No.

IN THE SUPREME COURT OF THE UNITED STATES

Petitioner Bentkey Services, LLC D/B/A The Daily Wire,

*Applicant,*

v.

Occupational Safety & Health Administration, et al.,

*Respondents.*

**EMERGENCY APPLICATION FOR STAY PENDING JUDICIAL REVIEW, OR, ALTERNATIVELY, PETITION FOR A WRIT OF CERTIOARI BEFORE JUDGMENT AND STAY PENDING RESOLUTION**

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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## QUESTIONS PRESENTED

The Occupational Safety and Health Act ("OSH Act') requires the Occupational Safety and Health Administration ("OSHA") to demonstrate with substantial evidence in the record as a whole that an Emergency Temporary Standard ("ETS") is necessary to protect employees from grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards. Courts reviewing an OSHA ETS must employ a "hard look" review. When considering a stay pending review on the merits, courts must weigh the balance of interests and harms, including harm caused by a rule later found invalid which, as the Fifth Circuit correctly concluded, almost *always* produces the irreparable harm of non-recoverable compliance costs. The questions in this case are:

1. Did the Sixth Circuit incorrectly apply the standard of review – that is, a "hard look," more searching than the arbitrary and capricious standard – to determine whether OSHA's conclusions justifying its claim of emergency power over workers were based on substantial evidence?
2. Has OSHA carried its burden of proving, with substantial evidence under a "hard look" review, that unvaccinated workers in nearly all workplaces of companies employing more than 100 workers, enterprise-wide, pose a grave risk of harm to themselves, primarily?

3. Has OSHA carried its burden of proving, with substantial evidence under a "hard look" review, that vaccination or masking and perpetual testing of only unvaccinated employees is necessary to address a grave risk?
4. Did the Sixth Circuit fail to correctly consider the potential irreparable harms caused by allowing the ETS to take effect, including: constitutional violations, compelling or pressuring workers to make medical decisions (vaccinations) against their preferences that cannot be undone, employers' loss of employees, employees' loss of jobs, the risks to both employer and employee posed from employers accumulating personal medical information of employees, and the potentially needless substantial compliance costs to employers—versus the federal government *not* coercing vaccinations, while state and local governments as well as employers remain free to require them, and in light of the continuing availability of vaccines, free of charge, to any individual who wants one, in the context of 85% of the U.S. population over the age of 18 having received at least one vaccination?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Bentkey Services, LLC D/B/A The Daily Wire is a limited liability company organized under the laws of Texas. It is owned by Bentkey Ventures, LLC, and Bentkey, Inc. No publicly-held company has an ownership interest in it.

## PARTIES TO THE PROCEEDING

The Applicant (Petitioner below) is Bentkey Services, LLC D/B/A The Daily Wire. The Respondents (Respondents below) are the Occupational Health and Safety Administration and the United States Department of Labor.

## LIST OF PROCEEDINGS AND DECISIONS BELOW

The Fifth Circuit's unreported November 6, 2021 Order finding "grave statutory and constitutional issues with the Mandate" and staying the Mandate is available at 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021).

The Fifth Circuit's reported November 12, 2021 Order extending the stay and ordering OSHA to "take no steps to implement or enforce the Mandate" is available at 17 F.4th 604, 619 (5th Cir. 2021) ("5th Cir. Order").

The Sixth Circuit's reported December 15, 2021 Order denying initial hearing *en banc*, Chief Judge Sutton's dissent from the denial of initial hearing *en banc* finding the ETS unlawful, and Judge Bush's separate dissent finding the ETS unlawful are available at 2021 WL 5914024 (6th Cir. Dec. 15, 2021).

The Sixth Circuit's unreported December 17 2021, Order dissolving the Sixth Fifth Circuit's stay, and Judge Larsen's dissenting opinion, is attached as Exhibit 1 ("6th Cir. Order").[1]

[1] Petitioners before the Sixth Circuit immediately began filing applications for relief from this Court. The Supreme Court has given OSHA until December 30, 2021, to respond to all such applications. See Dkt. No. 21A243-250.

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

Bentkey Services, LLC, d/b/a The Daily Wire ("The Daily Wire") respectfully requests that the Court stay the Occupational Safety and Health Administration's ("OSHA") November 4, 2021 Emergency Temporary Standard ("ETS") pending judicial review. *See COVID-19 Vaccination and Testing: Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (codified at 29 C.F.R. pts. *1910 et seq*.) (hereafter, "ETS"). In the alternative, The Daily Wire requests that the Court treat this application as a petition for writ of certiorari before judgment, grant certiorari forthwith, and issue a stay pending resolution of the petition.

## INTRODUCTION

The OSHA ETS is, by its nature, a temporary rule addressed to an issue that, by its nature, should disappear. But the sweeping power asserted by OSHA and endorsed by the Sixth Circuit, as well as the Sixth Circuit's vision of unquestioning Judicial Branch deference to Executive Branch assertions of emergency power, will endure—and have implications far beyond this matter. The Daily Wire continues to agree with and adopt the arguments advanced by other Petitioners who focus on the violence the Sixth Circuit's opinion does to the fundamental structure of the American government system, including federalism, the balance of powers, the limitations on Congress's Commerce Clause power, and the statutory clarity required for congressional delegations of massive power to one agency.

Constitutionally, the bottom line of the OSHA and Sixth Circuit positions is that the Government has plenary power to regulate commerce extending to dictating every actual and potential American worker's medical choices on the premise that workers are essential to national commerce as commercial means of production. This is a vision of Americans as economic subjects of the state rather than free citizens from whom the government's power derives and on whose behalf the government's power must be exercised. Although The Daily Wire also argued these issues extensively before the Sixth Circuit, and does not now abandon them, this Emergency Application will instead focus on its other, complementary arguments and evidence from its perspective as an employer that are unique but related – arguments which the Sixth Circuit glossed over.

Specifically, even if the Court were to allow that the federal government has a general police power to mandate vaccinations to protect American commerce, *and* that Congress delegated that power to OSHA, *and* that OSHA can mandate vaccinations, regardless of hazards particular to certain occupations or workplace features common to certain industries[2]—the ETS *still* must be stayed, and ultimately enjoined, because it is not supported by substantial evidence, and its provisions fail to meet the statutory requirements for an ETS.

