Nos. 21A243, 21A244, 21A245, 21A246,
21A247, 21A248, 21A249, 21A250, 21A251,
21A252, 21A258, 21A259, and 21A260

IN THE

Supreme Court of the United States

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

MOTION OF FORMER OSHA ADMINISTRATORS CHARLES JEFFRESS, DAVID MICHAELS, AND GERARD SCANNELL FOR LEAVE TO FILE ATTACHED AMICUS BRIEF IN OPPOSITION TO EMERGENCY APPLICATIONS FOR A STAY OR INJUNCTION PENDING CERTIORARI REVIEW; FOR LEAVE TO FILE WITHOUT 10 DAYS' NOTICE; AND FOR LEAVE TO FILE IN PAPER FORMAT

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December 22, 2021

Amici Charles Jeffress, David Michaels, and Gerard Scannell respectfully move for leave **(1)** to file the attached amicus curiae brief in opposition to the eleven Emergency Applications, filed on December 17–20, 2021, seeking a stay or injunction pending certiorari review of the Sixth Circuit's decision granting a motion to dissolve a stay of the Occupational Safety and Health Administration (OSHA) Emergency Testing Standard on COVID-19 vaccination and testing, which was issued by the Fifth Circuit before the matter was transferred to the Sixth Circuit, **(2)** to file the enclosed brief without 10 days' advance notice to the parties of amici's intent to file, and **(3)** to file in unbound format on 8½-by-11-inch paper. *See* Sup. Ct. R. 37.2(a)

By email on December 20, 2021, amici provided notice to all parties of their intent to file an amicus brief in opposition to the emergency applications. Counsel for the petitioners-applicants in twelve of the thirteen applications—Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A250, 21A251, 21A252, 21A258, 21A259, and 21A260—stated that they consent to the filing. In addition, several other petitioners in the other consolidated cases pending in the Sixth Circuit, who are also respondents here—National Association of Home Builders of the United

States, North America's Building Traders Unions, et al., Gulf Coast Restaurant Group, SEIU Local 32, the AFL-CIO and UFCW, Natural Products Association, Burnett Specialists, et al., the United Association, Scotch Plywood, and Texas Governor Gregg Abbott—have consented to the filing. Counsel for petitioner-applicant in No. 21A249 and respondent U.S. Department of Labor did not respond.

Amici curiae are three former Assistant Secretaries of Labor for Occupational Safety and Health, who administered OSHA under Presidents George H.W. Bush, Bill Clinton, and Barack Obama: **Gerard Scannell** was OSHA Administrator from 1989 to January 1993. Before becoming OSHA Administrator, he was director of corporate safety, health and fire protection at Johnson & Johnson. **Charles Jeffress** was OSHA Administrator from October 1997 to January 2001. Before joining the U.S. Department of Labor, he served in the North Carolina Department of Labor as the director of its OSHA state plan. He has also served in senior positions at the U.S. Chemical Safety and Hazard Investigation Board, at the Legal Services Corporation, and at the American Association for Justice. And **David Michaels** was OSHA Administrator from December 2009 to January 2016—the longest serving administrator

in OSHA's history. He also served as the Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 to 2001. Dr. Michaels is an epidemiologist and a professor at George Washington University School of Public Health in the Departments of Environmental and Occupational Health and Epidemiology. The three filed together a brief as amici curiae in the sixth Circuit.

Amici Scannell, Jeffress, and Michaels seek to file an amicus brief in opposition to the emergency applications for a stay or injunction pending certiorari review because they are concerned that a stay or injunction would delay measures needed to control the spread of Covid-19 and that the applications present an incorrect, and untenable, view of OSHA's statutory authority to protect workers against workplace exposure to disease-causing agents. They believe that their brief may be helpful to the Court in considering the applications.

Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file and to file in unbound format on 8½-by-11-inch paper. The Sixth Circuit granted the government's motion to dissolve the stay imposed by the

Fifth Circuit on the evening of December 17, 2021, and the applications for a stay were filed in this Court on December 17, 18, and 20. The Court has now set a deadline of December 30 for respondent's brief. Counsel for amici provided notice to all parties on December 20, and because of prescheduled vacation plans is filing today. Because of the rapid schedule and because no party has opposed the filing, amici request that the Court grant leave to file the attached amicus brief without 10 days' advance notice to the parties and in unbound format.

CONCLUSION

For the foregoing reasons, amici Scannell, Jeffress, and Michaels respectfully request that the Court grant this motion to file the attached proposed amicus brief and accept it in the format and at the time submitted.

December 22, 2021

Respectfully submitted,

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AMICUS CURIAE BRIEF OF FORMER OSHA ADMINISTRATORS CHARLES JEFFRESS, DAVID MICHAELS, AND GERARD SCANNELL IN OPPOSITION TO EMERGENCY APPLICATIONS FOR STAY (OR INJUNCTION) PENDING CERTIORARI REVIEW

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December 22, 2021

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INTEREST OF AMICI CURIAE[1]

Amici curiae are three former Assistant Secretaries of Labor for Occupational Safety and Health, who administered the Occupational Safety and Health Administration (OSHA) under Presidents George H.W. Bush, Bill Clinton, and Barack Obama.

Gerard Scannell was OSHA Administrator from 1989 to January 1993. Before becoming OSHA Administrator, he was director of corporate safety, health and fire protection at Johnson & Johnson.

Charles Jeffress was OSHA Administrator from October 1997 to January 2001. Before joining the U.S. Department of Labor, he served in the North Carolina Department of Labor as the director of its OSHA state plan. He has also served in senior positions at the U.S. Chemical Safety and Hazard Investigation Board, at the Legal Services Corporation, and at the American Association for Justice.

David Michaels was OSHA Administrator from December 2009 to January 2016—the longest serving administrator in OSHA's history. He

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[1] Amici have moved for leave to file this brief. No party's counsel authored the brief in whole or in part, and no party or party's counsel, nor anyone other than amici or their counsel, contributed money intended to fund its preparation or submission.

also served as the Department of Energy's Assistant Secretary for Environment, Safety and Health from 1998 to 2001. Dr. Michaels is an epidemiologist and a professor at George Washington University School of Public Health in the Departments of Environmental and Occupational Health and Epidemiology.

Amici submit this brief in opposition to the emergency applications because they are concerned that a stay or injunction would delay measures needed to control the spread of Covid-19 and that the applications present an incorrect, and untenable, view of OSHA's statutory authority to protect workers against workplace exposure to disease-causing agents. Amici believe that their brief may be helpful to the Court in considering the applications.

ARGUMENT

The applications for stay or injunction rest on a fundamentally flawed view of OSHA's statutory authority.

This case involves OSHA's issuance of an Emergency Temporary Standard under section 6(c) of the Occupational Safety and Health Act (OSH Act), 29 U.SC. § 655(c), to protect against workplace transmission of the virus that causes COVID-19—a disease that has infected over 50

million Americans and killed more than 800,000, including more than 46,000 in the six weeks that have passed since the applicants filed their petitions challenging OSHA's determination that workplace exposure to COVID-19 represents a grave threat.[2] The applications before this Court rest in large part on the view that OSHA lacks authority under OSH Act to issue standards addressing health threats to workers from workplace transmission of viruses and other infectious agents. That view of OSHA's authority is groundless.

A. The OSH Act authorizes OSHA to issue health and safety standards "to serve the objectives of" the Act. 29 U.S.C. § 655(b)(1). Those objectives include protecting workers from "illnesses arising out of work situations," *id.* § 651(a), and assuring "healthful working conditions" by reducing "health hazards" at "places of employment," *id.* § 651(b)(1). The Act's protections are explicitly aimed at "diseases" connected to work environments, *id.* § 651(b)(6) & (13), and the development of "medical criteria which will assure insofar as practicable that no employee will

[2] CDC, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths (visited Dec. 19, 2021).

suffer diminished health, functional capacity, or life expectancy as a result of his work experience," *id*. § 651(b)(7).

