No. A-____

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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.

JOB CREATORS NETWORK, INDEPENDENT BAKERS ASSOCIATION, LAWRENCE TRANSPORTATION COMPANY, GUY CHEMICAL COMPANY, RABINE GROUP OF COMPANIES, PAN-O-GOLD BAKING COMPANY, TERRI MITCHELL, WATERBLASTING, LLC,

*Applicants*,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, MARTIN J. WALSH, Secretary of Labor, DOUGLAS L. PARKER, Assistant Secretary of Labor for Occupational Safety and Health Administration,

*Respondents.*

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# EMERGENCY APPLICATION FOR STAY OF AGENCY STANDARD PENDING THE DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OF A PETITION FOR REVIEW AND ANY FURTHER PROCEEDINGS IN THIS COURT

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Jonathan Berry
*Counsel of Record*
BOYDEN GRAY & ASSOCIATES PLLC
801 17th Street NW, Suite 350
Washington, DC 20006
(202) 955-0618
berry@boydengrayassociates.com

*Counsel for Applicants*

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To the Honorable Brett M. Kavanaugh, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

In accordance with Supreme Court Rule 22 and 23 and the All Writs Act, 28 U.S.C. § 1651, applicants Job Creators Network, Independent Bakers Association, Lawrence Transportation Company, Guy Chemical Company, Rabine Group of Companies, Pan-O-Gold Baking Company, Terri Mitchell, and Waterblasting, LLC ("Applicants") respectfully request an immediate stay of respondent Occupational Safety & Health Administration's emergency temporary standard ("Mandate"), *COVID-19 Vaccination and Testing Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021), pending the disposition of Applicants' petition for review currently pending before the United States Court of Appeals for the Sixth Circuit and pending any further proceedings in this Court.

## INTRODUCTION

Applicants represent a collection of small businesses and organizations that challenge the Occupational Safety and Health Administration's issuance of an emergency temporary standard ("ETS") requiring that every company with 100 or more employees either forcibly vaccinate its employees, forcibly test them every week, or fire them—subject to steep fines for violations.

Only nine ETSs were issued before 2021, and of the six that were challenged, only *one* fully survived—demonstrating the incredible burden OSHA faces. As eleven circuit judges—three in the Fifth Circuit and eight in the Sixth Circuit—have concluded, Applicants are likely to succeed on the merits of their claims because the Mandate violates multiple "clear-statement" rules like the major-

questions doctrine, runs perilously close to illegal delegation, and has numerous other fatal flaws.

Applicants also demonstrate irreparable harm because they will permanently lose clients and reputation as a result of losing workers who immediately quit and join smaller companies rather than be vaccinated or tested weekly. The equities and public interest also favor Applicants. The status quo (before the most-recent decision below) was that the Mandate has been stayed effectively *ab initio*. Moreover, Applicants provide critical food production, delivery, and supply chain services for the country, which will suffer tremendously as the Mandate suddenly springs into life.

## OPINIONS BELOW

The Sixth Circuit's three-judge panel order (a 2-1 vote with Judge Larsen dissenting) dissolving the Fifth Circuit's stay has not yet been reported. The Fifth Circuit's order granting a stay is reported at *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021). The Fifth Circuit's order granting an administrative stay is available at *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021). The Sixth Circuit's internal operating procedures apparently do not authorize *en banc* petitions on such matters. *See* Sixth Circ. I.O.P. 35(g)–(h).

## JURISDICTION

The Circuit Justice has jurisdiction over this application pursuant to 28 U.S.C. § 1254(1) and has authority to grant Applicants relief under the All Writs Act, 28 U.S.C. § 1651(a).

## STATUTORY PROVISIONS

Pertinent provisions are reprinted in the Statutory Addendum. *See* Ex. 5.

## STATEMENT

### I. The Mandate and Proceedings Below.

COVID has presented enormous challenges to all Americans. But after tremendous sacrifices, the nation has turned the page. Despite this, on September 9, 2021, President Biden decided that there is such an urgent, new emergency in the form of COVID transmission in the workplace that he ordered OSHA to issue an ETS mandating that nearly every company in the country with 100 or more employees either forcibly vaccinate its employees, forcibly test them every week, or fire them. White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, Sept. 9, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. This mandate would "affect about 100 million Americans," or "two thirds of all workers." *Id.*

After a substantial delay, OSHA finally issued the Mandate in accordance with President Biden's command. *COVID-19 Vaccination and Testing Emergency Temporary Standard*, 86 Fed. Reg. 61,402, 61,549–61,550 (Nov. 5, 2021) (Ex. 6). It became binding on November 5, 2021. *See* 29 U.S.C. § 655(c).

The Mandate requires all employers of 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy" and requires any workers who remain unvaccinated to "undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination." 86 Fed. Reg. at 61,402. It will

apply to roughly 80 million workers, of whom OSHA estimated 32 million were not currently vaccinated, 22 million of whom OSHA expects will get vaccinated against their wishes because of the Mandate. *Id.* at 61,435, 61,472.

