Nos. 21-7000 (lead), 21-4080, 21-4117

In the United States Court of Appeals for the Sixth Circuit

IN RE: MCP NO. 165., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

On Petition for Review
from the Occupational Safety and Health Administration

TWENTY-SIX BUSINESS ASSOCIATION PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO AMEND SCHEDULE FOR STAY BRIEFING AND TO SET SCHEDULE FOR MERITS BRIEFING

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The 26 business associations that are Petitioners in Nos. 21-4080 and 21-4117 (collectively, the "Business Association Petitioners")[*] oppose Respondents' motion to modify this Court's current stay-briefing schedule and to set a merits-briefing schedule.

1. Respondents ask the Court to truncate the stay briefing schedule by requiring Petitioners to file their oppositions to all motions to vacate the stay only three days later, by Thursday December 2 instead of the current deadline of Tuesday December 7, and to give themselves four days to file any reply.

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[*] They are the National Federation of Independent Business, American Trucking Associations, Inc., National Retail Federation, FMI—The Food Industry Association, National Association of Convenience Stores, National Association of Wholesaler-Distributors, International Warehouse and Logistics Association, National Propane Gas Association, International Foodservice Distributors Association, Brick Industry Association, American Bakers Association, Kentucky Petroleum Marketers Association, Kentucky Trucking Association, Louisiana Motor Transport Association, Michigan Association of Convenience Stores, Michigan Petroleum Association, Michigan Retailers Association, Michigan Trucking Association, Mississippi Trucking Association, Ohio Grocers Association, Ohio Trucking Association, Tennessee Chamber of Commerce and Industry, Tennessee Grocers and Convenience Store Association, Tennessee Manufacturers Association, Tennessee Trucking Association, and Texas Trucking Association.

There is no need to alter the already-expedited briefing schedule this Court has entered, which is significantly shorter than the default motion schedule in this Circuit. But if the Court is to amend its schedule, then it should not grant the Government's self-serving request to give itself more time to file a reply brief than Petitioners have to oppose all motions to vacate the stay.

2. Respondents further ask the Court to set an unreasonable merits-briefing schedule that would require opening briefs by December 8—less than two weeks from today.[1] Their proposed schedule would prejudice the rights of current and future petitioners and intervenors. This Court should reject their request.[2]

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[1] Respondents would also give themselves two full weeks (until December 22) to file their brief, and would then require Petitioners to file their reply briefs in one week over Christmas (due December 29).

[2] Respondents offer (Emergency Mot. at 3) that they can file the administrative record immediately to get the briefing schedule started. But that is only because they acted unlawfully in foregoing notice-and-comment rulemaking, as the Business Association Petitioners argued in their Fifth Circuit stay motion (Exhibit A, Mot. for Stay at 7-15). Thus, the administrative record is not voluminous and thus is easy to file only because of Respondents' unlawful action.

Respondents' proposal would make opening briefs due almost a month before the statutory deadline to file petitions for review. The Occupational Safety and Health Act grants a statutory right to "any person adversely affected" by OSHA's emergency temporary standard ("ETS") to file a petition challenging its validity "at any time prior to the sixtieth day" after promulgation. 29 U.S.C. § 655(f). Respondents promulgated this ETS on November 5, 2021. Accordingly, adversely affected parties have until January 3, 2022, to file petitions for review. Counsel for the Business Association Petitioners is aware of other trade associations that are interested in and planning to file petitions for review. Respondents' proposed schedule would eliminate their statutory right to participate. At a minimum, this Court should not require briefing to begin until a reasonable time after January 3, 2022.

Respondents' briefing schedule would also apply before the 30-day deadline for motions to intervene under Federal Rule of Appellate Procedure 15. Many of the Business Association Petitioners, as well as other Petitioners, may intervene to oppose several of the petitions for

review filed by unions and other parties that have arguments contrary to their interests. Likewise, many of the union petitioners may move to intervene to oppose the petitions filed by the Business Association Petitioners and others. The Respondents' briefing schedule utterly fails to acknowledge the role of intervenors. This Court should not set a briefing schedule until after the period for intervention has ended and all the parties can agree upon a briefing schedule and word limits that account for intervenors.

3. The Business Association Petitioners also oppose Respondents' suggestion that the Court require all petitioners to file joint briefs or limit the standard-word allotment. There are more than three dozen petitions for review that have already been filed. There are more than 150 petitioners. There are also many different legal arguments against the ETS, including numerous different constitutional claims, statutory claims, and record-intensive administrative law arguments based upon substantial evidence. There are also many different petitioner groups, some of which may be adamantly opposed to any vaccination

requirements at all, others of which may have different views. Some of these groups may have strongly held convictions, including religious beliefs, about these issues. It may not be feasible for these disparate petitioners to join on briefing even if they share some legal arguments.

