

Nos. 21A244 and 21A247

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In The  
**Supreme Court of the United States**

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IN RE: MCP NO. 165, OCCUPATIONAL SAFETY  
AND HEALTH ADMINISTRATION, INTERIM FINAL  
RULE: COVID-19 VACCINATION AND TESTING;  
EMERGENCY TEMPORARY STANDARD  
86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021

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**On Applications For Stay Or Injunction Pending  
Review Of Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit**

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**MOTION AND BRIEF OF THE NATIONAL  
DISABILITY RIGHTS NETWORK AND THE JUDGE  
DAVID L. BAZELON CENTER FOR MENTAL  
HEALTH LAW AS *AMICI CURIAE* IN OPPOSITION  
TO THE EMERGENCY APPLICATIONS FOR A STAY  
OR INJUNCTION PENDING CERTIORARI REVIEW**

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AGATHA M. COLE  
*Counsel of Record*  
ALISON BOROCHOFF-PORTE  
CHRISTOPHER LEUNG  
ADAM POLLOCK  
POLLOCK COHEN LLP  
60 Broad Street, 24th Floor  
New York, NY 10004  
(212) 337-5361  
agatha@pollockcohen.com

*Counsel for Amici Curiae*

**MOTION FOR LEAVE TO FILE**

Pursuant to Supreme Court Rule 37.2, the National Disability Rights Network (“NDRN”) and the Judge David L. Bazelon Center for Mental Health Law respectfully move for leave to file the attached brief as *amici curiae* in opposition to the various Emergency Applications seeking to stay or otherwise enjoin the Sixth Circuit’s decision in *In re MCP NO. 165*, 21-4027, 2021 WL 5989357 (6th Cir. Dec. 17, 2021), pending review by this Court.

Due to the expedited briefing schedule in this matter, the undersigned *amici* were unable to provide the requisite ten days’ notice of their intent to file the present brief. *Amici* did provide notice to all parties via email on December 27, 2021, however, and have since obtained consent to the filing from many of those parties, including: the Republican National Committee; the State of Ohio; the Alliance Defending Freedom; the National Federation of Independent Business; BST Holdings, LLC; Associated Builders and Contractors, Inc.; the First Liberty Institute; Betten Chevrolet; the Job Creators Network; and Scott Bedke et al. No other party has objected to the filing of this brief.

Accordingly, and in light of the foregoing circumstances, *amici* respectfully request that their motion for leave to file the attached brief be granted.

December 30, 2021

Respectfully submitted,

AGATHA M. COLE

*Counsel of Record*

ALISON BOROCHOFF-PORTE

CHRISTOPHER LEUNG

ADAM POLLOCK

POLLOCK COHEN LLP

60 Broad Street, 24th Floor

New York, NY 10004

(212) 337-5361

*Counsel for Amici Curiae*

TABLE OF CONTENTS

|   | Page |
|---|------|
| INTEREST OF <i>AMICI CURIAE</i> .....   | 1    |
| SUMMARY OF THE ARGUMENT .....   | 2    |
| ARGUMENT .....  | 3    |
| I. THE ETS IS “NECESSARY” TO PROTECT<br>“EMPLOYEES” WHO FACE “GRAVE<br>DANGER FROM EXPOSURE” TO<br>“PHYSICALLY HARMFUL AGENT[S]”<br>OR “NEW HAZARDS” IN THE WORK-<br>PLACE .....  | 3    |
| A. The definition of “employees” in the<br>Occupational Safety and Health Act<br>necessarily includes those with medi-<br>cal conditions and/or disabilities that<br>make them especially vulnerable to<br>COVID-19 ..... | 5    |
| B. COVID-19 presents an especially<br>“grave danger” to employees who are<br>exposed to others in the workplace and<br>who have medical conditions that<br>make them particularly vulnerable to<br>infection .....        | 8    |
| C. Exposure to COVID-19 through em-<br>ployees who refuse to either get vac-<br>cinated or wear a mask and undergo<br>regular testing to protect is a “new<br>hazard” in the workplace.....                               | 12   |

TABLE OF CONTENTS—Continued

|  | Page |
|--|------|
| D. The ETS is a “necessary” workplace protection that effectively mitigates the risk of exposure to workers who are themselves or whose loved ones are especially vulnerable to COVID-19 ..... | 14   |
| II. ENJOINING THE ETS WOULD HAVE A DEVASTATING AND DISPROPORTIONATE IMPACT ON MEDICALLY VULNERABLE AND/OR DISABLED PERSONS .....   | 15   |
| CONCLUSION.....  | 20   |