Under the emergency rule, the employer must verify "the vaccination status of each employee," "maintain a record of each employee's vaccination status," and "preserve acceptable proof of vaccination." *Id.* at 61,552. For employees who opt not to get vaccinated, the employer must require a test every seven days, one that neither the Federal Government nor the employer must pay for and one that the employees may not take without the supervision of an authorized person. *Id.* at 61,530, 61,532, 61,551, 61,553. Unvaccinated employees who do not comply must be "removed from the workplace." *Id.* at 61,532. Unvaccinated employees must wear masks at work with few exceptions. *Id.* at 61,553. The testing and masking requirements do not apply to vaccinated employees. *Id.* Employers who violate the Act face penalties imposed by OSHA: up to $13,653 for each violation and up to $136,532 for each willful violation. 29 C.F.R. § 1903.15(d).

Although the Mandate ostensibly goes into full effect on January 4, 2022, OSHA "strongly encourages employers to implement the required measures to support employee vaccination *as soon as practicable*." *Id.* at 61,549–61,550 (emphasis added). The Mandate says it is "critical[ly] importan[t]" to "implement[] the requirements in this ETS, including the recordkeeping and reporting provisions, as soon as possible," *id.* at 61,505, and "it is essential that remediation efforts at a workplace be undertaken immediately," *id.* at 61,545.

On November 4, 2021, Applicants filed suit in the Eighth Circuit and sought a stay of the Mandate, attaching affidavits demonstrating the imminent and irreparable harm that would befall them if the Mandate were not stayed. *See Job Creators Network v. U.S. Dep't of Labor*, No. 21-3491 (8th Cir.). During this time, in a response to petitions filed in the Fifth Circuit, that court issued an administrative stay and then a stay pending review of the Mandate. *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021) (Ex. 2).

All of these cases (as well as ones in other circuits) were later transferred to the Sixth Circuit pursuant to the lottery process in 28 U.S.C. § 2112.

Applicants were among those who sought initial *en banc* hearing, which the Sixth Circuit denied in an evenly divided vote, with Chief Judge Sutton writing a lengthy dissent (joined by seven other judges) explaining not only why the court should hear the matter *en banc* but also why the Mandate is illegal. *In re: MCP No. 165*, No. 21-7000, ___ F. 4th ___, 2021 WL 5914024 (6th Cir. Dec. 15, 2021). The government also sought to dissolve the Fifth Circuit's stay, and a three-judge panel of the Sixth Circuit granted the government's motion by a 2-1 vote, with Judge Larsen dissenting. Ex. 1. The Sixth Circuit's internal operating procedures apparently do not authorize *en banc* petitions challenging rulings on motions for stays of agency rules. *See* Sixth Circ. I.O.P. 35(g)–(h).

## II. Applicants

***Job Creators Network*** is a nonpartisan membership organization whose mission is to educate employees of Main Street America and protect the 85 million

people who depend on the success of small businesses. Affidavit of Alfredo Ortiz, Ex. 4, ¶¶ 2–5.[1] Its members will suffer tremendous harm from the Mandate. *See id.*, ¶¶ 6–11.

***Independent Bakers Association*** is national trade association of over 200 family-owned wholesale bakeries and allied industry trades. Affidavit of Nicholas Pyle, Ex. 4, ¶¶ 2–4. IBA's affidavit explains in detail how its members were deemed "essential" during lockdowns because of their critical role in feeding the country—but these members are facing dramatic worker shortages already, and the Mandate is expected to cause 20–30% of employees to leave, which will severely "disrupt retail trade patterns, exacerbate fast food supply chain issues and increase the food insecurity for the nation's most nutritionally at risk." *Id.*, ¶¶ 5–10. IBA has standing through its members, one of which has submitted an affidavit explaining how the Mandate will drastically worsen an already-critical worker shortage for every link in its production and supply chain, leading to severe reputational and public harms, including the communities supported by the company's wages. Affidavit of Mike McKee, Ex. 4, ¶¶ 10–13.

***Lawrence Transportation Company*** is a refrigerated truckload carrier in Rochester, Minnesota, with over 100 employees and thus subject to the Mandate. Affidavit of Eric Lawrence, Ex. 4, ¶¶ 2–3. The company was deemed "essential" during the COVID lockdowns, *id.*, ¶ 9, and has encouraged its employees to get vaccinated, *id.*, ¶ 2. The Mandate will cause irreparable harm because Lawrence

[1] All affidavits cited herein were presented to the Sixth Circuit below. *See* ECF No. 98 (6th Cir. Nov. 23, 2021).