While the Daily Wire confines its Emergency Application to this argument, the distinction from the Constitutional arguments is artificial because these arguments are just another reflection of an ETS that is, at bottom, a lengthy *post hoc*

[2] And to be clear, The Daily Wire vigorously contests each of those propositions.

rationalization for an unconstitutional impulse rashly embodied in regulation. Or, in a description of the ETS retweeted by the White House Chief of Staff, "OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations."[3] The pretextual use of a workplace safety law for this purpose was plain to see when it was announced as an integral part of a multi-prong executive branch blitz of vaccination mandates after the President asserted he had lost "patience" with the unvaccinated. White House, "Remarks by President Biden on Fighting the COVID-19 Pandemic," (Sept. 9, 2021).[4]

Although contrary to its own recent position until that point and in tension with the available science, OSHA fulfilled the President's diktat with a published justification designed by its sheer length to discourage scrutiny. The Fifth Circuit was not deterred, and immediately identified the subterfuge of the ETS, issuing a stay until the matter could be fully briefed; but, following a multi-district lottery, the Sixth Circuit was assigned all of the matters challenging the ETS. The latter court then dissolved the stay, deferring to OSHA's misstatements and unsupported assertions of law, fact and science in support of OSHA's extraordinary assumption of power.

The Sixth Circuit's rapid decision to superficially and deferentially review the substance of OSHA's justifications departs from settled precedent for judicial review

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[3] Twitter, https://twitter.com/SRuhle/status/14360633579588239 40?s=20.
[4] Available at https://www.whitehouse.gov/ briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ (last accessed Sept. 28, 2021).

of an ETS. It sets a dangerous new precedent in which courts hold an extraordinary assertion of emergency power to a lower standard of justification than a routine matter. As demonstrated below, the Sixth Circuit erred when it concluded that OSHA was likely to prevail on the merits for the following reasons:

- The Sixth Circuit misapplied the standard of review of an OSHA ETS, reviewing OSHA's claims under an unduly deferential standard that effectively allowed OSHA to claim virtually limitless emergency powers over all American workers based on self-serving, selective citations of irrelevant or questionable studies.
- OSHA failed to establish by substantial evidence that COVID-19 is a *workplace* hazard in those workplaces where the ETS applies and for the workers to whom it applies. Relying entirely on the danger COVID-19 poses to *some* people without considering where they worked or what they did, it imposed a rule that applies arbitrarily to workers depending on the size of the company they work for. It pays no regard to the number of people they work with, the nature of their work, or the physical conditions of their workplace. Ignoring its own understanding of workplace conditions and practices such as employee proximity and poor ventilation (which indeed promote viral transmission), OSHA instead imposed a generic rule on workers regardless of occupation, industry, workplace conditions, practices, existing immunity, co-morbidities, or any other factors that a more measured approach would have included.

This constituted an about-face of OSHA's prior announced position that an un-tailored, one-size-fits-all approach was neither necessary nor prudent.

- OSHA's ETS ignores the unmistakable factors that profoundly influence the gravity of the risk that COVID-19 poses to any given unvaccinated worker: their age, health, and natural immunity from a prior infection. Imposing the mandate on an unvaccinated person with natural immunity is grossly overbroad, and at the same time, the ETS is grossly underinclusive. This is because the ETS allows vaccinated persons to work without masks or testing even though they can comprise approximately one quarter of hospitalized patients, and because vaccination does not prevent infection or transmission while at the same time diminishing the symptoms of infection that may have otherwise caused employees to avoid their workplace, limit their contacts, or wear a mask. The arbitrariness of the ETS's masking and testing alternative is further exacerbated by the unreliability of COVID-19 tests.
- The ETS will cause irreparable harm long after COVID-19 fades into the history books through permanent damage to the country's federal and constitutional order as well as the diminution of judicial oversight. It is remarkable that the Sixth Circuit made no mention of any interest in upholding the Constitutional order or the faithful execution of the law in its analysis of harms. For applicants such as Daily Wire, the

> immediate costs will be substantial and unrecoverable: extensive compliance costs far above the absurd figures OSHA published and the Sixth Circuit relied on, including legal costs, lost employees, the risks of handling employee's private medical information with regard to privacy rules, and the attendant risk of discrimination claims after subsequent personnel actions. These *real* costs, which any fair analysis and familiarity with commercial reality would reveal to be well-founded, the Sixth Circuit dismissed as "speculative." Against these concrete and identifiable interests, thus written off with the back of a hand, the Sixth Circuit incorrectly deferred to OSHA's speculative claim of the benefits it hoped its ETS would achieve. The court gave no consideration to the fact that States, municipalities and employers remain free to impose vaccination mandates, and employees remain free to obtain vaccinations free of charge—which 85% of the population over 18 has done at least once.

For the foregoing reasons, The Daily Wire requests that this Court order the OSHA ETS be stayed pending a decision on the merits of the applicants' petitions for review, or grant certiorari before judgment and stay the implementation of the ETS pending resolution.

## JURISDICTION

The Sixth Circuit has jurisdiction pursuant to 29 U.S.C. § 655(f) and 28 U.S.C. § 2112(a)(3). This Court has jurisdiction under 28 U.S.C. § 1254(1) and authority to grant relief for the applicant under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a).

## STATEMENT OF THE CASE

The federal government has issued an unprecedented mandate of COVID vaccines based on a rarely-used law of questionable applicability. OSHA's Emergency Temporary Standard, which the agency made effective immediately without public comment, classified tens of millions of American employees as workplace "hazards" whose medical decisions must be regulated. But OSHA's mandate is protecting employees *from* hazards under the Occupational Safety & Health Act (OSH Act or Act), 29 U.S.C. § 655(c), not *deeming them* hazards. This misalignment of law and policy is unsurprising because the ETS was announced as part of a comprehensive set of policies to drive up vaccination rates.

The ETS imposes a vaccination or masking and testing requirement on unvaccinated workers regardless of whether they are infected with the virus and without any showing the virus is present in their workplaces, while imposing no requirements on vaccinated employees even if they are infected and despite the fact that vaccination does not prevent infection and transmission of the virus to others. The ETS does not factor whether employees work together in close proximity, or the quality of ventilation—two occupational environmental factors OSHA acknowledges

are significant. Other than employees who work entirely alone or entirely outdoors, the ETS does not consider the extent to which covered employees work with others or interact with the public. There is also no consideration of the particular occupation or industry whose workers the ETS affects. Indeed, in June, OSHA itself, acting without apparent political interference, declined to impose a COVID vaccine mandate "in non-healthcare settings" because of the much lower magnitude of risk. 86 Fed. Reg. 32,376, 32,385 (June 21, 2021).