Section 6 of the OSH Act, 29 U.S.C. § 655, grants OSHA ample authority to carry out the Act's purposes by issuing standards aimed at preventing workplace outbreaks of communicable diseases caused by viruses and other infectious agents. OSHA's authority expressly extends to setting standards addressing "toxic materials *or* harmful physical agents," *id*. § 655(b)(5) (emphasis added), so as to "adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity" resulting from "exposure to the hazard," *id*. Section 6(c) authorizes OSHA to issue emergency temporary standards to protect employees from "grave danger" resulting "from exposure to substances *or* agents determined to be toxic *or* physically harmful," and from "new hazards," *id*. § 655(c)(1) (emphasis added).

These provisions unambiguously grant OSHA authority to protect workers from workplace exposure to a virus that causes severe and often fatal illness. Such a virus falls squarely within the plain meaning of "harmful physical agent" and "agent determined to be … physically

harmful." The relevant common meaning of "agent," both when the OSH Act was enacted in 1970 and now, is "something that produces or is capable of producing a certain effect"—more specifically, "a substance capable of producing a chemical reaction or a physical or biological effect." *Webster's Third New International Dictionary* 40 (3d ed. 1965). That definition plainly covers a virus that causes a disease. Indeed, when Congress enacted the OSH Act, references to disease-causing viruses and microbes as "agents" were commonplace, including in the Nixon Administration's renunciation of biological warfare and in extensive congressional deliberations on related subjects.[3] To the extent such agents produce disease, organ failure, and death, they undoubtedly cause "physical[] harm[]"—that is, "bodily" "damage" or "injury"—within the common meaning of those words. *Id*. 1706, 1034 (defining "physical" and "harm").

[3] *See* President's Statement on Chemical and Biological Defense Policies and Programs (Nov. 25, 1969), https://2001-2009.state.gov/r/pa/ho/frus/nixon/e2/83597.htm; *see also* Journal of the Senate 432, 91st Cong., 1st Sess. (Aug. 11, 1969) (recording vote on defense appropriations language concerning "lethal and nonlethal chemical and biological agents").

Citing the Fifth Circuit's stay decision, applicant Southern Baptist Theological Seminary (at 19–20) ascribes a much narrower meaning to the statute because, in their view, the proximity of the statutory term "physically harmful" to the word "toxic" suggests that the statute is aimed only at substances with characteristics of "toxicity" and "poisonousness," not at agents that are harmful because they cause infectious disease. That reading wrongly renders the disjunctive phrase "or physically harmful" superfluous, *see Bailey v. United States*, 516 U.S. 137, 146 (1995), in violation of the interpretive principle that "*or* creates alternatives," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012). Moreover, the view that the enacting Congress would have considered an infectious agent's propensity to cause disease to be a characteristic so distinct from "toxicity" that it never would have included that propensity in a reference to "physical[] harmful[ness]" occurring in the same phrase as "toxic" is belied by the many statutes in which Congress has treated toxicity and infectiousness as related concepts for regulatory purposes. For example, in the Clean Water Act, enacted in 1972, shortly after the OSH Act, Congress defined "toxic pollutant" to mean pollutants "including disease-

causing agents" that "cause death, disease" and other harms to organisms exposed to them. 33 U.S.C. § 1362(13). Thus, the supposition that a Congress that authorized regulation of toxic substances must *not* have intended also to reach harmful infectious agents—despite its use of language whose plain meaning covers them—is baseless.