Transportation is already facing a severe truck driver shortage. *Id.*, ¶ 4. These drivers and the mechanics who repair the trucks require specialized licenses and training. *Id.* Because of this, Lawrence Transportation "simply cannot hire more employees and have them start quickly." *Id.*

Approximately 10–15% of Lawrence Transportation's workforce "would rather walk off the job than be forced to get a vaccine or undergo weekly testing," and there is an incentive to do this sooner rather than later. *Id.*, ¶ 5. These workers "cannot be replaced at any point in the near future" and would have a "devastating" effect on the company. *Id.*, ¶¶ 6–7. Deliveries will be "delayed or canceled, resulting in severe financial and reputational damages for the Company, as well as a likely ripple effect of losing business to smaller trucking companies." *Id.*, ¶ 7.

The Company "would likely have to save costs by laying off non-drivers like office employees," who "are almost all vaccinated." *Id.* This means "*the mandate would result in vaccinated people losing their jobs*." *Id.* (emphasis added). The Mandate also imposes irreparable logistical harms, as drivers are on the road "for 7 to 10 days at a time, making it nearly impossible to get tested weekly." *Id.*, ¶ 10. The Mandate is designed to "force[] those drivers either to get vaccinated, or quit." *Id.*

The general public would also suffer because Lawrence Transportation delivers groceries that must be refrigerated. *Id.*, ¶ 9. "[T]hose deliveries will not be made, and people will not be able to get food deliveries to their grocery stores." *Id.*

***Guy Chemical Company LLC*** is a manufacturer in Somerset County, Pennsylvania, with over 160 employees, and thus is subject to the Mandate. Affidavit of Guy Berkebile, Ex. 4, ¶¶ 1–4. Guy Chemical was deemed "essential" during the pandemic lockdowns, due to its work producing materials for household and construction products. *Id.*, ¶ 9. Guy Chemical is already facing an intense worker shortage, and its employees typically must have extensive training (required, ironically, by OSHA) and specialized knowledge that cannot be learned quickly, and—critically—a majority of employees at the Company would refuse to comply with the Mandate because Guy Chemical has attracted workers who have left other companies with onerous vaccine and masking requirements. *Id.*, ¶¶ 6–7. If even 25% of Guy Chemical's workers refuse to show up, the Company would be unable to complete orders, resulting not only in lost business but also reputational damages. *Id.*, ¶ 8. The Mandate also imposes irreparable harm in the form of logistics: the onerous testing requirements will have the effect of forcing companies to abandon testing and mandate the vaccine—"[t]here is no practical choice." *Id.*, ¶ 10.

***The Rabine Group of Companies*** have over 300 employees, including over 100 just at Pipe View L.L.C. These companies perform critical infrastructure repairs for damaged roofs, roads, HVAC systems, and commercial doors and docks, as well as snow removal—and, like the other Applicants, are already suffering from severe worker shortages even without the estimated 20% of workers who will leave because of the Mandate. Affidavit of Gary Rabine, Ex. 4, ¶¶ 2–6. These projects

must be done immediately or customers may face legal liability and physical dangers, but the Mandate will prevent the Group's companies from meeting timeliness obligations, causing tremendous public harm, as well as critical business and reputational damages. *Id.*, ¶¶ 7–11.

As Job Creators Network CEO Alfredo Ortiz states, these companies represent only "the tip of the iceberg." Ortiz Affidavit, Ex. 4, ¶ 11. Thousands of other companies are in the same situation.

***Terri Mitchell*** is the Administrations Manager at Guy Chemical and is determined not to receive the vaccine because she previously had the coronavirus and has the confirmed presence of SARS-COV-2 antibodies. Affidavit of Terri Mitchell, Ex. 4, ¶¶ 2, 4–5. She also refuses to subject herself to the physical harms and indignity of involuntary weekly testing. *Id.*, ¶ 5. She would rather lose her position than comply with the Mandate, and—as a result of her role at the company—knows that "a majority of employees at Guy Chemical feel the same way." *Id.*, ¶ 6.

## ARGUMENT

The traditional stay factors all support granting relief to Applicants. *See Nken v. Holder*, 556 U.S. 418, 426–27 (2009).

Applicants are likely to prevail on the merits for several reasons. *First*, the Mandate violates multiple "clear-statement" doctrines, most notably the major-questions doctrine, which states that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). But there is not the slightest hint that

Congress gave OSHA the power to issue emergency orders covering 84 million Americans and resulting in compelled vaccination of over 22 million of them.

This Court has previously warned OSHA about issuing such edicts: "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645, 651 (1980) (plurality). The Court even warned OSHA against abusing ETSs just like the Mandate: "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." *Id.* (emphasis added). Shockingly, the majority opinion below fails to address these holdings.

*Second*, the Mandate violates the nondelegation doctrine, which prohibits Congress from transferring legislative powers *carte blanche* to an executive agency.

*Third*, even if OSHA did have the power to issue the Mandate, there is no unforeseen emergency necessitating a one-size-fits-all ETS, especially when the Mandate will severely disrupt essential services and—in a cruel twist—result in companies laying off *vaccinated* workers to stay solvent.