## TABLE OF AUTHORITIES

|  | Page          |
|--|---------------|
| CASES  |               |
| <i>Asbestos Info. Ass’n/N. Am. v. Occupational Safety &amp; Health Admin.</i> ,<br>727 F.2d 415 (5th Cir. 1984)..... | 9             |
| <i>Associated Builders &amp; Contractors, Inc. v. Shiu</i> ,<br>773 F.3d 257 (D.C. Cir. 2014) .....                  | 8             |
| <i>Fla. Peach Growers Ass’n, Inc. v. U.S. Dep’t of Labor</i> ,<br>489 F.2d 120 (5th Cir. 1974).....                  | 9             |
| <i>In re MCP NO. 165</i> ,<br>21-4027, 2021 WL 5989357<br>(6th Cir. Dec. 17, 2021).....                              | 9, 10, 12, 14 |
| <i>McMillan v. City of New York</i> ,<br>711 F.3d 120 (2d Cir. 2013) .....   | 8             |
| STATUTES AND REGULATIONS   |               |
| Americans with Disabilities Act,<br>42 U.S.C. § 12101 <i>et seq.</i> .....   | 8, 19         |
| COVID-19 Vaccination and Testing;<br>Emergency Temporary Standard,<br>86 Fed. Reg. 61,402 .....                      | <i>passim</i> |
| Occupational Safety and Health Act of 1970<br>(“OSH Act”),<br>29 U.S.C. § 651 <i>et seq.</i> .....                   | <i>passim</i> |
| Rehabilitation Act,<br>29 U.S.C. § 794 <i>et seq.</i> .....  | 8             |

## TABLE OF AUTHORITIES—Continued

|   | Page |
|---|------|
| OTHER AUTHORITIES   |      |
| <i>Accessibility</i> , U.S. Dep’t of Transportation,<br><a href="https://www.transportation.gov/accessibility">https://www.transportation.gov/accessibility</a> .....   | 18   |
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| <i>COVID-19 Compared with Other Deadly Viruses</i> ,<br>Med. Xpress (Nov. 1, 2021), <a href="https://medicalxpress.com/news/2021-11-covid-deadly-viruses.html">https://medicalxpress.com/news/2021-11-covid-deadly-viruses.html</a> .....   | 9    |
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## TABLE OF AUTHORITIES—Continued

|   | Page |
|---|------|
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| Heather Long and Andrew Van Dam, <i>U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era</i> , <i>Washington Post</i> (May 8, 2020), <a href="https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/">https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/</a> .....  | 16   |
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## TABLE OF AUTHORITIES—Continued

|  | Page |
|--|------|
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## TABLE OF AUTHORITIES—Continued

|  | Page |
|--|------|
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## TABLE OF AUTHORITIES—Continued

|  | Page   |
|--|--------|
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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici curiae* are non-profit and advocacy organizations that represent the interests of persons who live with certain medical conditions and/or disabilities that render them especially vulnerable to the effects of COVID-19 in the workplace:

**The National Disability Rights Network** (“NDRN”) is the non-profit membership organization for the federally mandated Protection and Advocacy (“P&A”) and Client Assistance Program (“CAP”) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

**The Judge David L. Bazelon Center for Mental Health Law** is a non-profit advocacy organization that works to protect and advance the civil rights of adults and children with mental illness or developmental disabilities, and to promote a society where Americans with mental disabilities live with autonomy, dignity, and opportunity in welcoming communities, supported by law, policy, and practices that help them reach their full potential.

*Amici* have a strong and shared interest in the outcome of this case based on their experiences advocating for the rights of employees with disabilities and related medical conditions to have safe and healthy workplaces, and to prevent the exclusion of such persons from meaningful participation in the workforce.



## SUMMARY OF THE ARGUMENT

*Amici* write to describe the dire implications of this case to the millions of American workers living with underlying medical conditions and disabilities that render them especially vulnerable to infection and complications from COVID-19. For these individuals, the risk of workplace exposure has devastating—and deadly—consequences.