The timing of the ETS raises serious questions about whether its justification is more political than scientific. As of this filing, two years since the COVID outbreak began, the CDC reports that 85% of American adults (over 18 years old) have received at least one vaccine dose. An additional number have developed natural immunity following COVID infection. Meanwhile, overall hospitalization rates and deaths have dropped substantially from pandemic highs without this mandate, despite fluctuations.

The ETS, however, is only the latest pandemic-related, unlawful assertion of expansive federal power by this administration. The Court has repeatedly reminded government officials that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn. v. Cuomo*, 2020 WL 6948354 (U.S. Nov. 25, 2020). In August, the Supreme Court firmly rejected the similarly odd and unilateral assertion by the Centers for Disease Control (CDC) that it could issue a nationwide moratorium on residential evictions—even *after* the Court forewarned the CDC that such an assertion of power would be unconstitutional. *Alabama*

*Association of Realtors v. Department of Health & Human Services*, No. 21A23, 2021 WL 3783142 at *3 (U.S. Aug. 26, 2021). Other courts have already blocked other parts of this plan, including vaccination mandates for federal contractors and health care workers, because the agencies exceeded their statutory authorities. *See Georgia v. Biden*, Civ. No. 1:21-cv-163, slip op. at 18–19, 21 (S.D. Ga. Dec. 7, 2021) (federal contractor mandate); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (same); *Missouri v. Biden*, -- F. Supp. 3d ---, *8 (E.D. MO, Nov. 29, 2021) (healthcare worker mandate) (appeal filed).

This ETS, too, exceeds the federal government's constitutional and statutory authority, as The Daily Wire argued below, and other petitioners ably argue in pleadings filed with this Court. The OSH Act only allows an ETS where "necessary" to protect employees from "grave danger" from exposure to *workplace* substances, agents, or hazards. 29 U.S.C. § 655(c). It does not give the government authority to classify workers *themselves* as "hazards." Interpreting the OSH Act the way the ETS does would give OSHA unprecedented fiat power to impose medical procedures on any American who has a job, just because they have a job, under an unlimited conception of Commerce Clause power. "[T]he sheer scope of [OSHA's] claimed authority . . . would counsel against the Government's interpretation." *See Ala. Ass'n of Realtors*, 2021 WL 3783142 at *3.

For these reasons and others, scores of affected parties filed legal challenges across the country, quickly resulting in pending applications in a dozen courts of appeals. On November 6, 2021, citing "grave statutory and constitutional issues with

the [m]andate," the Fifth Circuit issued an administrative stay. *BST Holdings*, 2021 WL 5166656, at *1. On November 12, 2021, the same Fifth Circuit panel unanimously granted a stay pending judicial review and enjoined OSHA from taking "steps to implement or enforce the Mandate until further court order." *BST Holdings*, 17 F.4th at 619.

In its ruling, the Fifth Circuit rejected an interpretation of the OSH Act pursuant to which OSH claimed to be empowered to issue non-workplace, public-health edicts, finding that "OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness*" to be a "transparent stretch." *Id.* at 613. The court also relied on OSHA's "prior representation to the D.C. Circuit" that "COVID-19 is a *recognized* hazard" and cannot constitute a "new hazard" under the OSH Act. *Id.* (citing D.C. Cir. Br. 25).

The Fifth Circuit panel held that 29 U.S.C. § 655(c)(1) did not justify the Mandate because OSHA failed to establish "the kind of grave danger [the OSH Act] contemplates." *BST Holdings*, 17 F.4th at 613. The court reasoned that "the Mandate itself concede[d] that the effects of COVID-19 may range from 'mild' to 'critical,'" and that the virus poses "little risk" to nearly 80% of Americans aged 12 and older who are fully or partially vaccinated. *Id.* at 614 (citing 86 Fed. Reg. 61402–03). The court also noted that OSHA failed to explain its departure from its previous position that an ETS was not necessary to address COVID-19. *Id.*

In addition, the Fifth Circuit held that OSHA also failed to show that what it described as the "staggeringly overbroad" Mandate was necessary, *id.* at 615, and observed that the Mandate was both overinclusive and underinclusive. OSHA's departure from its prior preference for a tailored and industry-specific approach resulted in an overly inclusive mandate that made no distinction between risk levels among industries or any consideration for employees' age, which could not be justified considering that "a 28-year-old trucker" is less vulnerable than "a 62-year-old prison janitor" to COVID-19. *Id.* The Court also observed that OSHA's 100-employee threshold for application of the Mandate was based, not on the nature of the emergency, but on the fact that "companies of 100 or more employers will be better able to administer (and sustain) the Mandate," not because of an actual emergency. *Id.* at 616.

The Fifth Circuit panel addressed the serious constitutional problems raised by the Mandate, which we will not elaborate on here. In a separate opinion, Judge Duncan also observed that it was not a "hard question" to conclude that the Mandate was unlawful under the major questions doctrine. *Id.* at 619 (Duncan, J., concurring).

On November 16, 2021, after the Mandate was stayed by the Fifth Circuit, the Judicial Panel on Multidistrict Litigation selected the Sixth Circuit to handle all cases challenging the ETS. Scores of parties petitioned the Sixth Court for an initial hearing *en banc*. *See In re OSHA*, 2021 WL 5914024, at *4 (Sutton, C.J., dissenting from the denial of initial hearing en banc). While the *en banc* petitions were pending,

on November 23, 2021, the government moved to dissolve the Fifth Circuit's stay, in a filing that amounted essentially to a merits-based appeal of the ruling.