Applicants have also demonstrated irreparable injury and favorable equities. Applicants are small businesses deemed "essential" during lockdowns and have struggled to survive the last two years. As the attached detailed affidavits make clear, these companies face the distinct prospect that a substantial number of

employees—a majority in some cases—will walk off the job rather than comply with the Mandate. Critically, they have every incentive to do this immediately rather than wait for the Mandate's deadlines to kick in. This will trigger a cascade of irreparable injuries as companies are unable to satisfy work orders, leading to lost clients, damaged reputation, and the threat of shutting their doors. After over a month of dormancy, the Mandate was suddenly sprung back into life by the Sixth Circuit, greatly upending the status quo and threatening imminent chaos.

The public will suffer tremendously, too. Applicants provide critical supply-chain services like food production, grocery store food deliveries, and emergency repairs for buildings and roads. By forcing those companies to operate without a sizable part of their workforce, the Mandate will cause immediate shortages at grocery stores, shortages of household and commercial goods, and languishing critical infrastructure failures.

## I. Applicants Are Likely to Succeed on the Merits.

### A. Prior Emergency Temporary Standards

The Occupational and Health Safety Act of 1970 ("OSH Act") provides the Secretary of Labor the incredible power to issue ETSs that are immediately effective upon publication in the Federal Register, without having to comply with *any* of the requirements of the Administrative Procedure Act. 29 U.S.C. § 655(c). The Secretary must determine, *inter alia*, that the covered "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." *Id.* The Secretary has delegated this

authority to the Assistant Secretary for Occupational Safety and Health. *Edison Elec. Institute v. OSHA*, 849 F.2d 611, 614 (D.C. Cir. 1988).

This is an "extraordinary power," *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974), and represents "OSHA's most dramatic weapon in its enforcement arsenal." *Asbestos Information Ass'n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984). This weapon must be "delicately exercised, and only in those emergency situations which require it." *Peach Growers*, 489 F.2d at 129–30.

Before 2021, OSHA had issued fewer than 10 ETSs. Of the six that were challenged, five (83.3%) were fully or partially vacated or stayed*, Asbestos*, 727 F.2d at 426; *Am. Petroleum Institute v. OSHA*, 581 F.2d 493, 503 (5th Cir. 1978), *aff'd*, 448 U.S. 607 (1980); *Taylor Diving Salvage v. U.S. Dept. of Labor*, 537 F.2d 819, 821 (5th Cir. 1976); *Peach Growers*, 489 F.2d at 129; *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973).

This lousy batting average—even when defending *limited* ETSs—demonstrates the extraordinarily high burden OSHA must satisfy. As demonstrated next, the Mandate does not survive this scrutiny.

### B. OSHA Lacked Authority to Issue the Mandate.

Applicants are likely to succeed on the merits of their challenge to the Mandate for several reasons.

#### 1. The Mandate Violates Multiple Clear-Statement Doctrines.

The Mandate represents an unprecedented assertion of power by OSHA, regulating far more than any prior ETS in OSHA's 50 years: 84 million Americans

(32 million currently unvaccinated), in every industry, representing almost 2/3 of all workers across the entire country. Its dictates are also unprecedented: OSHA is press-ganging private companies into being vaccination police who forcibly inject or test their employees—or fire them. For the first time in history, OSHA seeks to regulate the citizenry itself.

Under the major-questions doctrine, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.*

The Mandate fails this doctrine because there is no "clear statement" in § 655(c) giving OSHA such sweeping powers over the nation's economy, nor to mandate vaccination or intrusive weekly testing for 32 million people, nor to expand its purview beyond the workplace.

Only once before has OSHA attempted anything close to the Mandate—and this Court rejected it and forewarned OSHA from trying again. In the famous "benzene case," OSHA had issued a permanent standard pursuant to § 655, governing low levels of benzene, under such a broad theory of workplace harm that OSHA could effectively regulate substantial portions of the nation's industry. *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 623 (1980) ("*API*"). The Court rejected OSHA's power grab: "In the absence of a clear mandate

in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of § 655." *Id.* at 645 (plurality). The government's argument "would in turn justify pervasive regulation limited only by the constraint of feasibility." *Id.* The Court also criticized OSHA for "apply[ing] the same limit to all [industries], largely as a matter of administrative convenience." *Id.* at 650.

Significantly, the Court made these statements in the context of a *permanent* standard while noting that OSHA's ETS authority is *even more* "narrowly circumscribed." *Id.* at 651. The Court warned OSHA against abusing ETSs: "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry," and thus Congress "*narrowly circumscribed the Secretary's power to issue temporary emergency standards*." *Id.* (emphasis added). But the Mandate thumbs its nose at this precedent. And, shockingly, the majority opinion below fails to address these holdings.

Nor can OSHA claim that COVID provides cause to ignore *API*. The Court recently relied on the major-questions doctrine in holding that the CDC's eviction moratorium was illegal. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). The moratorium applied to "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction." *Id.* Those figures pale in comparison to the Mandate, which applies to 100% of the country's geographic scope and over 84 million individuals (forcing vaccination or testing on 32 million of them).