Given the number of petitioners, the variety of issues they intend to pursue from varying perspectives, and the possibility of a truncated briefing schedule, the Business Association Petitioners believe this Court's standard 13,000-word allotment for opening briefs is appropriate for each group of petitioners represented by the same counsel. The Business Association Petitioners would consent to the Respondents' request to get one-half of the length of the total words used by all petitioners.

If the Court does find joint briefing desirable, then the Business Association Petitioners recommend the formation of a liaison committee of counsel of record for each petitioner group and any intervenors that shall meet and confer with counsel for Respondents, and that the liaison committee then submits briefing proposals to the

Court by January 7, 2022 (three days after the deadline for filing petitions for review).

4. It would be one thing if Respondents would stipulate to a stay of the ETS pending the conclusion of judicial review and to a day-for-day extension of the deadlines in the ETS for each day litigation is pending in this Court before a merits decision is rendered; in that circumstance, an expedited briefing schedule may be warranted. But as demonstrated by Tuesday's "emergency" motion (filed eleven days after the Fifth Circuit's November 12 stay was entered), the Government absolutely refuses to countenance any delay in its unprecedented ETS. Indeed, the Administration continues to insist that employers should comply with the ETS notwithstanding the stay order entered by the Fifth Circuit under 28 U.S.C. § 2112(a)(4).[3]

[3] On November 18, 2021, Press Secretary Jen Psaki responded to a question about the impact of the Fifth Circuit's stay on the timing for ETS compliance by saying there was none. "Let me be very clear: Our message to businesses right now is to move forward. . . . That was our message after the first day [sic] issued by the Fifth Circuit. That remains our message and nothing has changed. . . . So, we are still heading towards the same timeline." Press Briefing by Press Secretary Jen Psaki (Nov. 18, 2021),

And in any event, it would be unreasonable and impractical to begin briefing before January. The Business Association Petitioners therefore propose an alternative merits-briefing schedule that would allow all potential petitioners and intervenors to join the case and provide all parties sufficient opportunity to prepare their merits arguments. Specifically, the Business Association Petitioners propose:

- Petitioners' opening briefs due January 21, 2022.
- Respondents' brief due February 4, 2022.
- Intervenors in support of Respondents briefs due February 11, 2022.
- Reply briefs due February 25, 2022.
- Oral argument as soon thereafter as possible.

* * * * *

For the foregoing reasons, the Business Association Petitioners respectfully ask the Court to deny Respondents' motion to set a further

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https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/18/press-briefing-by-press-secretary-jen-psaki-november-18-2021/.

expedited briefing schedule on Respondents' motion to vacate the Fifth Circuit's stay and to set an expedited merits-briefing schedule.

Dated: November 26, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(D)(2)

This Response complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2) because it contains 1,577 words excluding the parts of the response exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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CERTIFICATE OF SERVICE

On November 26, 2021, this Opposition was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Federal Rule of Appellate Procedure 25(a)(5); and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed, per this Court's Rule 25(a)(3).

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Exhibit A

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No. ___

In the United States Court of Appeals for the Fifth Circuit

TEXAS TRUCKING ASSOCIATION; MISSISSIPPI TRUCKING ASSOCIATION; LOUISIANA MOTOR TRANSPORT ASSOCIATION; AMERICAN TRUCKING ASSOCIATIONS, INC.; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; NATIONAL RETAIL FEDERATION; FMI – THE FOOD INDUSTRY ASSOCIATION; NATIONAL ASSOCIATION OF CONVENIENCE STORES; NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; INTERNATIONAL WAREHOUSE & LOGISTICS ASSOCIATION; AND INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION,

Petitioners,

v.

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

Respondents.

On Petition for Review
from the Occupational Safety and Health Administration

MOTION FOR STAY PENDING DISPOSITION OF PETITIONERS' PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Petitioners has any parent corporation and that no publicly held corporation holds more than 10% of their stock. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioners:
Texas Trucking Association
Mississippi Trucking Association
Louisiana Motor Transport Association
American Trucking Associations, Inc.
National Federation of Independent Business
National Association of Wholesaler-Distributors
International Warehouse and Logistics Association
International Foodservice Distributors Association
FMI – The Food Industry Association
National Association of Convenience Stores
National Retail Federation

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Respondents:
Occupational Safety and Health Administration
United States Department of Labor
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Douglas L. Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health.