On December 15, 2021, the Sixth Circuit denied numerous petitions for initial hearing *en banc* by an 8-8 vote. Chief Judge Sutton—joined by Judges Kethledge, Thapar, Bush, Larsen, Nalbandian, Readler, and Murphy—would have granted initial hearing *en banc*. Chief Judge Sutton's opinion also carefully explained why the Mandate is unlawful. While acknowledging the interest in combatting COVID-19, he nonetheless found that resolving the "conflict between existing law and [OSHA's] proposed policy is not particularly hard" because OSHA clearly lacked authority to issue the Mandate. *Id.* at *3, *14 (Sutton, C.J., dissenting from the denial of initial hearing en banc). As he explained, "federal courts 'expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance' and to use 'exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'" *Id.* at *1 (quoting *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

Here, as Chief Judge Sutton explained, "Congress did not 'clearly' grant [OSHA] authority to impose this vaccine-or-test mandate." *Id.* at *2. The OSH Act, he observed, "covers only workplace-specific hazards and permits only workplace-specific safety measures." *Id.* at *7 (emphasis removed) (citing extensive statutory sources—from the name of the OSH Act itself to numerous provisions in the law itself—as well as OSHA's own past permanent and emergency standards to demonstrate this explicit limitation on OSHA's power found in the legislation) (listing

permanent standards focusing on workplace issues and ETSs "addressing exposures solely because of . . . the workplace"). The OSH Act's use of the term "necessary," Judge Sutton continued, requires an ETS to be not "just appropriate" but "indispensable or essential" to address a grave danger. *Id.* at *9. Because OSHA never "made that finding [itself] under the correct interpretation of the law," Judge Sutton observed, no court has "authority to uphold [the Mandate] as 'necessary.' *Id.*; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Finally, Judge Sutton noted that OSHA cannot show under "any standard of review" that the vaccine-or-test mandate is *indispensable* to protect "vaccinated working people from a risk [OSHA] does not consider grave" and "unvaccinated working people from themselves based on [a] highly personal medical decision[]." *Id.* *11. The Mandate's one-size-fits-all approach "[a]pplying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself" fails to appreciate that the risk level varies among employees. *Id.* at *10 (quoting *BST Holdings*, 17 F.4th at 615). Judge Sutton also had no difficulty concluding that the challengers would face irreparable injuries: "irreversible vaccination"; "uncompensated testing costs"; "lost job[s]"; "$3 billion in compliance costs"; and "difficulties . . . in competing with smaller companies." *Id.* at *14.

In a separate opinion, Judge Bush also explained that Congress "has no authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine mandate upon the American public." *Id.* at *15 (Bush, J., dissenting from the denial of initial hearing en banc).

On December 17, 2021, the Sixth Circuit's motions panel lifted the Fifth Circuit's stay. In the panel's view, the OSH Act did in fact grant OSHA the authority to issue the Mandate. 6th Cir. Order at 11–12. The panel accepted the government and Union Petitioners' justifications for the issuance of an ETS wholesale. *Id.* at 19, 24–25. No consideration was given to the fact that, with or without the Mandate, states, municipalities, and employers may impose vaccination mandates utilizing their authority under the police power. Nor did the Sixth Circuit acknowledge, much less address, the fact that employees remain free to obtain vaccinations free of charge, and that 85% of the population over 18 has done so at least once. The costs, both economic and otherwise, of being forced to comply with an invalid medical mandate, or the inability to undo a vaccination, were ignored.

## REASONS FOR GRANTING THE APPLICATION

### A. The Sixth Circuit Was Unduly Deferential to OSHA Because It Failed to Properly Apply the Correct Standard of Review: Substantial Evidence, Reviewed with a "Hard Look."

The APA prohibits agency action that is unconstitutional, exceeds statutory authority, or is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 705–06. Further, an ETS must be supported by "substantial evidence," requiring courts to take a "harder look" than even under the APA's arbitrary and capricious standard for reasoned decision-making. 29 U.S.C § 655(f); *Asbestos Info.*, 727 F.2d at 421. Agencies must also provide reasons for changes in position and explain their rejection of alternatives. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–15 (2020)*; Dep't of Commerce v. New* York, 139 S. Ct. 2551, 2575 (2019).

The substantial evidence that OSHA must show is evidence proving that this ETS is "necessary to protect employees" from "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. 655(c)(1). Generally, courts consider whether the administrative record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938), but "the extent to which the supporting evidence has survived public and scientific scrutiny, . . . will affect the weight given to it by an inexpert judiciary." *Asbestos Info.* 727 F.2d at 421. Courts have developed many exceptions countenancing use of extra-record evidence, including:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; . . . (8) in cases where relief is at issue, especially at the preliminary injunction stage.

*Esch v. Yeutter,* 876 F.2d 976, 991-92 (D.C. Cir. 1989) (emphasis added). Because OSHA failed to consider relevant factors, more evidence is needed to clearly understand the complex issues presented. As new evidence shows that OSHA's decision was not correct, the Court should consider the expert testimony included here.

The Sixth Circuit misconstrued the "hard look" substantial evidence standard, describing it as a question of OSHA's "reasonableness" and holding that "deference is given to OSHA's fact-finding expertise." 6th Cir. Order at 18 (citing

*Asbestos* at 422). However, the *Asbestos* court distinguished between legislative decisions and policy decisions, finding that OSHA decisions reviewable under the more rigorous substantial evidence standard include "decisions … evaluating the data and drawing conclusions from it," allowing the court to "review that data in the record and determine whether it reflects substantial support for the Secretary's findings." *Asbestos* at 422. The Sixth Circuit concluded its recitation of its review standard by holding that its review had to be done with "flexibility." 6th Cir. Order at 18. This misinterprets the *Asbestos* Court, which only referred to "flexibility" in relation to distinguishing between agency policy choices that were less subject to review and legislative decisions based on data that were subject to substantial evidence review. *Asbestos* at 422. In sum, the Sixth Circuit was unduly deferential to OSHA's asserted conclusions from the data.

Applying its overly deferential, novel standard, the Sixth Circuit was satisfied that "OSHA pointed to extensive scientific evidence, including studies conducted by the CDC, of the dangers posed by COVID-19," and thus concluded it could not "say that OSHA acted improperly" because of its "clear reliance on "a body of reputable scientific thought." 6th Cir. Order at 23 (citing *Indus. Union Dep't.*, 448 U.S. at 656).