In the Sixth Circuit, the government acknowledged that the Mandate causes vast economic and political consequences, but claimed that the major-questions doctrine does not apply at all because the text of 29 U.S.C. § 655(c) "unambiguously" authorizes such seismic agency actions. It is quite a stretch to claim that Congress *unambiguously* gave OSHA the power to impose requirements of incalculable economic and political consequences:

- Imposing vaccine-or-testing requirements for 84 million Americans. *See* 86 Fed. Reg. at 61,471.
- Requiring forcible vaccination or testing of over 31 million of those Americans, 22.7 million of whom will be vaccinated against their wishes. *Id.* at 61,471–61,472.
- Imposing these requirements on every single industry in the country, amounting to over 264,000 businesses. *Id.* at 61,475.
- Imposing direct compliance costs of nearly $3 billion, not even counting the economic fall-out, which will be incalculable. *Id.* at 61,493.

But, again, there is no need to speculate on whether OSHA has this power. This Court rejected OSHA's position 40 years ago. *See API*, 448 U.S. at 645, 650–51 (plurality). The Sixth Circuit lacked the power to disregard this Court's holding.

Because there is no clear Congressional authorization, the Mandate fails the major-questions doctrine and violates *API*.

This Court has similarly held that it expects Congress to use "exceedingly clear language if it wishes to significantly alter the balance between federal and

state power." *Ala. Ass'n*, 141 S. Ct. at 2489. But implementing widespread general health programs is traditionally a matter for the States. *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) ("The safety and the health of the people of [a State] are, in the first instance, for that [State] to guard and protect" and "are matters that do not ordinarily concern the national government."); *BST Holdings*, 17 F.4th at 617. As noted above, there is no clear authority in the OSH Act for the Mandate, and thus it fails for this additional reason.

**2. The Mandate Violates the Nondelegation Doctrine.**

If OSHA truly does have such broad statutory authority to issue the Mandate, then § 655 violates the nondelegation doctrine. "[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). Thus, Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). This requirement—known as the nondelegation doctrine—is a central component of separation of powers.

The original understanding of the Constitution prohibited any transfer of Congress's vested legislative powers to any other entity. *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting). Congress must "make[] the policy decisions when regulating private conduct." *Id.* OSHA's interpretation of § 655(c) violates this original understanding. Under OSHA's view, "what constitutes a risk worthy of

Agency action is a policy consideration"—an "essentially legislative task." *Asbestos*, 727 F.2d at 421, 425; 86 Fed. Reg. at 61,405 ("determinations are 'essentially legislative'"). But policymaking is the role of Congress, and it "would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

Indeed, OSHA's interpretation of § 655 would run afoul even of the more-lenient modern interpretations of the nondelegation doctrine. *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). Under OSHA's view, "the degree of agency discretion" and "the scope of the power congressionally conferred" are practically limitless. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

OSHA cannot claim surprise, as *API* held that if OSHA were correct that § 655 permits regulation of the national economy, then "the statute would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in" its nondelegation cases. 448 U.S. at 646 (plurality). The Court chose to apply a constitutional-avoidance canon to reject a broad interpretation of OSHA's power. *Id.*

The Court here should follow the same path, but if the Court nonetheless adopts OSHA's view, the Court should conclude that § 655 violates the nondelegation doctrine.

### C. Even if OSHA Has Authority, an ETS Is Inappropriate.

OSHA has also failed to satisfy the statutory requirements for imposing an ETS. The Court must "take a 'harder look' at OSHA's action" because it was not subject to the APA. *Asbestos*, 727 F.2d at 421.

***No Necessity.*** OSHA can invoke its extraordinary ETS powers only upon a finding that an urgent emergency has arisen such that the agency simply cannot wait for the normal notice-and-comment process to occur. 29 U.S.C. § 655(c). That is, OSHA must "prove[] that the ETS, OSHA's most dramatic weapon in its enforcement arsenal, is '*necessary*' to achieve the projected benefits." *Asbestos*, 727 F.2d at 426 (emphasis added).

"[T]he Agency's failure to act may be evidence that a situation is not a true emergency." *Asbestos*, 727 F.2d at 423; *see Peach Growers*, 489 F.2d at 131 (the alleged grave concern "has been going on during the last several years thus failing to qualify for emergency measures"). But it is common knowledge that the COVID pandemic has been ongoing since early 2020, and vaccines have been widely available for almost all of 2021. OSHA provides no persuasive justification for why there is suddenly such an emergency now when so many Americans have *already* gotten vaccinated.

Notably, OSHA refused to issue an ETS in 2020 because "employers are maintaining hazard-free work environments." *In re Am. Fed'n of Lab. & Cong. of Indus. Organizations*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). That was during the height of the pandemic and is especially telling because OSHA claims it is *mandated* to issue an ETS when conditions warrant.

*Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32,376-01, 32,380 (June 21, 2021) (claiming § 655(c) "is not discretionary").

To be sure, an agency can change its mind. But COVID vaccines have been around for nearly a year, and no explanation was offered for why OSHA issued the Mandate only now, especially when vaccination rates are even better than before. In the Sixth Circuit, the government explained away its refusal to issue an ETS in June 2020 on the basis that there were no vaccines then. But the availability of vaccines now makes it less necessary—not more—to impose something as drastic as the Mandate.

In *API*, the Court criticized OSHA for "decid[ing] to apply the same limit to all [industries], largely as a matter of administrative convenience." *API*, 448 U.S. at 650 (plurality). "[I]t is expected that even an emergency temporary standard not overlook those obvious distinctions among … uses and plant practices that make certain regulations that are appropriate in one category of cases entirely unnecessary in another." *Dry Color*, 486 F.2d at 105. The Fifth Circuit correctly held that the Mandate is not "necessary" because a one-size-fits-all rule is inappropriate. *BST Holdings*, 17 F.4th at 615–16. The government argued below that ETSs need not make "employer-by-employer or employee-by-employee" distinctions. But an ETS must at least make sensible industry-by-industry distinctions, and that was not even attempted here. *Dry Color*, 486 F.2d at 105.

In an attempt to show some degree of tailoring, the government pointed below to exceptions for employees who work exclusively alone or outside. But these

are trivial, especially compared to the 84 million Americans who will nonetheless be covered. For example, the Mandate estimates that *only 9%* of landscaping and groundkeepers will qualify as working exclusively outdoors—and that is the *highest* percentage of any occupation. 86 Fed. Reg. at 61,461. If only 9% of landscapers are deemed to work outside, the entire exception is a fig leaf designed only to provide the false sense of tailoring.

Further, "an ETS must, on balance, produce a benefit the costs of which are not unreasonable. The protection afforded to workers should outweigh the economic consequences to the regulated industry," *Asbestos*, 727 F.2d at 423–24, "without eliminating the [relevant] enterprise and the associated jobs," *Peach Growers*, 489 F.2d at 130. But the Mandate will have precisely that effect and, ironically, will encourage employees to switch to employers who are not covered by the Mandate—causing severe economic disruption in the meantime. Pyle Affidavit, Ex. 4, ¶ 8; Lawrence Affidavit, Ex. 4, ¶ 5; Berkebile Affidavit, Ex. 4, ¶¶ 7–8. As one Applicant notes, the Mandate will actually force him to lay off *vaccinated* workers to save costs. Lawrence Affidavit, Ex. 4, ¶ 7.[2]

***No Grave Danger Demonstrated from Workplace Transmission.*** OSHA must also demonstrate that the Mandate addresses a "grave" danger. 29 U.S.C. § 655(c). The Fifth Circuit aptly concluded that no grave danger would be prevented by the Mandate. *BST Holdings*, 17 F.4th at 613–14. The question is not whether

[2] Moreover, side effects from vaccines are a critical cost of the Mandate—but OSHA has deliberately blinded itself to any calculation of these costs by saying it "will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination." OSHA, *FAQ*, https://www.osha.gov/coronavirus/faqs#vaccine.

COVID *generally* presents a grave danger, but whether the lack of a vaccine mandate and weekly testing for the next few months presents a grave danger to nearly every workplace in the entire nation such that OSHA was not required to go through notice-and-comment rulemaking. *Asbestos*, 727 F.2d at 427. In other words, OSHA "cannot use its ETS powers as a stop-gap measure" to avoid notice-and-comment. *BST Holdings*, 17 F.4th at 616.

OSHA's prior actions declining to issue an ETS, as well as the lack of tailoring discussed above confirm no such grave danger. Point in case: employees with natural immunity from prior COVID infections are included in the Mandate, but OSHA failed to conclude that such workers actually face a grave danger. Rather, OSHA stated that it "is unable to establish that such immunity eliminates grave danger." 64 Fed. Reg. at 61,422. Through double negatives, OSHA is saying a *lack* of evidence showing grave danger is somehow now enough to announce that a grave danger exists. This alone warrants finding a lack of substantial evidence. *See BST Holdings*, 17 F.4th at 615.

## II. Applicants Will Suffer Irreparable Injury in the Absence of a Stay.

Absent a stay, companies will *immediately* have to start the groundwork for complying, such that they are in full compliance *before* the vaccine deadline hits in early January. The Mandate expressly recognizes this fact: to "reduce burdens on both employers and employees when the compliance dates for the additional requirements for employees who are not fully vaccinated arrive," OSHA "strongly encourages employers to implement the required measures to support employee

vaccination *as soon as practicable*" after issuance of the Mandate. 86 Fed. Reg. at 61,549–61,550 (emphasis added). Elsewhere, the Mandate says it is "critical[ly] importan[t]" to "implement[] the requirements in this ETS, including the recordkeeping and reporting provisions, as soon as possible," *id.* at 61,505, and "it is essential that remediation efforts at a workplace be undertaken immediately," *id.* at 61,545.