Focusing on the statutory provision that authorizes OSHA to issue emergency temporary standards, *amici* seek to highlight the necessity of the emergency temporary standard (“ETS”) for covered “employees” who live with medical conditions that render them

more vulnerable to infection—and who therefore face a particularly “grave danger from exposure” to COVID-19 in the workplace. 29 U.S.C. § 655(c)(1). *Amici* submit this brief to stress the importance of the ETS as an especially “necessary” workplace protection for these employees, *id.*, and to urge this Court against issuing a stay or injunction that would prevent the ETS from going into effect.

*Amici* further write to underscore the immeasurable and disproportionate harm that these employees will suffer if the ETS is enjoined, as compared to the far less consequential injuries that those opposing the ETS are invoking as the basis for seeking this Court’s intervention.

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## ARGUMENT

### I. THE ETS IS “NECESSARY” TO PROTECT “EMPLOYEES” WITH MEDICAL CONDITIONS OR DISABILITIES WHO FACE A PARTICULARLY “GRAVE DANGER FROM EXPOSURE” TO “PHYSICALLY HARMFUL AGENT[S]” OR “NEW HAZARDS” IN THE WORKPLACE.

The Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 651 *et seq.*, was enacted “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) (emphasis added). In order to achieve that objective, Congress gave OSHA broad

authority to promulgate and enforce occupational safety and health standards requiring “the adoption or use of . . . practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment” for American workers. 29 U.S.C. §§ 652(8), 655-659.

Although such regulations are ordinarily subject to the notice-and-comment procedures described in 29 U.S.C. § 655(b), the emergency temporary standard provision functions as an exception to these default rulemaking procedures by allowing for “an emergency temporary standard to take immediate effect” if it is determined that: “(A) that employees are exposed to grave danger from exposure to . . . agents determined to be . . . 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).

The challenged ETS was issued pursuant to this provision on November 5, 2021, and requires employers with 100 or more employees to implement a “COVID-19 vaccination policy,” or require that employees “undergo regular COVID-19 testing and wear a face covering at work[,] in lieu of vaccination.” 86 Fed. Reg. 61,402.

As explained below, *amici* submit that the ETS is especially “necessary” to protect “employees” with underlying medical conditions and/or disabilities who face a particularly “grave danger from exposure” to

COVID-19, which is a “physically harmful agent” and presents “new hazards” in the workplace.

**A. The definition of “employees” in the Occupational Safety and Health Act necessarily includes those with underlying medical conditions and/or disabilities that render them especially vulnerable to COVID-19.**

The OSH Act defines the term “employee” as one “who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(6) (“Definitions”). This broad statutory definition necessarily includes employees with underlying medical conditions and/or disabilities that render them especially vulnerable to COVID-19 infection as being within the scope of those persons that the statute is designed to protect. These individuals are just as entitled to reasonable protections from “grave danger” in the workplace as all other employees—even if that means implementing protective measures that others may oppose on political and ideological grounds.

The Centers for Disease Control and Prevention (“CDC”) has identified numerous medical conditions that exacerbate the risk of developing severe illness from COVID-19 infection. *People with Certain Medical Conditions*, Centers for Disease Control and Prevention (Oct. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. People with cancer, for example, as

well as those with diabetes, immune system disorders, or heart disease—and countless other medical conditions affecting large swaths of the U.S. population—are all at an “increased risk of [developing] severe illness from [exposure to] COVID-19.” *Id.*

Some individuals affected by these conditions also face a heightened risk of contracting COVID-19 in the first place—such as those with weakened immune systems, who are unable to mount a sufficiently strong antibody response to vaccines—or those with limited mobility, who have difficulty avoiding contact with others or practicing other preventative measures (*e.g.*, frequent handwashing, wearing a mask, etc.). *People with Disabilities*, Centers for Disease Control and Prevention (Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>. People with intellectual disabilities also have a heightened risk of becoming infected. *See* Wendy Ross, *The Terrible Toll of COVID-19 on People with Intellectual Disabilities*, Ass’n of Am. Med. Colleges (Apr. 20, 2021), <https://www.aamc.org/news-insights/terrible-toll-covid-19-people-intellectual-disabilities> (citation omitted) (“Having an intellectual disability . . . [is] the highest independent risk factor for contracting COVID-19, controlling for race, ethnicity, and other variables . . . [and] [is] higher even than age or heart or lung problems.”). And in the case of infection, those with disabilities are also less likely to be able to afford medical care. *See, e.g., Disability, Health Equity & COVID-19*, Nat’l Inst. For Health Care Management (Sept. 21, 2021), <https://nihcm.org/>

publications/disability-health-equity (“26.7% of people with a disability could not see a doctor due to cost in the past 12 months compared to 10.1% of people without a disability.”).