Other clear language in the OSH Act and related statutes confirms that the Act applies to workplace exposure to harmful infectious agents and authorizes OSHA standards to include vaccinations as part of the protection afforded workers against such exposure. For example, 29 U.S.C. § 669(a)(5) requires the Secretary of Health and Human Services to assist OSHA by developing information regarding "potentially toxic substances or harmful physical agents," including through medical examinations and tests. That provision goes on to provide that "[n]othing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, *immunization*, or treatment, for those who object thereto on religious grounds, *except* where such is *necessary for the protection of the health or safety of others*." *Id*. (emphasis added) The provision's reference to "immunization," and its creation of a limited religious exception to the statute's authorization of standards involving

immunization, would be meaningless if the statute did not contemplate that "harmful physical agents" include infectious disease-causing agents and that standards addressing such agents may include provisions involving immunization.

The Workers Family Protection Act, enacted in 1992 and codified at 29 U.S.C. § 671a, in the same U.S. Code chapter as the OSH Act, likewise confirms OSHA's authority to issue standards under the OSH Act addressing workplace exposures to infectious-disease agents such as viruses. Based on congressional findings that "hazardous chemicals and substances that can threaten the health and safety of workers are being transported out of industries on workers' clothing and persons," and that these substances "have the potential to pose an additional threat to the health and welfare of workers and their families," section 671a requires the National Institute for Occupational Safety and Health, in cooperation with OSHA, to study "the potential for, the prevalence of, and the issues related to the contamination of workers' homes with hazardous chemicals and substances, *including infectious agents*, transported from the workplaces of such workers." *Id*. § 671a(c)(1)(A). The statute tasks OSHA with ongoing responsibility to consider whether additional standards are

needed to address such issues, and, if so, to promulgate such standards "*pursuant to … the Occupational Safety and Health Act of 1970*." *Id.* § 671a(d)(2) (emphasis added). The statute reflects express congressional recognition that the harmful agents that OSHA is authorized to address through standards under the OSH Act include "infectious agents"—and that, in issuing such standards, OSHA can consider health threats to family members of workers exposed to infectious agents in the workplace.

B. Given the OSH Act's language and structure, OSHA has long asserted authority to protect workers against infectious agents, including viruses. Most notably, OSHA promulgated the Occupational Exposure to Bloodborne Pathogens standard in 1991 "to eliminate or minimize occupational exposure to Hepatitis B Virus (HBV), Human Immunodeficiency Virus (HIV) and other bloodborne pathogens." 56 Fed. Reg. 64004 (1991), *codified at* 29 C.F.R. § 1910.1030. The standard, among other provisions, requires employers to make the hepatitis B vaccine available to employees at risk of exposure to HBV. 29 C.F.R. § 1010.1030(f). Even earlier, OSHA had provided, in its Hazardous Waste Operations and Emergency Response standard, *id.* § 1910.120, that employers must protect workers engaged in hazardous waste cleanup

against "[a]ny biological agent and other disease-causing agent which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any person, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death [or] disease." *Id.* § 1910.120(a)(3).

In addition, OSHA's Respiratory Protection standard, 29 C.F.R. § 1910.134(a)(1), requires use of respirators to prevent occupational diseases caused by "harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors" when engineering controls are infeasible. In promulgating the current standard, OSHA emphasized that it "does apply to biological hazards," 63 Fed. Reg. 1152, 1180 (1998), including "bioaerosols" that may lead to "epidemics of infections including colds, viruses, tuberculosis, and Legionnaires Disease," *id.* at 1159. More specifically, OSHA has recognized that occupational exposure to the microbe that causes tuberculosis is a health risk that falls within the scope of the OSH Act, although it concluded in 2003 that because of advances in efforts by hospitals and other workplaces to prevent such exposure a standard under 29 U.S.C. § 655(b) was unnecessary to address

the risk. *See* 68 Fed. Reg. 75768 (2003). At the same time, the agency recognized that the statute's "general duty" clause, 29 U.S.C. § 654(a)(1), which requires employers to provide a workplace "free from recognized hazards," continues to authorize enforcement actions against employers who fail to protect workers against the risk of tuberculosis infection.