The Sixth Circuit compounded its incorrectly deferential approach by further misapplying the rule that "the ultimate determination of what precise level of risk constitutes a 'grave danger' is a 'policy consideration that belongs, in the first instance, to the Agency.'" 6th Cir. Order at 20 (quoting *Asbestos* at 425). After reiterating a prior case holding that courts should defer to OSHA as to the precise

dangerous level of exposure of a substance in the workplace, the Sixth Circuit concluded that this meant that OSHA could *both* assume a dangerous substance is present in *all* workplaces *and* determine that all employees are exposed to that substance, in this case, the coronavirus, without a court being able to meaningfully review the basis for that determination. 6th Cir. Order at 21 (citing *Dry Color Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d 98, 102 n.3 (3d Cir. 1973)). *Dry Color Manufacturers*, however, involved a fairly simple determination that particular chemicals were carcinogenic. Therefore, the burdens of the ETS necessarily only applied to those workplaces that used those chemicals. Even then, the Third Circuit found that the ETS was deficient. *Dry Color Mfrs. Ass'n.*, 486 F.2d at 107.

Employing straw-man rhetoric, the Sixth Circuit posed an absurd extreme as the only alternative to its deference to OSHA's assumptions of universal coronavirus presence in the workplace and risk: "OSHA is not required to investigate every business to show that COVID-19 is present in each workplace nor is it required to prove that every worker will experience the same risk of harm." *Id.* The Sixth Circuit thus reduced its own review to something akin to rational basis review, and eliminated OSHA's evidentiary burden to prove particular workplaces, occupations, or workers were at risk. Ironically, immediately after misstating its standard and OSHA's burden, the Sixth Circuit in fact described the features of particular workplaces in which COVID-19 posed a grave risk: "Transmission can occur 'when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes)' or 'in indoor spaces without adequate ventilation

where small respiratory particles are able to remain suspended in the air and accumulate.'" 6th Cir. Order at 21 (citing ETS at 61,409); *see also id.* ("American workplaces often require employees to work in close proximity—whether in office cubicles or shoulder-to-shoulder in a meatpacking plant") (citing ETS at 61,411).

According to the Sixth Circuit, OSHA's burden is met merely by citing "studies," even if their methodology and conclusions are debatable (and they are debated), that supported the ETS with broad conclusions that COVID-19 was harmful and contagious among workers in close proximity. Further, "[a]s long as it supports its conclusion with 'a body of reputable scientific thought,' OSHA may 'use conservative assumptions in interpreting the data . . . , risking error on the side of overprotection rather than underprotection.'" 6th Cir. Order at 25 (citing *Indus. Union Dep't*, 448 U.S. at 656). On this thin and lightly reviewed basis, the Sixth Circuit would permit OSHA to immediately dictate, without even the normal process of notice and comment rulemaking, the medical choices of all workers in all occupations in all workplaces. (The 100-employee company threshold is a matter of convenience, not statutory or constitutional authority). This was error.

### B. OSHA Failed to Establish By Substantial Evidence That COVID-19 is a Workplace Hazard Present for the Workplaces to Which It Applies.

At the risk of stating the obvious, to issue a workplace standard to remedy exposure to a danger in the workplace, OSHA must first establish that the danger exists *in the workplace*. Similarly, an evaluation of OSHA's proposed remedy to a claimed workplace hazard, including whether it is necessary, must start with proof

that the hazard exists *in the place where the remedy would operate to alleviate that hazard*. Thus an ETS operating as pretext for something else, such as an unconstitutional "workaround" issued as a component of an integrated vaccination campaign usurping state police powers following the official loss of patience with public health choices, might be unmasked by a lack of particularized evidence of the workplace hazard it claims to remedy. The Sixth Circuit's approach, however, forestalls such an empirically-based challenge.

OSHA need not issue an ETS that addresses America's workplaces room-by-room, but to the extent that *it claims* the power to issue a national vaccination mandate, *it must prove* the hazard (the coronavirus) is present in the workplaces covered by its rule. As the Fifth Circuit wrote at the start of its opinion, OSHA "'reasonably determined' in June 2020 that an emergency temporary standard (ETS) was 'not necessary' to 'protect working people from occupational exposure to infectious disease, including COVID-19.'" Cir. Order at 609 (quoting *In re AFL-CIO*, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)). Indeed, the Fifth Circuit noted that OSHA was itself against a one-size-fits-all mandate for all workplaces, that it could in fact be "counterproductive," "inefficacious," and a "poorly-suited approach." *Id*.

The ETS performs a sleight-of-hand by not in fact regulating workplace exposure to the coronavirus, but rather *regulating the unvaccinated*, regardless of whether they or anyone else in the workplace is infected with the coronavirus. Moreover, the ETS makes no effort to tailor its reach in any way to particular

occupations, particular industries, or even particular concentrations of employees of any occupation or in any industry who similarly work in large numbers within a confined space. A crane operator alone ten stories up in a glass enclosure is regulated the same as a call center worker. And while there is an exception for a person who works outside, that exception applies equally to an arborist as to a tour guide. As the Fifth Circuit indeed concluded, OSHA failed to meet a "threshold burden" of "show[ing] that employees covered by the ETS are in fact *exposed* to the dangerous substances, agents, or hazards at issue—here, COVID-19." 5th Cir. Order at 613.

OSHA and the Sixth Circuit all but concede that different workplaces pose different dangers, acknowledging that particular workplaces are ripe for transmission when people are in close contact (within six feet for fifteen minutes or more) or are in unventilated indoor spaces where virus particles can remain suspended in the air. 6th Cir. Order at 21 (citing ETS at 61,409). And yet rather than mandate social distancing or ventilation, OSHA forced vaccination of the unvaccinated, or masking and testing of the unvaccinated, *without requiring social distancing and ventilation*. Turning the statute on its head, absolving OSHA of a burden of proving by substantial evidence that its rule targeted a hazard present in the workplace, and shifting the burden to the public, the Sixth Circuit's solution to the ETS for employers with workplaces without a risk of exposure was to suggest individual employers petition OSHA for a variance (exception) to the ETS. 6th Cir. Order at 6.

The Sixth Circuit also endorsed OSHA's bootstrapping of its argument that all workplaces are at risk by citing vague reports of undifferentiated workplace "clusters" and "outbreaks." The Sixth Circuit and OSHA refer to reports produced by the North Carolina, Colorado, and Louisiana health departments to claim that three quarters of outbreaks through August 24, 2021, were associated with workplaces. 6th Cir. Order at 22 (citing *id.* at 61,413). **In fact, an expert analysis of all 658 references in the ETS reveals that fully 98% of these were *not related to COVID-19 workplace transmissions***. (Kaufman ¶ 77). The Daily Wire provided this fact to the Sixth Circuit, see Bentkey Opp. to OSHA Mot. to Dissolve Stay, ECF 344-1, but the Sixth circuit ignored it.