Individuals living with these medical conditions comprise a significant portion of the American workforce. One in four adult Americans (approximately 61 million people) have a disability. *CDC: 1 in 4 US Adults Live with a Disability*, Centers for Disease Control and Prevention (Aug. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0816-disability.html>. And nearly 40% of persons with disabilities aged 16 to 64 are gainfully employed. See *Disability Employment Statistics*, Office of Disability Employment Policy, U.S. Dep’t of Labor, <https://www.dol.gov/agencies/odep/research-evaluation/statistics>. Millions of Americans are also immunocompromised. Sara Berg, *What to Tell Immunocompromised Patients About COVID-19 Vaccines*, American Medical Association (Aug. 17, 2021), <https://www.ama-assn.org/delivering-care/public-health/what-tell-immunocompromised-patients-about-covid-19-vaccines> (“Immunocompromised people account for at least 2.7% of U.S. adults—about 7 million people. This includes those who have had organ transplants, stem cell transplants and cancer, as well as those with primary immunodeficiency and those treated with immunosuppressive medications.”). Many of these individuals want to continue working—or must do so in order to provide for themselves and their families.

It is the aim of our federal laws to ensure the employment and protection of persons with disabilities

and to enable them to be employees. This goal is enshrined in the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* and Rehabilitation Act, 29 U.S.C. § 794 *et seq.* See *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 260 (D.C. Cir. 2014) (“Congress enacted the Rehabilitation Act . . . ‘to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society,’ as well as ‘to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities.’”); *McMillan v. City of New York*, 711 F.3d 120, 122-23 (2d Cir. 2013) (“One of the central goals of the Americans with Disabilities Act . . . is to ensure that, if reasonably practicable, individuals are able to obtain and maintain employment without regard to whether they have a disability.”). This cannot be achieved without effectuating the interdependent goals of the OSH Act to assure “safe and healthful working conditions,” 29 U.S.C. § 651(b), which, by its terms protects all such individuals as “employees,” who are equally entitled to safe workplaces. 29 U.S.C. § 652(6).

**B. COVID-19 presents an especially “grave danger” to employees who are exposed to others in the workplace and who have medical conditions that make them particularly vulnerable to infection.**

It has been said that the “[g]ravity of [the] danger” contemplated by the emergency temporary standard provision, 29 U.S.C. § 655(c)(1), is “a policy decision

committed to OSHA, [and] not to the courts.” *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 427 (5th Cir. 1984). Nevertheless, since the meaning of this phrase is apparently in dispute before this Court, the practical health and safety concerns that prompted OSHA to issue the ETS merit some discussion here—especially as they relate to the populations that *amici* represent.

“Health effects may constitute a ‘grave danger’ under the OSH Act if workers face ‘the danger of incurable, permanent, or fatal consequences.’” *In re MCP NO. 165*, 21-4027, 2021 WL 5989357, at \*10 (6th Cir. Dec. 17, 2021) (quoting *Fla. Peach Growers Ass’n, Inc. v. U.S. Dep’t of Labor*, 489 F.2d 120, 132 (5th Cir. 1974)).

It is abundantly clear that exposure to COVID-19 presents a “grave danger” (*i.e.*, a threat of fatal consequences) in the workplace. COVID-19 is a contagious disease caused by an airborne virus (SARS-CoV-2) that is remarkably lethal. *See, e.g., COVID-19 Compared with Other Deadly Viruses*, Med. Xpress (Nov. 1, 2021), <https://medicalxpress.com/news/2021-11-covid-deadly-viruses.html> (“The human toll of COVID-19 . . . far outstrips that of other viral epidemics in the 21st century [including H1N1 and SARS]”).

Over the 21-month period since COVID-19 was declared be a global pandemic, the virus has infected approximately 52.8 million Americans and led to over 812,000 deaths in the United States. *See United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, Centers

for Disease Control and Prevention, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days); Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91(1) *Acta bio-medica: Atenei Parmensis* 157-160 (2020), <https://pubmed.ncbi.nlm.nih.gov/32191675/>. And although the majority of Americans infected with COVID-19 ultimately survive, there is mounting evidence that the disease causes serious, long-lasting, and in some cases permanent health problems in some individuals—affecting their quality of life and potential life-expectancy over the long-term. Tae Chung et al., *COVID ‘Long Haulers’: Long-Term Effects of COVID-19*, *Johns Hopkins Medicine* (Apr. 1, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-long-haulers-long-term-effects-of-covid19>; *Long COVID-19 and Workplace Accessibility*, Partnership on Employment & Accessible Technology (Sept. 7, 2021), <https://www.peatworks.org/long-covid-19-and-workplace-accessibility/>; *see also In re MCP NO. 165*, 21-4027, 2021 WL 5989357, at \*11 (6th Cir. Dec. 17, 2021).