Finally, OSHA's standard on Access to Employee Exposure and Medical Records, 29 C.F.R. § 1910.1020, grants both OSHA and affected employees a right of access to any records regarding employee exposure to harmful physical agents subject to regulation under the OSHA Act. The standard specifically defines "[t]oxic substance or harmful physical agent" to include "any biological agent (bacteria, virus, fungus, etc.)" that poses a health hazard. *Id*. § 1910.1020(c)(12).

C. The implication of the applicants' view that the statute does not authorize protection of workers against health impacts of disease-causing infectious agents such as viruses is that OSHA's longstanding construction of the OSH Act—and, thus, the standards described above, the COVID-19 Emergency Temporary Standard, and the earlier COVID-19 Healthcare Emergency Temporary Standard, 29 C.F.R. § 1910.502(m)—are invalid. Even if the statute's clear language did not

unambiguously cover agents such as viruses that cause physically harmful diseases (which, as explained above, it does), OSHA's reading should nonetheless be upheld because it represents a "permissible construction of the statute." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 520 (6th Cir. 2019) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)); *see also City of Arlington, Tex. v. FCC*, 589 U.S. 290 (2013) (requiring deference to an agency's determination of the scope of its regulatory authority). Yet the applicants do not consider whether the longstanding, consistent construction of the statute by the agency responsible for administering it is entitled to *Chevron* deference. The agency's reading easily passes muster under *Chevron*, as the reading is firmly grounded in the statute's language and its expressly manifested purpose of fostering healthful workplaces and protecting workers against exposure to illness and disease in their working environments. *See* 29 U.S.C. § 651. OSHA's "natural" reading falls "well within the bounds of reasonable interpretation," and is "entitled to deference under *Chevron*." *Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 454 (1999).

The applicants' view that the statute applies only to harmful substances and agents that occur uniquely in workplaces (*e.g.*,

Application of Phillips Manufacturing, No. 21A245, at 22; Application of 26 Business Ass'ns, No. 21A244, at 19) is equally untenable. Although the statute authorizes OSHA to issue standards for *workplace* health and safety, nothing in the statutory language suggests that OSHA cannot regulate to prevent harm from workplace exposures to physically harmful agents if those agents are also present elsewhere. Toxic substances and physically harmful agents are rarely confined to workplaces, and OSHA, throughout its history, has acted to protect workers against workplace exposures to hazards that they may also encounter outside the worksite.

For example, OSHA's bloodborne pathogens standard, 29 C.F.R. § 1010.1030, provides workplace protections against infectious agents that can be encountered anywhere. Moreover, that standard's requirement that employers provide workers with the HVB vaccine protects workers once they leave the workplace just as much as it does in the workplace—as will the COVID-19 vaccinations that the Standard at issue here encourages. Other examples of workplace protections against hazards existing elsewhere abound. OSHA requires employers to protect workers against the recognized hazard of heat exposure on the job, *see*

https://www.osha.gov/heat-exposure/standards, although workers are also exposed to heat at home and elsewhere in their communities. And OSHA regulates lead in workplaces, *see* 29 C.F.R. § 1910.1025, while many other agencies regulate it in other settings, including the home, *see*, *e.g.*, https://www.epa.gov/lead/lead-laws-and-regulations. Similarly, OSHA protects workers against airborne exposure to hexavalent chromium within workplaces, *id*. § 1910.1026, while EPA regulates air emissions of the same hazardous substance, from the same facilities, 40 C.F.R. § 63.342.

The applicants' non-textual view of the statute would gut these and many other longstanding OSHA standards aimed at fostering safe and healthy workplaces and would threaten virtually the entire body of the agency's work over its 50-year history. This Court should not grant a stay premised on such a flawed foundation.

CONCLUSION

This Court should deny the emergency applications for a stay or injunction in connection with OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard.

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