In the 5% of studies the ETS cites that are relevant to workplace transmissions, the authors warned about significant limitations, such as:

- Contreras Z *et al.* (2021, July), cited in COVID ETS at 61413 and 61512 for the principle "that the rule will protect employees in the places where outbreaks are most likely to occur." However, if one were actually to read that study closely, one would discover it also finds that the "number of COVID-19 worksite outbreaks mirrored trends in community transmission."
- Waltenburg MA *et al.* (2021, January), cited in COVID ETS at 61415 that the "meat packing and processing industries and related agricultural and food processing sectors have also been impacted by COVID-19." However, the study warns that the "Workers are members

of their local communities; transmission of SARS-CoV-2 could have occurred both at the workplace and in the surrounding community and thus could be affected by levels of community transmission."

- Steinberg J *et al.* (2020, August 7), cited in COVID ETS at 61415 for the principle that the "authors found a high burden of disease in persons employed at these facilities who were racial or ethnic minorities." However, the study itself states: "Finally, the location of virus acquisition (e.g., facility versus community) for individual employees could not be determined."
- Kapoor DA *et al.* (2020), cited in COVID ETS at 61416 was cited that "COVID-19 cases were also observed in staff at ambulatory care settings." This study did not find that vaccination was needed to safely operate ambulatory care, but instead found that with "stringent guidelines based on best available data in place—as well as a robust strategy for testing and contact tracing—outpatient practices can remain open and safely provide care during this and future crises."

(Kaufman ¶ 78). To reiterate, these are some of the handful of studies that actually are relevant to workplace transmission, out of nearly 500 that OSHA cited that had even less relevance—if any.

The Fifth Circuit had correctly concluded that random information about workplace COVID-19 "'clusters' and 'outbreaks' and other significant 'evidence of workplace transmission' and 'exposure'" . . . misses the mark, as OSHA is required to

make findings of exposure—or at least the presence of COVID-19—in *all* covered workplaces." 5th Cir. Order at 613 (quoting OSHA 5th Cir. Opp'n to Emergency Stay Mot. at 8).

That the ETS targets *unvaccinated workers*, whether or not they are infected with the virus, and ignores vaccinated persons who are indeed infected with the virus, makes perfect sense for a vaccination mandate, but not a workplace safety rule meant to protect against infection from a virus known to be present in the workplace. OSHA thus failed to show by substantial evidence that COVID-19 was present in the workplaces covered by the ETS.

### C. OSHA's ETS Failed to Establish the Gravity of Potential Workplace Exposure for the Affected Employees, Ignoring the Key Elements of Risk: Age, Health Conditions, and Natural Immunity from Prior Infection.

Even if the Court allows OSHA to declare or assume the coronavirus is meaningfully present in a particular (or every) workplace, OSHA has not met its burden to establish the gravity of the risk to employees following a workplace exposure to COVID-19. Indeed, the ETS concedes the effects of COVID-19 may range from "mild" to "critical." *See* 5th Cir. Order at 614. The Fifth Circuit also correctly concluded the Mandate "is staggeringly overbroad" because it "fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees . . . [O]ne constant remains—the Mandate fails almost completely to address, or even respond to, much of this

reality and common sense." Order at 615.

Contrary to OSHA's contentions in the ETS, *see* COVID ETS at 61,424, SARSCoV-2 and COVID-19 do not pose a grave danger of a "serious or life threatening disease or condition" for all unvaccinated employees in non-medical workplaces. All American workers are not at a meaningful risk of dying from COVID-19, but rather age and underlying medical conditions are primary determinants of risk. (App. 5, Declaration of Jay Bhattacharya ¶ 11-18 ("Bhattacharya Decl.")); (App. 6, Declaration of Sean Kaufman ¶ 15, 34, 36-38 ("Kaufman Decl.")) and (App. 7, Declaration of James Lyons-Weiler Decl. ¶ 9, 25 ("Lyons-Weiler Decl.")). The Daily Wire provided this information to the Sixth Circuit, see Bentkey Opp. to OSHA Mot. to Dissolve Stay, ECF 344-1, but, again, the Sixth circuit ignored it.

Scientific studies of survival rates of those who have tested positive for COVID vary by age. One study showed that patients between 20 to 49 years old have a 99.991% survival rate, those between 50-64 have a 99.86% survival rate, while those above 65 have a 94.6% survival rate. (Bhattacharya Decl. ¶13). OSHA asserts that there have been over 700,000 deaths due to COVID, and 75.4% of these deaths were not of working-age individuals. When one factors in that only 5% of the remaining deaths involve individuals where COVID was the exclusive cause of death, the approximately 4,600 deaths per year is remarkably similar to the annual average death that the CDC reports for this age group. (Kaufman Decl. ¶15).

The two segments of the population that have faced the highest mortality risk are the elderly and those with severe chronic disease. (Bhattacharya Decl. ¶17). Many

experts have stated that the government should be focusing its attention upon these high-risk groups rather than mandating vaccines on those with a high survival rate, especially in light of the fact that vaccination does not prevent transmission. (Bhattacharya Decl. ¶17); (Lyons-Weiler Decl. ¶25). As the Fifth Circuit correctly concluded, "the virus poses 'little risk' to nearly 80% of Americans aged 12 and older who are fully or partially vaccinated." 5th Cir. Op. at 614.

The Sixth Circuit's rationalization of the fact that COVID-19's effects closely track age—and therefore the ETS is overinclusive because it arbitrarily imposes requirements on some workers that are at substantially lesser risk than others—is to deny that OSHA set out to prevent injury rather than mere transmission. 6th Cir. Order at 29 ("The argument that the ETS is overinclusive because it imposes requirements on some workers that are at lesser risk of death than others overlooks OSHA's reasoning. OSHA promulgated the ETS to prevent employees from transmitting the virus to other employees—that risk is not age-dependent.").