In light of the foregoing, the fact that COVID-19 presents a “grave danger” to the health of those who are exposed to the virus should hardly be a point of real contention. And, of course, the gravity of that danger is even more stark and consequential for those individuals who themselves, or whose loved ones, have medical conditions or live with disabilities that make them especially susceptible to infection and who are more vulnerable to severe illness and complications if they contract the disease.

The *gravity* of the danger is sobering. Millions of Americans are currently living with underlying medical conditions which the CDC has identified as significantly increasing the risk complications that can lead to “hospitalization, admission to the intensive care unit[s] . . . intubation or mechanical ventilation, [and even] death,” due to COVID-19 infection. *Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Providers*, Centers for Disease Control and Prevention (Oct. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html>. And many others live with intellectual and/or developmental disabilities that make them more vulnerable to the disease; according to one study, the “mortality [rate] of those with intellectual disabilities and developmental disabilities . . . [is] nearly 8 times higher than the general population.” Jonathan Gleason et al., *The Devastating Impact of Covid-19 on Individuals with Intellectual Disabilities in the United States*, NEJM Catalyst (Mar. 5, 2021), <https://catalyst.nejm.org/doi/full/10.1056/CAT.21.0051>. In other words, the threat is unquestionably real for the millions of Americans *amici* represent.

No one should be forced to contend with the prospect of facing such great harm in the workplace or made to choose between their own basic health and safety—or that of a child or other loved one who is especially vulnerable to infection—and their ability to work for a living. Particularly not where, as here, employers can implement reasonable, low-cost measures,

as required by the ETS, to effectively mitigate the risks of exposure.

**C. Exposure to COVID-19 through employees who refuse to either get vaccinated or wear a mask and undergo regular testing is a “*new hazard*” in the workplace.**

The government has already convincingly articulated why workplace exposure to COVID-19 constitutes a “physically harmful [biological] agent” within the meaning of 29 U.S.C. § 655(c)(1), and the U.S. Court of Appeals for the Sixth Circuit agreed with its well-reasoned analysis. *In re MCP NO. 165*, 21-4027, 2021 WL 5989357, at \*4 (6th Cir. Dec. 17, 2021) (“An agent that causes bodily harm—a virus—falls squarely within the scope of that definition.”).

In addition, it is worth noting that the risk of workplace exposure through colleagues and co-workers who refuse to either get vaccinated, or wear a mask and undergo regular testing, is also a relatively “new” phenomenon and workplace “hazard” that many employees are now facing for the first time—given the momentous return to the workplace that has been precipitated, in recent months, by the widespread availability of vaccines and testing technologies.

At the onset of the COVID-19 pandemic, many businesses were forced to drastically downsize or alter their in-person work arrangements and operations, or shutdown altogether, in order to reduce the spread of

infection. Many employees who were laid-off, furloughed, or instructed to work-from-home are now being asked and expected to return to the workplace. For those individuals, the threat of exposure to COVID-19 in the workplace is clearly a “new hazard” that they did not necessarily have to contend with until very recently. And many employers do not have the necessary accommodations in place for the safe return of employees with disabilities. *New Employer Survey Portends Difficult Road Ahead for People with Disabilities Who Lost their Jobs During COVID-19 Pandemic*, Nat’l Org. on Disability (July 16, 2020), <https://www.nod.org/new-employer-survey-portends-difficult-road-ahead-for-people-with-disabilities-who-lost-their-jobs-during-covid-19-pandemic/> (explaining that “many employers still do not have adequate accommodations processes in place and fewer HR and hiring managers are receiving needed disability training to effectively on-board new employees.”). This is especially problematic given the more recent increase of COVID-19 infection due to the Omicron variant.

Moreover, for those employees who are themselves, or whose children or loved ones are more vulnerable to COVID-19, the risk of exposure through coworkers who refuse to get vaccinated or undergo regular testing makes the prospect of returning to or remaining in the workplace impossibly difficult. Our laws serve—and should be utilized—to protect these individuals, rather than forcing them to contend with draconian Darwinistic social policies masquerading as non-interventionism.