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/s/ Steven P. Lehotsky
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Counsel of Record for Petitioners

INTRODUCTION

Petitioners, their members, and American businesses have contributed significantly to fighting COVID-19, including substantial efforts to make vaccines available and encourage employees to protect themselves against this pandemic. Petitioners are trade associations representing businesses across the economy. Their members have seen COVID-19 wreak havoc on their employees and communities. This is not a case about the efficacy of COVID-19 vaccines, which are a marvel of modern medicine. Petitioners' members have taken extraordinary measures to protect their employees, customers, and communities during the pandemic. They have distributed, incentivized, encouraged, and in some cases mandated the vaccine.

This is a case about American businesses that do not want to face the immediate irreparable harm of losing employees, incurring substantial and unrecoverable compliance costs, and worsening already fragile supply chains and labor markets. Yet that is precisely what would result from the Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency Temporary Standard." 86 Fed. Reg. 61,402 (Nov. 5, 2021).

This challenged action is an extreme assertion of administrative power. OSHA created an immediately effective COVID-19 vaccine-and-testing mandate for most businesses with 100 or more employees. OSHA admits that its sweeping standard would cover "84 million" Americans—over 25%

of the population. *Id.* at 61,475. And OSHA concedes that COVID-19 "is not a uniquely work-related hazard." *Id.* at 61,407. Nevertheless, this federal agency, itself tasked with regulating workplace hazards, is attempting to require most American businesses with 100 or more employees to face staggering fines unless their employees either get vaccinated or submit to weekly COVID-19 tests. *E.g.*, *id.* at 61,475. And OSHA attempts to require these businesses to keep onerous databases of their employees' COVID-19 vaccine- and testing-statuses, which can be handed over to the federal government at OSHA's direction. *Id.* at 61,548.

This regime was never subject to the notice-and-comment procedure that OSHA's statute typically requires. OSHA delayed for months while it easily could have initiated notice-and-comment procedure: The pandemic has been ongoing for almost two years, COVID-19 vaccines have been widely available to anyone over the age of 12 for about six months, and the President announced his desire for a vaccine mandate nearly two months ago.

Instead, to avoid notice-and-comment, OSHA invokes a statutory exception, 29 U.S.C. § 655(c). Congress designed this emergency power for OSHA to use only when necessary to protect workers from the most exigent and newly emergent workplace hazards, until a more permanent rule could be put in place. Congress did not delegate OSHA the power to commandeer private employers to control Americans' healthcare decisions. OSHA's action is a not-so-veiled effort to evade notice-and-comment while forcing

businesses and employees to immediately comply in permanent fashion with a supposedly "temporary" mandate.

Under the major questions doctrine, OSHA's attempt to "discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" must be rejected. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Courts reject statutory interpretations that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *Id.* The major questions doctrine applies with equal force to federal agency actions invoking COVID-19 to evade Congress's limits on agency power. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). Congress, in 29 U.S.C. § 655(c), did not provide anything close to clear authority for OSHA to commandeer American businesses into implementing a COVID-19 vaccine-and-testing mandate and tracking database covering 84 million people.

Without a stay, American businesses, including Petitioners' members, will face immediate irreparable harm—including enormous unrecoverable compliance costs, lost profits, lost sales to competitors who have fewer than 100 employees and therefore not subject to the action, lost goodwill, and unemployment. The compliance costs alone will be staggering. Businesses must begin preparing to implement OSHA's directive immediately. This includes figuring out how to practically monitor employee vaccine-and-

testing status, implementing systems to ensure this monitoring occurs, creating the requisite database to retain employee data for OSHA inspection, and devising policies for employee noncompliance. Meanwhile, there is a risk that many employees resistant to vaccination and government-mandated testing will quit their jobs rather than submit.

This Court should therefore stay OSHA's unlawful action, pending disposition of Petitioners' petition for review. *See* Fed. R. App. P. 18(a)(2); 5 U.S.C. § 705; 29 U.S.C. § 655(f). Petitioners, as "trade associations," can seek "injunctive relief" for their members. *Tex. Ass'n of Mfgrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377 (5th Cir. 2021); *accord Tex. Enter. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021) ("individual member participation" unnecessary for "[i]njunctive relief").

The courts have stayed multiple other OSHA emergency temporary standards. *See, e.g.*, *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984); *Am. Petrol. Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978); *Taylor Diving & Salvage Co. v. DOL*, 537 F.2d 819 (5th Cir. 1976). Seeking an administrative stay from OSHA while this Court reviews the petition would be impracticable. *See* Fed. R. App. P. 18(a)(2). The emergency temporary standard sought to take effect immediately on November 5, 2021, and OSHA has clearly stated that it opposes delayed implementation of its mandate.

