suggests that it does not.

c. Constitutional-doubt canon

Statutes should be construed so as to avoid placing their constitutionality in doubt. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Emergency Provision is unconstitutional, on two separate grounds, if it empowers OSHA to issue the Vaccine Mandate.

Commerce Clause. The Commerce Clause, which entitles Congress "[t]o regulate Commerce … among the several States," U.S. Const. art. I, §8, cl. 3, is the only enumerated power that conceivably empowered Congress to enact the

Emergency Provision. While courts have broadly construed the Clause's language, two limiting principles prove relevant here. First, this 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, 618–19 (2000) (quotation omitted). Because Congress has no police power, and because regulating public health and safety is part of the police power, *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905), the Commerce Clause gives Congress no power to regulate public health and safety. Second, the Commerce Clause does not permit the regulation of private inactivity, such as the decision not to purchase health insurance. *NFIB v. Sebelius*, 567 U.S. 519, 557–58 (2012) (op. of Roberts, C.J.).

If the Emergency Provision authorizes the Vaccine Mandate, it runs afoul of both limits. First, the Vaccine Mandate is a public-health regulation: it regulates private healthcare decisions by making life harder for citizens who refuse to care for themselves in the federally approved manner. Second, the Vaccine Mandate regulates private inactivity: those who fail to vaccinate will either be fired or forced to obtain expensive weekly testing.

The Sixth Circuit concluded that, because the Vaccine Mandate requires employers to enforce its terms, the Vaccine Mandate simply regulates the economic activity of employers engaged in commerce, *not* the inactivity of citizens or the public health. *See* App.A-32–33. That gloss on the Mandate's operation is creative but unavailing. The Mandate regulates private inactivity by requiring employers to enforce the Mandate's terms in response to employees' private inactivity—namely,

the decision not to vaccinate. That constitutes an impermissible regulation of private inactivity. To illustrate, remember that Congress cannot, under the Commerce Clause, make individuals buy health insurance. *NFIB*, 567 U.S. at 558 (op. of Roberts, C.J.). No court would permit Congress to evade that rule by passing a law forbidding employers from retaining uninsured employees. That hypothetical law, just like the requirement to buy health insurance at issue in *NFIB*, would regulate private inactivity. So does the Vaccine Mandate. App.B-37 n.2 (Bush, J., dissenting from denial of initial hearing *en banc*).

Nondelegation doctrine. OSHA's broad reading of the Emergency Provision would turn the statute into an unconstitutional delegation of legislative authority. "[A] statutory delegation" of policymaking power "is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quotation and alterations omitted). In other words, when Congress empowers an agency to regulate, it must enact "specific restrictions" that "meaningfully constrain[]" the agency's exercise of authority. *Touby v. United States*, 500 U.S. 160, 166–67 (1991).

The Emergency Provision contains no intelligible principle if it is read to permit the Vaccine Mandate. On OSHA's reading, all viruses are "agents" or "substances" for purposes of the Emergency Provision, and those viruses cause a "grave" danger whenever they threaten serious health effects to even a small subset of the overall population. Read in that manner, the Emergency Provision empowers

OSHA to demand whatever measures it thinks are necessary in response to almost every remotely serious germ known to mankind. That almost-limitless grant of authority contains no intelligible principle.

B. The States and their citizens will be irreparably harmed without a stay

Without a stay, the States will sustain three irreparable injuries.

First, without the stay, OSHA will irreparably harm the States by intruding on their sovereign authority to enact and enforce policies that conflict with the Vaccine Mandate. *See* 86 Fed. Reg. at 61406. A State "suffers a form of irreparable injury" any time it is prevented from "effectuating" laws "enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The Vaccine Mandate inflicts this type of harm. Its preemptive policy will interfere with the States' sovereign prerogative to develop vaccine policies best suited to their populations. *See, e.g.*, 2021 Tenn. Pub. Acts, 3d Extraordinary Sess., ch. 6 (to be codified at Tenn. Code Ann. §§14-2-101 to -103); 2021 W. Va. Pub. Acts, 3d Extraordinary Sess., ch. 32 (to be codified at W. Va. Code §16-3-4b); Idaho Code §39-9003.

Second, because the Vaccine Mandate invades the States' constitutional prerogatives, it necessarily causes irreparable harm. Government actions that "threaten[] or … impair[]" constitutional rights necessarily cause irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67; *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Because the Constitution empowers the States alone to regulate certain matters (including

public health), and because the Vaccine Mandate illegally invades this sphere of authority, the Vaccine Mandate causes irreparable injury to the States. *See Abbott*, 138 S. Ct. at 2324 (federal court, by enjoining a constitutional state law, causes irreparable injury to the State).

Third, some States will suffer irreparable harm from unrecoverable compliance costs. The Occupational Safety and Health Act permits States to adopt State OSHA plans, 29 U.S.C. §667(b), which apply "to all employees of public agencies of the State and its political subdivisions," §667(c)(6). States with these plans count as employers bound by the Mandate. *See* 86 Fed. Reg. at 61462, 61506. Thus, absent a stay, States with OSHA plans, just like all other covered employers, will be required to expend money complying with the Mandate's terms. *See* App.B-30 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Plus, the States must enforce these plans against local companies. Because the money expended enforcing State OSHA Plans will be unrecoverable in light of the federal government's sovereign immunity, those expenditures constitute irreparable harm.

These are the irreparable harms that the States themselves will sustain absent a stay. Many employees and private employers will sustain irreparable injuries, too. From the perspective of employees, the Vaccine Mandate imposes immense costs: "an irreversible vaccination, uncompensated testing costs," and a "lost job," to name just a few. App.B-30 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Employers, for their part, face an "estimated $3 billion in compliance costs." *Id*. And "small companies (with just over 100 workers)" will face difficulties "competing with

smaller companies who can attract workers disinterested in complying with the mandate." *Id.* Other petitioners will address these and other irreparable harms in more detail. *See also* App.A-55–56 (Larsen, J., dissenting). For that reason, the States will not belabor the issues in this brief.