**D. The ETS is a “necessary” workplace protection that effectively mitigates the risk of exposure to workers who are themselves especially vulnerable.**

As explained by the Sixth Circuit, OSHA proffered “extensive” and “substantial” evidence to substantiate its finding that the challenged ETS is a “necessary” workplace protection within the meaning of 29 U.S.C. § 655(c)(1). *In re MCP NO. 165*, 21-4027, 2021 WL 5989357, at \*13-16 (6th Cir. Dec. 17, 2021) (explaining that OSHA’s decision to issue the ETS was supported by “extensive evidence” regarding the effectiveness and necessity of vaccine policies or masking-and-testing protocols to protect employees from being infected and infecting others in workplace); *see also id.* at \*19 (citing OSHA’s estimate that the ETS will “save over 6,500 worker[s] lives” and “prevent over 250,000 hospitalizations” over the six-month period during which it is slated to take effect).

The “necessity” of that protection is even more critical for those who live with medical conditions that make them especially susceptible to contracting the virus and more vulnerable to severe illness, complications, or even death, if they become infected. Indeed, the challenged ETS and the protections that it will provide to workers when it goes into effect are quite literally life-saving measures for persons with these conditions. Recent policies have demonstrated that lives are saved when individuals with disabilities are prioritized. In Tennessee, for example, “the first state to include people with intellectual disabilities in its

initial vaccine rollout,” new infections among individuals with intellectual disabilities and their caregivers fell approximately 80 percent between December 2020 and February 2021. Wendy Ross, *The Terrible Toll of COVID-19 on People with Intellectual Disabilities*, Ass’n of Am. Med. Colleges (Apr. 20, 2021), <https://www.aamc.org/news-insights/terrible-toll-covid-19-people-intellectual-disabilities> (citation omitted).

And while the ETS is of course “necessary” to protect all covered employees from the risks and dangers associated with COVID-19, the critical importance of these protections to millions of Americans who either themselves, or whose loved ones, live with conditions that render them more vulnerable to infection, should weigh heavily on this Court’s conscience in deciding whether to intervene at this stage.

## **II. ENJOINING THE ETS WOULD HAVE A DEVASTATING AND DISPROPORTIONATE IMPACT ON MEDICALLY VULNERABLE AND DISABLED PERSONS**

COVID-19 has already resulted in a massive loss of work and employment opportunities for many Americans. In early 2020, the national unemployment rate was relatively low at 3.6 percent, and the United States was in the midst of a decade-long economic expansion. *Unemployment Rises in 2020, as the Country Battles the COVID-19 Pandemic*, Monthly Labor Review (June 2021), <https://www.bls.gov/opub/mlr/2021/>

article/unemployment-rises-in-2020-as-the-country-battles-the-covid-19-pandemic.htm. At the onset of the pandemic, millions of Americans were laid off as businesses downsized or suspended their operations—causing an unprecedented spike in the national unemployment rate to 14.7 percent by April 2020—the highest rate since the Great Depression. Heather Long and Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era*, Washington Post (May 8, 2020), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/>. The impact of these layoffs had a disproportionate effect on workers with disabilities, who experienced a 20 percent decline in employment as compared to a 14 percent decline experienced by workers without disabilities. See Gina Livermore & Jody Schimmel Hyde, *Workers with Disabilities Face Unique Challenges in Weathering the COVID-19 Pandemic*, Mathematica (May 28, 2020), <https://www.mathematica.org/commentary/workers-with-disabilities-face-unique-challenges-in-weathering-the-covid-19-pandemic>; see also Press Release: Kessler Foundation, National Trends In Disability Employment (nTIDE) April 2020 Jobs Report: COVID Recession Hits Workers with Disabilities Harder (May 8, 2020), <https://kesslerfoundation.org/press-release/ntide-april-2020-jobs-report-covid-recession-hits-workers-disabilities-harder>.