PROCEDURAL BACKGROUND

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

On September 9, 2021, the President announced that he would direct OSHA to issue an emergency temporary standard requiring all employers with "100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, at https://www.whitehouse.gov/covidplan/.

Nearly two months later, on November 5, 2021, OSHA published the emergency temporary standard at issue. 86 Fed. Reg. at 61,402. Among many requirements, this OSHA action requires most employers with 100 or more

employees to determine the vaccination status of their employees by December 5, 2021—and to then require unvaccinated employees to either get fully vaccinated by January 4, 2022 or submit to weekly COVID-19 testing. *Id.* Covered employers must "remove" any employees who fail to comply, and employers face staggering penalties of up to $14,000 per violation for failing to comply. *See id.* at 61,553. OSHA also requires covered employers to maintain databases of their employees' vaccine and testing statuses, and OSHA can inspect these at any time. *See id*. OSHA's action also purports to preempt state law. *Id.* at 61,406.

On November 6, 2021, this Court entered an order staying this OSHA emergency temporary standard pending further action by the Court. Order, *BST Holdings, L.L.C., et al., v. Occupational Safety & Health Admin., et al.*, No. 21-60845 (5th Cir. Nov. 6, 2021).

Petitioners filed their petition for review in this Court on November 9, 2021.

ARGUMENT

Petitioners are likely to succeed on the merits, and Petitioners and their members face "irreparable injury"—which is sufficient to stay agency action pending review. 5 U.S.C. § 705. Even if other factors applied, the balance of equities favors Petitioners and a stay furthers the public interest. *See Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 311 (5th Cir. 2021).

I. Petitioners Are Likely to Succeed on the Merits.

A. OSHA Was Required To Use Regular Notice-and-Comment Procedures Instead of Waiting Months to Issue an "Emergency" Action Taking Effect Immediately.

Against the backdrop of nationwide supply chain and labor market problems, OSHA needed to use at least some amount of notice-and-comment procedure before massively disrupting the American economy. Instead, OSHA's invocation of "emergency" power unlawfully evaded the statutorily-required notice-and-comment procedures for six months. *See* 29 U.S.C. § 655(c)(3). This emergency power must be "delicately exercised" and used only as "an unusual response to exceptional circumstances," *Dry Color Mfrs. Ass'n, Inc. v. DOL*, 486 F.2d 98, 104 n.9 (3d Cir. 1973)—not as an excuse to avoid the rigor of the notice-and-comment process.

OSHA's delay in issuing the challenged action confirms that it cannot satisfy the "necessary" prerequisite to invoke the limited "emergency" power Congress delegated. 29 U.S.C. § 655(c)(1). Congress granted only limited "emergency" powers to OSHA, under 29 U.S.C. § 655(c), for the potential exigency of protecting workers from a new or newly recognized danger. *Asbestos Info. Ass'n*, 727 F.2d at 423.

There is nothing "necessary" about OSHA's action to deal with a virus that has now been circulating for almost two years in virtually every conceivable corner of the globe. This is especially so when OSHA acted months after vaccines were readily available—and months after OSHA could have

initiated notice-and-comment procedure. As the Supreme Court just clarified in another case dealing with COVID-19 agency action, a statutory delegation of agency power based on a "necessary" requirement cannot permit an "unprecedented" and "breathtaking amount of authority." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

No one doubts the dangers of this worldwide pandemic. But OSHA's own delay—coupled with a months-long refusal to initiate notice-and-comment procedure—confirms that OSHA cannot possibly establish "substantial evidence" justifying its determination that this emergency rule is "necessary." 29 U.S.C. § 655(f). A court "must take a 'harder look' at OSHA's action than [it] would if it were reviewing the action under the more deferential arbitrary and capricious standard [under] the Administrative Procedure Act." *Asbestos Info. Ass'n*, 727 F.2d at 421. This hard-look review here dictates that OSHA's delay precludes any use of its section 655(c) emergency power.

B. Congress Did Not Authorize OSHA to Commandeer Businesses into Implementing a COVID-19 Vaccine-and-Testing Mandate and Monitoring Covering 84 Million Americans.

Congress did not vest OSHA with the power to require a COVID-19 vaccine-and-testing plus monitoring regime for all employers with at least 100 employees. Under the major questions doctrine, if Congress wants to delegate a "vast expansion" of an administrative agency's power, then Congress must "speak with the requisite clarity to place that intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849

(2020). All the factors courts use to identify "major" questions rebut OSHA's claimed authority.

1. OSHA's action is a novel use of its emergency authority. Courts view skeptically agency assertions of power under "federal regulations crafted from long-extant statutes that exert novel and extensive power over the American economy." *Chamber of Com. of U.S. v. DOL*, 885 F.3d 360, 387 (5th Cir. 2018); *see UARG*, 573 U.S. at 324. OSHA has seldom used its emergency temporary standard power in the 51 years since the OSH Act became law.