Having to comply with these requirements will undoubtedly yield irreparable harm. "[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring). That alone is sufficient here. OSHA itself estimated there will be $2.98 billion in compliance costs over six months. 86 Fed. Reg. at 61,493. Even if that amount were evenly spread over the six-month life of the ETS, it would mean $16.5 million *every single day*. But the costs are not evenly spread. They are overwhelmingly frontloaded (and thus imminent) because companies will have to create all these programs and deal with lost time for any employees who get vaccinated before the deadlines hit.

As the Fifth Circuit found, employees are facing imminent, irreparable harm because the Vaccine Mandate forces "reluctant individual recipients … to a choice between their job(s) and their jab(s)"; and companies are facing imminent, irreparable harm in the form of "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." *BST Holdings*, 17 F.4th at 618.

Those findings are amply supported by the record in this case. Applicants are already facing intense labor shortages, and they often require many employees with specialized licenses or training, leading to an extremely small pool of potential hires, plus on-boarding processes that prevent new hires from quickly ramping up. McKee Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶ 4; Berkebile Affidavit, Ex. 4, ¶ 6; Rabine Affidavit, Ex. 4, ¶¶ 4–5. But sizable portions of their workforce—sometimes a majority—have indicated that they will not comply with the Mandate, and to maximize the odds of finding a job at a company not covered by the Mandate, there is a strong incentive for them to leave soon, *regardless of when OSHA will actually start enforcing the Mandate*, and changing jobs is especially easy given the low unemployment rate. Berkebile Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶ 5.

Because of the difficulty in finding replacement workers, these companies will be drastically short in workers, meaning cascading lost business with no hope of recovery. *Ala. Ass'n*, 141 S. Ct. at 2489. These delayed and canceled shipments and services will sour customer relationships, leading to lost business and reputational harm. Pyle Affidavit, Ex. 4, ¶ 7; Lawrence Affidavit, Ex. 4, ¶¶ 7–8; Berkebile Affidavit, Ex. 4, ¶ 8; Rabine Affidavit, Ex. 4, ¶ 8. To stay afloat, companies will have to make drastic employment cuts, including of vaccinated workers. *See, e.g.*, Lawrence Affidavit, Ex. 4, ¶ 7.

The Mandate's onerous logistical requirements for testing will likewise cause irreparable harm by effectively "forc[ing] [workers] either to get vaccinated, or quit." *Id.,* ¶ 10. Companies often lack the manpower to carry out mass testing—meaning workers must leave the premises to get tested, causing additional lost productivity. Berkebile Affidavit, Ex. 4, ¶ 10. The testing regime is undoubtedly designed to be so burdensome that it presents no real option for the vast majority of companies.

For the individual Applicant Terri Mitchell, a compelled vaccination represents an irreparable harm because it cannot be undone, and involuntary nasal or throat testing—by edict of the President—is a breach of personal autonomy. As Justice Scalia said: "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

Incredibly, OSHA never even bothered to calculate the irreparable damage that will occur from employees leaving businesses because of the impending Mandate deadlines, and the resulting cascading destruction of an already-stressed supply chain. Those figures would dwarf the $3 billion in compliance costs.

The government argued below that only a small percentage of employees in the past actually quit rather than be vaccinated. But those people were the early adopters. At this point, if someone has not gotten vaccinated, he is unlikely to be persuadable—and he means it when he says he will switch jobs rather than comply. Indeed, the entire premise of the Mandate is that the remaining unvaccinated people *cannot* be persuaded by the measures used in the past: "OSHA has found

that neither reliance on voluntary action by employers nor OSHA non-mandatory guidance is an adequate substitute for specific, mandatory workplace standards at the federal level." 86 Fed. Reg. at 61,445.

Nor can the government claim that companies have not *yet* started incurring costs, perhaps because company owners saw that the Fifth Circuit maintained a stay since November 6, 2021. The White House has *repeatedly* told businesses to move forward *despite* the Fifth Circuit's rulings, as conveyed by prominent press reports:

- Morgan Chalfant, *White House: Move Forward with Mandate Despite Court Freeze*, THE HILL, Nov. 8, 2021, https://thehill.com/homenews/administration/580586-whits-house-move-forward-with-mandate-despite-court-freeze.
- Morgan Chalfant, *White House Tells Businesses to Move Forward with Vaccine Mandate*, THE HILL, Nov. 18, 2021, https://thehill.com/homenews/administration/582232-white-house-tells-businesses-to-move-forward-with-vaccine-mandate.