C. Staying the unlawful Vaccine Mandate will promote the public interest and will not substantially harm others

If the Vaccine Mandate is illegal, staying it necessarily promotes the public interest. The "public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants" seek relief, "and ultimately … upon the will of the people … being effected in accordance with" law. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (Sutton, J.) (quotation omitted). And the Executive Branch cannot serve the public interest when it acts unlawfully. *Realtors*, 141 S. Ct. at 2490. To conclude otherwise would deprive Congress of the power to "decide whether the public interest merits" an agency action. *Id.* Along the same lines, enjoining an unlawful law or policy inflicts no legally cognizable harm—that is why the public-interest and substantial-harm-to-others factors merge when the government is the defendant. *See Nken*, 556 U.S. at 435. Further, the Vaccine Mandate will cause harms to others and injure the public interest by undermining our federalist constitution. While COVID-19 is a national problem, it is a problem that state "borders add tools and flexibility for fixing." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 5 (2021). By blocking the States from adopting policies best suited to their populations, the Mandate prevents States from experimenting with the best ways to combat COVID-

19. ("It is hard to find harm to OSHA from delay, as it waited almost two years since the pandemic began, and nearly a year after vaccines became publicly available, to issue the mandate." App.A-56 (Larsen, J., dissenting)).

OSHA claims that the Vaccine Mandate will save lives. OSHA's ominous calculation—it says the stay costs precisely "77 lives and 3128 hospitalizations per day," *Respondents' Emergency Motion to Dissolve Stay* at 41 No. 21-7000, Doc. 69 (6th Cir.)—is hard to square with the agency's sluggishness in promulgating the Mandate and in seeking relief from the Fifth Circuit's stay. (Remember, instead of immediately filing in this Court, OSHA waited eleven full days before filing in the Sixth Circuit a motion to dissolve the stay.) Regardless, even if its calculation proves accurate, the government cannot violate the law in pursuing well-intentioned, or even critically important, policies. *See, e.g.*, *Realtors*, 141 S. Ct. at 2490; *Boumediene v. Bush*, 553 U.S. 723, 798 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). "The laws and Constitution are designed to survive, and remain in force, in extraordinary times." *Boumediene*, 553 U.S. at 798. That is why, even at the stay- or injunction-pending-appeal stage, this Court has refused to let governments violate the law in pursuit of pandemic-related policies—policies the government *always* insists will save lives. *See Realtors*, 141 S. Ct. at 2490; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*per curiam*).

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"Once before, in the throes of another [far more severe] threat to the country, the executive branch claimed it needed to seize control of the country's steel mills as

a 'necessary' measure to 'avert a national catastrophe.'" App.B-8 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*) (quoting *Youngstown Sheet & Tube*, 434 U.S. at 582). "But that threat, like this one, did not permit the second branch to act without authorization from the first." *Id*. We can have a Constitution or we can have a congressionally unauthorized vaccine mandate. We cannot have both.

II. In the alternative, the Court should grant certiorari before judgment and decide this case on an expedited basis

Instead of simply granting a stay, the Could should treat this application as a petition for a writ of certiorari before judgment and hear the case on the merits. It is free to do so. *See Nken v. Mukasey*, 555 U.S. 1042 (2008). And the same considerations that justify a stay would justify this Court in granting certiorari before judgment. Indeed, the reasoning in the federal government's own recent petitions for certiorari before judgment justify granting immediate review here. "A petition for a writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but the issues presented by [OSHA's] extraordinary [standard] are 'of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.'" Application to Vacate Stay of Preliminary Injunction at 37, *United States v. Texas*, No. 21A85 (U.S., Oct. 18, 2021) (quoting Sup. Ct. R. 11); *accord* Petition for Writ of Certiorari Before Judgment at 13, *Dep't of Commerce*, No. 18-966 (U.S., Jan. 25, 2019); Petition for Writ of Certiorari Before Judgment at 16, *Dep't of Homeland Sec. v. Regents the University of Cal.*, No. 18-587 (Nov. 5, 2018). Further, without granting certiorari before judgment, "this Court would not be able to review" the "important dispute" regarding the Vaccine

Mandate's legality "until next Term at the earliest." Petition for Certiorari Before Judgment at 16, *Dep't of Commerce*, No. 18-966; *accord* Application to Vacate Stay at 38, *Texas*, No. 21A85.

Having persuaded the Court to grant certiorari before judgment three times in recent years, each time in order to resolve an exceptionally important issue before the end of an already-underway Supreme Court term, the federal government cannot fairly object to this Court's granting a writ of certiorari before judgment in this case. In law as in life, "what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 136 S. Ct. 1412, 1418 (2016).

III. The Court should issue an immediate administrative stay

The States respectfully request an immediate administrative stay to the Vaccine Mandate's enforcement. The filings in this case, even at the stay-pending-review stage are likely to be voluminous. A stay will ensure that the Court has adequate time to review those filings while simultaneously preventing the harm that would otherwise occur during the interim. The Court should therefore enter an administrative stay so as to maintain the *status quo ante* while the Court determines whether to grant a stay pending review, a writ of certiorari before judgment, or both.

Issuing an administrative stay is particularly appropriate here, given that a stay had already been in place for weeks before the panel abruptly lifted it. Requiring businesses to take steps to implement the Mandate now pending this Court's decision would have significant destabilizing effects across the economy.

CONCLUSION

The Court should stay the Vaccine Mandate pending review, grant certiorari before judgment, or both.

December 2021

Respectfully submitted,

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