These figures are especially dismaying when viewed alongside evidence of the critical benefits that secure employment has on the psychological and socioeconomic well-being of persons who live with disabilities,

mental illness and/or other serious medical conditions. See, e.g., Lisa Ottomanelli & Lisa Lind, *Review of Critical Factors Related to Employment After Spinal Cord Injury: Implications for Research and Vocational Services*, 32 J. Spinal Cord Med. 503 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2792457/> (explaining that persons who resume work after becoming disabled due to spinal cord injuries report having a significantly higher quality-of-life than those who become unemployed as a result); Vidya Sundar et al., *Striving to Work and Overcoming Barriers: Employment Strategies and Successes of People with Disabilities*, 28 Journal of Vocational Rehabilitation 93 (2018), <https://kesslerfoundation.org/sites/default/files/2019-07/Striving%20to%20Work%20JVR.pdf> (“Work is a highly valued activity that provides opportunities to engage in meaningful activity, socialize with others, and achieve economic self-sufficiency [for people with disabilities].”); *Getting to Work: Promoting Employment of Persons with Mental Illness*, Judge David L. Bazelon Center for Mental Health Law (Sept. 2014), <http://www.bazelon.org/wp-content/uploads/2017/01/Getting-to-Work.pdf> (explaining that “employment has been widely recognized as a fundamental part of recovery and of community integration for people with serious mental illness”); see also *Going Back to Work*, National Cancer Institute (Jan. 24, 2019), <https://www.cancer.gov/about-cancer/coping/day-to-day/back-to-work>.

If the various challenges to the ETS succeed, the absence of reasonable workplace protections from COVID-19 will only deepen this divide by effectively

precluding large swaths of Americans with disabilities and underlying medical conditions from participating in the workforce due to legitimate concerns for their health and safety. Individuals with disabilities already face inordinate difficulties in sustaining employment, and suffer disproportionately from poverty, and access to adequate transportation for commuting purposes. *See Highlighting Disability/Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities*, Nat'l Council on Disabilities (Oct. 26, 2017), <https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release> (“People with disabilities make up approximately 12 percent of the U.S. working-age population; however, they account for more than half of those living in long-term poverty.”); *Accessibility*, U.S. Dep’t of Transportation, <https://www.transportation.gov/accessibility> (“According to the National Household Travel survey, 25.5 million Americans have travel-limiting disabilities.”). Moreover, it is plainly disingenuous to express concern over those employees who might resign because of a vaccine or test-and-mask requirement, while staying silent about those employees who would have no choice but to resign to protect themselves or their families from unsafe conditions. *See* Emergency Application of Twenty-Six Bus. Ass’ns for Immediate Stay of Agency Action at 27, Consolidated Case No. 21A244, at 30-32 (Dec. 17, 2021) (expressing concern over employees who “would be more likely to quit their jobs” in response to OSHA regulations).

To the extent that the ETS challenges seek to levy the interests of employers and employees who are

*by personal choice* ideologically opposed to vaccines, masks, testing, above the interests of employees who possess legitimate health and safety concerns through *no choice of their own*, the balance of the equities strongly favors the latter group of employees who face a real and substantial risk of physical, irreparable injury in the absence of such protections.

In signing the Americans with Disabilities Act of 1990, the late President George H.W. Bush stated that “the American people have once again given clear expression to our most basic ideals of freedom and equality,” and heralded the Act for “promis[ing] to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation, and telecommunications,” and setting the stage to reverse the “persistent discrimination in the workplace” that persons with disabilities face. Transcript of Statement by President George H.W. Bush (July 26, 1990), Nat’l Archives, <https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html>.

As our nation contends with the dual threat of a public health emergency and economic recession that have both had a disproportionate impact on persons with disabilities, it is incumbent upon the Court to consider how enjoining the ETS would exacerbate the historical exclusion and contemporary inequities that these communities have already faced in the workplace and in society at large.

In the words of Hubert H. Humphrey, “the moral test of government is how . . . [it] treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped.” Celebrating the 100th Anniversary of Hubert H. Humphrey’s Birth, The Leadership Conference Education Fund, <https://civilrights.org/edfund/resource/humphrey100/>. This precise moment in history is no doubt such a test, as are the issues presently before the Court. Accordingly, *amici* implore the Court to consider these individuals in its analysis of the pending applications.

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## CONCLUSION

For these reasons, the Court should deny the pending applications to stay or enjoin the ETS, which is a critically important and proper exercise of OSHA’s statutory authority under 29 U.S.C. § 655(c)(1).

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Respectfully submitted,

AGATHA M. COLE

*Counsel of Record*

ALISON BOROCHOFF-PORTE

CHRISTOPHER LEUNG

ADAM POLLOCK

POLLOCK COHEN LLP

60 Broad Street, 24th Floor

New York, NY 10004

(212) 337-5361

*Counsel for Amici Curiae*