Far from consisting of the usual puffery about their belief in ultimately prevailing, these White House statements stepped perilously close to the line of encouraging contempt of the Fifth Circuit's order. On November 18, White House Press Secretary Jen Psaki stated during a press conference that the government still expects businesses to take action in advance of the now-stayed Mandate's January 4 deadline and that the government still views that deadline as the key

date for compliance. *See Press Briefing by Press Secretary Jen Psaki*, WHITE HOUSE, Nov. 18, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/18/press-briefing-by-press-secretary-jen-psaki-november-18-2021/ (agreeing that the White House is "still working off of that January 4th compliance deadline" and "still heading towards the same timeline," and therefore businesses are "urg[ed]" "to move forward with the President's vaccine and weekly testing rule").

The government seeks to have it both ways: they tell the courts that there are no immediate costs, then they tell the public to start complying now if they know what is good for them.

An immediate stay is both necessary and appropriate, given the imminent and irreparable harms imposed by the Mandate. The Fifth Circuit correctly recognized this. This Court should grant this Application.

## III. The Equities and Public Interest Strongly Favor a Stay.

The equities and public interest likewise favor a stay. *Nken*, 556 U.S. at 435.

It "is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n*, 141 S. Ct. at 2490. That ends the matter: OSHA has no equitable interest in enforcement of an invalid ETS.

Moreover, there is an interest in maintaining the status quo, under which the Mandate has not been in effect for nearly its entire existence. *Nken*, 556 U.S. at 429.

The Mandate has been stayed almost since the moment it was issued, and the Sixth Circuit's decision to spring the Mandate back into life—on a Friday night after close of business, no less—will cause incredible chaos.

Further, the government has diminished equities. OSHA seeks to press-gang private parties into forcibly vaccinating or testing over 30 million employees. And OSHA issued the Mandate without even posting drafts or summaries online to inform the public—unwarranted secrecy in the false name of efficiency, given that the COVID pandemic has been around for nearly two years. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (equitable interests "tilt[] against" a party who waits "years" to initiate action). Meanwhile, even before the Mandate was issued, the Department of Labor demanded that companies "begin the process of adopting vaccination mandates,"[3] an obvious *in terrorem* scheme where the government uses threat of the Mandate to strong-arm companies into giving the government what it wants, regardless of whether the Mandate will be upheld in court.

Threatening to issue illegal edicts as a strategy to force involuntary vaccinations and testing is a cynical exercise of government powers, unworthy of equitable charity. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945).

The Mandate itself even stoops to personal attacks against those who question OSHA's authority, labeling those who "resist curbs on personal freedoms"

[3] Ben Penn, *Top DOL Lawyer Courts Business Support for Biden's Vaccine Order*, Bloomberg Law, Sept. 10, 2021, https://news.bloomberglaw.com/daily-labor-report/top-dol-lawyer-courts-business-support-for-bidens-vaccine-order.

as suffering from "psychological reactance," which OSHA implies is some kind of undesirable mental condition. 86 Fed. Reg. at 61,444.

By contrast, Applicants have strong equitable interests. They have already suffered greatly over the last two years and now face terribly difficult choices about the viability of their businesses, as demonstrated above.

There are also very strong public interests in staying the Mandate, as the attached affidavits explain in detail. Applicants were deemed "essential" during the lockdown because they serve as critical cogs in our nation's economy. Lawrence Affidavit, Ex. 4, ¶ 9; Berkebile Affidavit, Ex. 4, ¶ 9; Rabine Affidavit, Ex. 4, ¶ 10. These companies represent just a tiny fraction of those affected. Nationwide, thirty percent of unvaccinated workers have indicated they will not comply, which will wreak havoc on supply chains. *See, e.g.*, Spencer Kimball, *Business Groups Ask White House to Delay Biden Covid Vaccine Mandate Until After the Holidays*, CNBC, https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html.

Food will not be produced or transported to grocery stores, schools, and nursing homes; household products will not be manufactured; damaged roofs and sinkholes will not be repaired; snow will not get removed; and buildings with broken HVAC systems will turn into freezing meat lockers. Pyle Affidavit, Ex. 4, ¶ 10; McKee Affidavit, Ex. 4, ¶ 11; Lawrence Affidavit, Ex. 4, ¶ 9; Berkebile Affidavit, Ex. 4, ¶ 9; Rabine Affidavit, Ex. 4, ¶ 9. This in turn will cause a cascade effect that takes down companies at each link in the supply chain, along with the

workers at those companies and their local communities. McKee Affidavit, Ex. 4, ¶¶ 12–13.

## CONCLUSION

For the foregoing reasons, Applicants respectfully request a stay pending the disposition of Applicants' petition for review currently pending before the United States Court of Appeals for the Sixth Circuit and pending any further proceedings in this Court.

Respectfully submitted,

By _____
Jonathan Berry
*Counsel of Record*

Jonathan Berry
*Counsel of Record*
BOYDEN GRAY & ASSOCIATES PLLC
801 17th Street NW, Suite 350
Washington, DC 20006
(202) 955-0618
berry@boydengrayassociates.com

*Counsel for Applicants*

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