OSHA has done so only ten times before, and nine of these were in the late 1970s and early 1980s. Seven of the ten were challenged in court, and three were unchallenged. Five of these other challenged actions were blocked by courts, the one more recent challenge remains pending, and only a single challenge was rejected:

- In 1971, OSHA issued unchallenged emergency temporary standards for asbestos dust exposure in the workplace. 36 Fed. Reg. 23,207 (Dec. 7, 1971).
- In 1973, OSHA issued emergency temporary standards limiting workplace exposure to certain organophosphorus pesticides. 38 Fed. Reg. 10,715 (May 1, 1973). This Court vacated the standard several months after it had taken effect. *Fla. Peach Growers Ass'n v. Dept. of Labor*, 489 F.2d 120 (5th Cir. 1974).
- Also in 1973, OSHA issued an emergency temporary standard limiting workplace exposure to 14 carcinogens. 38 Fed. Reg. 10,929

(May 3, 1973). The Third Circuit vacated this action as to the two carcinogens challenged. *Dry Color*, 486 F.2d 98.

- In 1974, OSHA issued an unchallenged emergency temporary standard limiting exposure levels for vinyl chloride. 39 Fed. Reg. 12,342 (April 5, 1974).
- In 1976, OSHA issued an emergency temporary standard addressing certain diving operations. 41 Fed. Reg. 115 (June 15, 1976). This Court stayed the rule pending review. *Taylor Diving & Salvage Co.*, 537 F.2d at 819.
- In 1977, OSHA issued an emergency temporary standard reducing the allowable benzene exposure levels and setting monitoring requirements. 42 Fed. Reg. 22,516 (May 3, 1977). This Court stayed the standard. *Am. Petrol. Inst.*, 581 F.2d at 493.
- In 1977, OSHA issued an unchallenged emergency temporary standard limiting workplace exposure to 1,2 Dibromo-3-chloropropane. 42 Fed. Reg. 45,536 (Sept. 9, 1977).
- In 1978, OSHA issued an emergency temporary standard reducing allowable workplace exposure levels to vinyl cyanide. 43 Fed. Reg. 2,586 (Jan. 17, 1978). The Sixth Circuit denied a stay request. *Vistron v. OSHA*, No. 78-3027, 6 OSHC 1483 (6th Cir. Mar. 28, 1978).
- In 1983, OSHA issued an emergency temporary standard reducing asbestos exposure levels. 48 Fed. Reg. 51,086 (Nov. 4, 1983). This

Court stayed and ultimately vacated that standard. *Asbestos Info. Ass'n*, 727 F.2d at 415.

- And in June 2021, OSHA issued an emergency temporary standard establishing workplace safety standards for health care workers designed to protect them from COVID-19 exposures. 86 Fed. Reg. 32,376 (June 21, 2021). The action was challenged, and that case remains pending and held in abeyance. *See* Order, *United Food and Com. Workers & AFL/CIO v. OSHA*, D.C. Cir. No. 21-1143, Dkt. 1914330 (D.C. Cir. Sept. 15, 2021).

OSHA therefore has traditionally focused its prior emergency temporary standards on the narrow task of lowering the permissible exposure level of workplace toxins—like asbestos, 48 Fed. Reg. at 51,086; vinyl cyanide, 43 Fed. Reg. at 2,585; benzene, 42 Fed. Reg. at 22515; and certain pesticides, 38 Fed. Reg. at 10715. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642-43 (1980) (OSH Act "empowers the Secretary to promulgate standards, not for chemical and physical agents generally, but for 'toxic materials' and 'harmful physical agents"). In fact, before OSHA issued the 2021 emergency temporary standard, OSHA had *never* attempted to apply its emergency power to an airborne virus in any manner, let alone via vaccine mandate.

And even though prior OSHA emergency temporary standards were narrower in scope, almost all of the court challenges to these more cabined emergency actions still succeeded. The instant challenge should likewise

succeed, as "no regulation premised on [the emergency temporary standard power] has even begun to approach the size or scope of the [challenged OSHA action]." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

2. Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* (quoting *UARG*, 573 U.S. at 324, in turn citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Congress has not done that here.

Congress, in 29 U.S.C. § 655(c), provided OSHA an emergency power targeted to protecting employees in the workplace from exposure to exigent or emergent hazards. Congress did not give OSHA an economy-wide power to impose mandates and monitoring on 84 million employees for a danger that potentially exists in virtually every location. OSHA's interpretation would drastically expand its authority in novel ways over "entire[]" industries, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)—and thus "a significant portion of the American economy," if not most of the American economy, *Brown & Williamson*, 529 U.S. at 159.