This approach, however, is neither consistent with the ETS, OSHA's arguments, or the statute, which instead condition OSHA's authority on combatting workplace *injury*. And even if this policy were lawful, it would be based on a faulty key premise—because the ETS is not addressed to employees who are *infected* (whether unvaccinated or vaccinated) and present in the workplace, but rather limited to the *unvaccinated*, whether infected or not.

Scientists have found that both the vaccinated and the unvaccinated are capable of transmitting the virus and demonstrate the same amount of viral

shedding. (Kaufman Decl. ¶ 13). Both the vaccinated and the unvaccinated are equally capable of being infected and transmitting the virus. (*Id.*) Studies have demonstrated prolonged immunity with respect to memory T and B cells, bone marrow plasma cells, spike-specific neutralizing antibodies, and IgG+ memory B cells following naturally acquired immunity. (Bhattacharya Dec. ¶ 21). Multiple peer-reviewed studies comparing natural and vaccine immunity have concluded that natural immunity provides equivalent or greater protection against severe infection than immunity generated by vaccines. (Bhattacharya Dec. ¶ 22) (Kaufman Decl. ¶ 57, 59). Scientists have also shown that natural immunity lasts longer than vaccine immunity. (Kaufman Decl. ¶ 68). Reinfection by those with vaccines was far greater than those with natural immunity. (Bhattacharya Dec. ¶ 23) (Kaufman Decl. ¶ 68). Studies have also proven that people who had taken the vaccine were 13 times higher of experiencing a breakthrough infection (like Delta) than those who had obtained natural immunity. (Bhattacharya Dec. ¶ 24) (Kaufman Decl. ¶ 56).

It is an established scientific fact that those who have natural immunity from a prior infection of COVID-19 have a strong and long-lasting protection from subsequent infection, and that vaccination is not necessary to protect these workers. (Bhattacharya Decl. ¶ 7, 25, & 26); (Kaufman Decl. ¶ 13, 60, 61, 69, 70 & 84); and (Lyons-Weiler Decl. ¶ 24).

OSHA thus failed to demonstrate that the ETS alleviates a grave risk to the targeted employees (the unvaccinated) in the workplaces to which it applies.

### D. OSHA Failed To Establish The Necessity Of The ETS And It Is Overbroad, Underinclusive, And Therefore Arbitrary.

OSHA must prove by substantial evidence that the ETS is *necessary*, and not arbitrary or capricious. *Asbestos Info.*, 727 F.2d at 421-422. Instead of accounting for employees of different ages, susceptibility to severe impacts, or the widespread vaccination rates among adults, the application of the ETS is arbitrarily keyed to numbers of employees in a company—not even the number in a given location or their proximity to others in the workplace. This ETS also completely fails to distinguish between unvaccinated workers who have recovered from COVID and those who have never been exposed. In *Missouri v. Biden*, -- F.Supp.3d ---, *8 (E.D. MO, 2021) (appeal filed), the court found that it was arbitrary and capricious that CMS's rejected alternative to vaccine mandates for "those with natural immunity by a previous coronavirus infection."

The Fifth Circuit also doubted the necessity of the ETS based on its "underinclusive nature," which "implies that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary." Order at 616. One key aspect of the ETS's underinclusiveness is that it "cannot prevent vaccinated employees from spreading the virus in the workplace, or prevent unvaccinated employees from spreading the virus in between weekly tests." Order at 616 n. 19.

The coronavirus vaccine is meant to decrease the length and severity of disease but does not prevent infection and transmission. (Kaufman Decl. ¶ ¶ 40, 42, 50.) Both vaccinated and unvaccinated workers are capable of being infected and transmitting

the virus in the workplace. (Kaufman Decl. ¶¶ 13, 51.) Moreover, the Sixth Circuit and OSHA recognized that those who are infected but symptomatic, asymptomatic, or pre-symptomatic can transmit the disease, 6th Cir. Order at 21, but did not account for the fact that because the vaccine lessens symptoms and the ETS does not require vaccinated employees to wear masks or test, the *vaccinated* will pose a particular danger under the ETS. ETS at 61,409. Indeed, the Johnson & Johnson vaccine does not appear to be effective against the new Omicron variant of the virus. Stephanie Nolan, *Most of the World's Vaccines Likely Won't Prevent Infection from Omicron*, NEW YORK TIMES (Dec. 19, 2021). This variation in effectiveness increases the likelihood that vaccinated workers, not subject to mask or testing requirements, will pose a threat to the workplace, adding to the arbitrariness of the rule.

Finally, as a measure targeting American workers, the necessity of the ETS must be evaluated against the data for the working-age population. The government's assurance that vaccines are effective, ETS at 61,402, 61,402–03, which is necessarily behind its admitted impatience with the unvaccinated, must contend with the fact that Americans over eighteen, who comprise nearly all of the workforce, are overwhelmingly vaccinated—currently 85%, and climbing, having received at least one vaccination. *See COVID Data Tracker,* Centers for Disease Control, *available at* https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr (last accessed December 18, 2021). The ETS also ignores the treatment options that

workers have at their disposal, (Lyons-Weiler Decl. ¶ 31-33); (Kaufman Decl. ¶ 16), which are expanding.[5]

The ETS should be enjoined because the "lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassel v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (alteration in original) (quoting *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). Indeed, as the Fifth Circuit found, OSHA has failed to explain its departure from its own previous position that an ETS was not necessary to address COVID-19. 5th Cir. Op. at 614.

**E. The ETS's Testing Requirement Undermines Its Alleged Necessity.**

The testing mandate in the ETS for unvaccinated workers alone will not work for two reasons: first, science has proven that vaccination does not prevent transmission, so allowing vaccinated employees in the workplace without testing puts everyone at risk if one accepts OSHA's theory of risk. (Bhattacharya ¶ 32-33); (Kaufman ¶ 23, 42); (Lyons-Weiler Decl. ¶ 25). Second, COVID tests are inaccurate. (Lyons-Weiler Decl. ¶ 37). The ETS's testing requirement undermines the premise of its necessity, because COVID testing delivers both false positive and false negative results. These errors are not harmless. (Lyons-Weiler Decl. ¶ 15). And false positives will lead to unwarranted and costly quarantining of a significant portion of the workforce while allowing infectious individuals, including infectious vaccinated employees, into the workplace. (Lyons-Weiler Decl. ¶ 14). These false positive test

[5] *See* Brendan Morrow, *Pfizer says effectiveness of COVID antiviral pill is 'beyond our wildest dreams'*, Yahoo News (Nov. 5, 2021). https://news.yahoo.com/pfizer-says-effectiveness-covid-antiviral-110635778.html?fr=sycsrp_catchall.

counts also lead towards a higher fatality reporting rate. (Lyons-Weiler Decl. ¶¶ 13-18).) OSHA therefore failed to prove by substantial evidence the efficacy of compulsory testing of unvaccinated employees to alleviate the alleged grave danger.