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

"employees." 29 U.S.C. § 655(c)(1). Congress did not delegate OSHA power to address economy-wide diseases.

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

The proper role of the federal government and the States in responding to COVID-19 is the subject of "earnest and profound debate across the country," making the "oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (internal quotation omitted). OSHA's action—which purports to preempt state law—will significantly disrupt countless industries, leading to even more supply chain and labor shortages. This is a classic instance of an agency's regulatory action "involving billions of dollars" (at least) and "affecting the price of [many goods and services] for millions of people"; so one would expect Congress

to speak clearly if it had authorized an executive agency to wield such power. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

Moreover, the constitutional avoidance canon compels application of the major questions doctrine here. OSHA's action raises serious non-delegation doctrine concerns. The "fundamental policy decisions" are "the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Indus. Union,* 448 U.S. at 687 (Rehnquist, J., concurring in the judgment); *accord id.* at 645-46 (Stevens, J., controlling op.); *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

A nationwide COVID-19 vaccine-and-testing mandate, monitoring, and database is a fundamental policy decision. OSHA believes its emergency powers apply even when a danger "is not a uniquely work-related hazard." 86 Fed. Reg. 61,407. This is precisely the "kind of open-ended grant" of delegated power that must be avoided. *Indus. Union*, 448 U.S. at 646 (Stevens, J., controlling op.). And that is particularly true here where there are at least substantial questions whether Congress's enumerated constitutional powers allow it to impose a vaccine mandate upon the vast working public. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 549-61 (2012) (holding that Affordable Care Act's health-insurance mandate is not a valid exercise of Congress's Commerce Clause or Necessary and Proper Clause powers).

3. Congress is "especially unlikely" to have given OSHA expansive authority to address COVID-19 because OSHA has "no expertise" in

combating a worldwide pandemic. *King*, 135 S. Ct. at 2489. OSHA, which is part of the Department of Labor, has expertise over job-related "working conditions" like industrial accidents and workplace hazards. 29 U.S.C § 651(b). In contrast, other agencies—like the CDC and the FDA, both part of the Department of Health and Human Services—have expertise over public health, vaccines, and pandemics. Yet even the CDC and the FDA lack the "breathtaking amount of authority" over entire industries that OSHA claims here. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

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

II. OSHA's Unlawful Action Will Inflict Immediate Irreparable Harm on Petitioners' Members.

A. Petitioners' members will suffer irreparable injury in myriad ways: enormous unrecoverable compliance costs, lost profits, lost sales to competitors who are not subject to the action, loss of goodwill and reputation control, and increased unemployment.

First, Petitioners' members face the "irreparable injury" of enormous unrecoverable financial "compliance costs." *Texas v. EPA*, 829 F.3d 405, 433

(5th Cir. 2016). The "magnitude" of injury does not control, as it is the "irreparability that counts." *Id.* at 434. These compliance costs are "likely unrecoverable," "[b]ecause federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs., L.L.C. v. FDA*, ___ F.4th ___, 2021 WL 4955257, at *8 (5th Cir. Oct. 26, 2021). Consequently, "complying with [an agency order] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Id.* (quoting *Texas v. EPA*, 829 F.3d at 433). This lack of a "guarantee of eventual recovery" makes these compliance costs irreparable. *Id.* (quoting *Ala. Ass'n*, 141 S. Ct. at 2489).

OSHA itself estimates that the recordkeeping requirements for test results *alone* will cost American businesses over $600 million. 86 Fed. Reg. 61,490. OSHA estimates that tracking vaccination status will cost businesses an additional $300 million. *Id.* Even if OSHA's estimates are accurate, Petitioners will bear additional costs. *Id.* at 61,490-92 (listing estimated costs of recordkeeping by sector); *and see* Ex. A, Decl. Beckwith ¶¶8, 38; Ex. C, Decl. Sullivan ¶27; Ex. D, Decl. Harned ¶¶24-25; Ex. E, Decl. Martz ¶¶10, 26; Ex. F, Decl. Sarasin ¶¶8, 27; Ex. G, Decl. DeHaan ¶¶ 6, 24. Not only are these costs an irreparable injury, but so too are the havoc that they will wreak by "increase[ing] rates for consumers," "endanger[ing] the reliability of" critical supply chains, and even threatening to "close facilities." *Texas v. EPA*, 829 F.3d at 433.

Second, OSHA's action will directly cause Petitioners' members the irreparable injuries of "lost profits" and "[l]os[t] sales . . . to competitors," *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 & nn.2-3 (5th Cir. Unit B 1981)—as well as "loss of control of reputation, loss of trade, and loss of goodwill," *Emerald City Mgmt., L.L.C. v. Kahn*, 624 F. App'x 223, 224 (5th Cir. 2015) (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 726 (3d Cir.2004)). *See* Ex. A., Decl. Beckwith ¶¶29, 42; Ex. D, Decl. Harned ¶¶8, 15-29; Ex. G, Decl. DeHaan ¶¶ 6, 17.

American businesses are experiencing unprecedented labor shortages caused by COVID-19, and OSHA's unlawful action will exacerbate these problems. Ex. A., Decl. Beckwith ¶¶25-36; Ex. D, Decl. Harned ¶¶15-17; Ex. E, Decl. Martz ¶15; Decl. DeHaan ¶¶13-15. For example, major delivery services already are dealing with staffing shortages at shipping hubs "to the point where [one] has had to divert packages" to longer routes, and another has warned that Christmas gifts purchased after October may not arrive until the spring. *See* Ex. A, Decl. Beckwith ¶35; Ex. C, Decl. Sullivan ¶24; Ex. D, Decl. Harned ¶22; Ex. F, Decl. Sarasin ¶24-2; Ex. G, Decl. DeHaan ¶22; *and see* Lisa Rowan, *From Supply Chain Woes to Shipping Delays: Is It Worth It to Holiday Shop Right Now?*, Forbes Advisor (Oct. 19, 2021), https://www.forbes.com/advisor/personal-finance/holiday-shopping-early-start-supply-chain/. Stores already have closed or reduced hours because of the tight labor market, which translates to lost employee hours and pay and

lost sales. Ex. A, Decl. Beckwith ¶¶25, 36; Ex. E, Decl. Martz ¶24; Ex. F, Decl. Sarasin ¶14.

Not only will OSHA's action lead to business closures, poor service, and missed sales, but it will result in the irreparable injury of increased "[u]nemployment." *Texas v. EPA*, 829 F.3d at 434. Studies show that between 38-50% of unvaccinated employees say they would rather quit than submit to vaccination mandates. 86 Fed. Reg. at 61,475. OSHA acknowledged this but claims that the "data suggests that the number of employees who actually leave . . . is much lower." *Id.* OSHA speculates that only 1-3% of total employees will quit because of the mandate. *Id.* But OSHA's 1-3% estimate relies on a single article that summarizes data from *health care workers*—in Vermont. *Id.* at n.42. Even if OSHA had tried to show that the study was representative, an additional 1-3% turnover *above* Petitioners' general attrition rate—which is already higher because of the pandemic—is a significant loss. When so many jobs already are unfilled, each additional resignation creates an even greater business impact, as remaining workers no longer have capacity to pick up the slack.

Sectors from transportation and logistics, to convenience, to retail food suppliers have made it clear that OSHA's vaccine and testing mandates will make it even harder to retain and hire needed employees. See Ex. A Decl. Beckwith; Ex. B, Decl. Gannon ¶¶11-19; Ex. C, Decl. Sullivan ¶17; Ex. D, Decl. Harned ¶18; Ex. F, Decl. Sarasin ¶21. The consensus across these sectors is that OSHA's action will exacerbate their labor and supply chain issues.

All this is happening at the worst possible time of the year. Retailers are preparing for the holiday shopping season, which generates a significant portion of their annual revenue. Ex. A, Decl. Beckwith ¶27; Ex. C, Decl. Sullivan ¶8; Ex. D, Decl. Harned ¶¶9; Ex. E, Decl. Martz ¶10; Ex. G, Decl. DeHaan ¶7. And the holiday season ordinarily requires the retail sector to employ additional workers. *Id.* Even if they are able to secure enough workers willing to accept forced vaccination or weekly testing, the retailers will first have to spend more than $10 million of their much needed holiday revenue on the emergency standard's recordkeeping obligations. *See* 86 Fed. Reg. at 61,491 (estimating costs to clothing and clothing accessories stores).

The American economy cannot afford to have fewer employees willing to work because of sweeping federal vaccine, testing, and monitoring mandates imposed overnight on over 84 million workers. In sum, "'the burden upon [the stay movant] in terms of time, expense, and administrative red tape is too great' while it must respond in other ways to the [COVID-19] crisis." *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (per curiam) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 571 (5th Cir. Unit A 1981)).

B. Petitioners and their members need a stay immediately to prevent these irreparable harms.

OSHA's action seeks to take effect immediately, and the Executive Branch has publicly advised businesses to prepare to comply—notwithstanding the stay this Court entered a few days ago. *See* CNBC, *White House tells businesses to proceed with vaccine mandate despite court-ordered pause* (Nov.