**F. The Balance Of Equities Favors A Stay.**

The Sixth Circuit dismisses the costs and risks employers such as the Daily Wire will face as "speculative;" unquestioningly accepts OSHA's arbitrary theory that compliance will not impose significant costs; and concludes that employers facing "true impossibility of implementation . . . can assert that as an affirmative defense in response to a citation," or individually petition OSHA for a variance. 6th Cir. Order at 36-37. The Sixth Circuit stated, without explanation, that testing and masking do not create irreparable harms despite the evidence submitted by petitioners that they do. *Id.* The Sixth Circuit concluded that a stay "would risk compromising" the numbers of deaths and hospitalizations arising from workplace transmissions that OSHA claims its ETS would prevent, "indisputably a significant injury to the public." *Id.* Against these numbers, accepted with judicial deference, no interest—even if it were the foundation of Constitutional government, individual rights, or economic impacts of any magnitude—could possibly prevail. Indeed, the Sixth Circuit's balance of harms analysis omits any mention of the Constitution or the rule of law.

Returning to the data on the alleged prevalence of workplace outbreaks, 98% of the references contained in this ETS have nothing to do with workplace transmission. (Kaufman Decl. ¶ 77). The few cases dealing with workplace transmission that are cited in the ETS are based on minimal evidence that is

extremely weak and is loaded with confounding variables. (Kaufman Decl. ¶ 79). A careful review of the 490 pages of the ETS shows a complete lack of statistically significant references attributing risk to specific workplace environments. (Kaufman Decl. ¶ 81).

OSHA contends the ETS has proven that workers "are being hospitalized with COVID-19 every day, and many are dying." ETS at 61549. However, this sweeping assertion is not backed up with a single scientific citation. The few studies contained in the ETS that even deal with workers with COVID-19 fail to properly determine whether their infection was due to a workplace or community transmission. (*See e.g.* Kaufman Decl. ¶ 78.b, 78.d, 78.j, and 78.l).

While the ETS fails to actually prove that there is a grave danger of workplace transmission, the ETS puts the Daily Wire in an untenable position. The Daily Wire employs over 100 people. (App. 8, Declaration of Jeremy Boreing ("Boreing Decl.") ¶ 38-54). The ETS will force it to either (A) intrude on employees' private health decisions, undertake significant compliance costs, face increased liability to workers, and lose key employees; or (B) pay crushing fines for noncompliance. (Boreing Decl. ¶ 39-54.). By some estimates, administration costs could be millions of dollars annually.[6] The Sixth Circuit's suggestion that The Daily Wire address these harms by adding the costs of applying for an exemption, likely litigating over the denial of

[6] Rebecca Rainey, Biden's Workplace Vaccine Mandate Faces Headwinds, Politico, *available at* https://www.politico.com/news/2021/09/13/biden-mandates-vaccines-reactions-511680 (last accessed December 5, 2021).

an exemption, or asserting an affirmative defense in OSHA enforcement proceedings—only adds more harm.

Indeed, as the Fifth Circuit correctly concluded, companies such as The Daily Wire that are "seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA's plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees." 5th Cir. Order at 618. "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment).

The Fifth Circuit also correctly concluded that "a stay is firmly in the public interest" because of the "economic uncertainty" and "workplace strife" caused by "the mere specter of the Mandate," but, more importantly, "the principles at stake when it comes to the Mandate are not reducible to dollars and cents." Order at 618. "The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials." 5th Cir. Order at 618–19.

Against these interests, in the absence of an ETS: states, local governments, and employers are free to impose vaccination requirements; vaccines are readily

available and free to any person who wants one; and 85% of persons over the age of 18 in the U.S. have already received at least one vaccination.

Accordingly, on balance, the interests favor this Court's imposition of a stay pending a review on the merits of the Mandate.

## CONCLUSION

The Sixth Circuit misapplied the standard of review for an OSHA ETS, giving excessive deference to OSHA's assertions. Moreover, in addition to the significant Constitutional problems with the ETS, which other applications amply analyze and with which The Daily Wire agrees as shown in its pleadings before the Sixth Circuit, the ETS also fails to meet the statutory requirements for an ETS.

It does so by failing to establish by substantial evidence that the danger it cites (the coronavirus) is present in the workplaces it regulates. Instead of regulating the handling of the coronavirus or practices in place in which the coronavirus is found, it regulates *unvaccinated workers*, whether or not they are infected, and does not regulate vaccinated workers, even if they are infected. It also makes no distinction between workplaces in which people work in close proximity, even though that is one factor OSHA recognizes as significant for the risk of transmission. Indeed, the rule applies to companies based on the number of people they employ rather than any aspect of their industry or the characteristics of their facilities, including how many employees work in them. These features of the ETS are what one would expect from a trick to impose an otherwise unconstitutional federal vaccination mandate to ramp up the vaccination rate, but not a workplace safety rule arising from a hazard (the virus) actually present in a particular kind of workplace.

The Sixth Circuit also incorrectly weighed the balance of interests when dissolving the stay imposed by the Fifth Circuit. Against a concrete host of articulated irreparable harms, including extensive compliance costs and risks incurred to respond to an invalid rule and the public interest in upholding the Constitution and the rule of law, OSHA has only a speculative claim that forcing employees to get vaccinated will mean fewer are harmed by the virus. But 85%, and climbing, of all Americans over 18 have at least one vaccination shot, the data on workplace transmission is weak to nonexistent, states, municipalities, and companies can mandate vaccinations, and workers can get free vaccinations at will.

For the foregoing reasons, and the constitutional and other statutory arguments asserted by the other applicants and submitted by The Daily Wire before the Sixth Circuit, The Daily Wire requests that the Supreme Court order the stay of the implementation of OSHA's ETS pending review, or grant certiorari and a stay before judgment pending resolution on the merits.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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