8, 2021), https://www.cnbc.com/2021/11/08/biden-vaccine-mandate-white-house-tells-business-to-go-ahead-despite-court-pause.html (White House Deputy Press Secretary: "They should continue to move forward and make sure they're getting their workplace vaccinated").

To be able to comply with OSHA's December and January mandates, Petitioners and their members have to devote significant resources immediately. Petitioners and their members have to begin data collection, employee communication, and recordkeeping, all of which will push employees to quit. Simply preparing to implement these mandates is expensive and complicated—nearly $1 billion by the government's own estimates. Ex. A, Decl. Beckwith ¶¶38-40; Ex. F, Decl. Sarasin ¶28; Ex. G, Decl. DeHaan ¶25.

Petitioners must begin implementing these requirements now, not by December 7, as the government has suggested. *E.g.*, Ex. A, Decl. Beckwith ¶39; Ex. C, Decl. Sullivan ¶28; Ex. D, Ex. G, Decl. Harned ¶25; Ex. E, Decl. Martz ¶27; Ex. G, Decl. DeHaan ¶25. Not every employee can be vaccinated on the same day, just before the deadline—that is a logistical impossibility for both employers (who cannot lose everyone at once) and the healthcare system (who cannot vaccinate all at once). Nor can employers wait until the last minute to design policies for addressing and approving medical and religious exemptions, or to begin hiring additional employees to supervise testing. That work must start now.

Employees averse to vaccination and testing have entrenched views. Ex. A, Decl. Beckwith ¶23; Ex. B, Decl. Gannon ¶10; Ex. C, Decl. Sullivan ¶¶10-

13; Ex. E, Decl. Martz ¶14; Ex. E, Decl. Martz ¶11-13; Ex. F, Decl. Sarasin ¶¶12-15; Ex. G, Decl. DeHaan ¶11. They will quit. Companies who offer testing themselves to persuade some of the entrenched from fleeing will have gigantic additional costs, including lost time and resources competing to procure sparce tests. Ex. A, Decl. Beckwith ¶40; Ex. B, Decl. Gannon ¶12; Ex. C, Decl. Sullivan ¶26; Ex. D, Decl. Harned ¶23; Ex. E, Decl. Martz ¶28; Ex. F, Decl. Sarasin ¶26; Ex G, Decl. DeHaan ¶23. These losses will cause immediate, irreparable harm.

The government's request that the Judicial Panel on Multidistrict Litigation first resolve the circuit assignment or review the merits before this Court stays OSHA's unlawful action would leave Petitioners irreparably harmed. *See* Ex. A., Decl. Beckwith ¶¶29, 42; Ex. D, Decl. Harned ¶¶8, 15-29; Ex. G, Decl. DeHaan ¶¶ 6, 17. Absent a stay, OSHA's mandate will have its unlawful effect while the courts complete their review, so Petitioners will suffer all the attendant harms even when they ultimately prevail.

In short, Petitioners should not have to suffer these irreparable harms from immediate compliance planning while their legal challenges proceed. *E.g.*, *Chamber of Commerce v. EPA*, 577 U.S. 1127 (2016) (granting four prejudgment applications to stay federal agency action pending conclusion of litigation, where planning for compliance had to begin immediately and would cause irreparable harm if not enjoined).

C. A stay of agency action pending review under 5 U.S.C. § 705 only requires a showing of "irreparable harm." Regardless, Petitioners satisfy

whatever other factors might apply. As to any potential "balanc[ing of] the equities," when a Petitioner shows a "strong likelihood of success on the merits" plus "irreparable injury," that showing "outweighs" any injury to the respondents. *Freedom From Religion Found.*, 4 F.4th at 316-17.

And a stay would further the public interest, for many of the reasons discussed above. The "public interest is in having governmental agencies abide by the federal laws that govern their existence and operations," and "there is generally no public interest in the perpetuation of unlawful agency action." *Wages & White Lion Invs.*, 2021 WL 4955257, at *9 (internal quotations omitted). And the public interest is supported by requiring "that a major new policy undergoes notice and comment." *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015).

CONCLUSION

The Court should stay OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021), pending disposition of Petitioners' petition for review.

Dated: November 9, 2021

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On November 9, 2021, I conferred with Martin Totaro, counsel for Respondents, who stated that Respondents oppose the relief requested in this motion.

/s/ *Steven P. Lehotsky*

Steven P. Lehotsky

CERTIFICATE OF SERVICE

On November 9, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

/s/ *Steven P. Lehotsky*

Steven P. Lehotsky

CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2)(A) because it contains 5,162 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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