Nos. 21-7000 (lead), 21-4027/4028/4031/4032/4033, 21-4080, 21-4091/4090, 21-4093/4088/4101/4096, 21-4097/4102/4083

MCP No. 165

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION RULE ON COVID-19 VACCINE AND TESTING 86 FED. REG. 61402

OPPOSITION OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA AND WYOMING TO DISSOLVING STAY OF ENFORCEMENT

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RESPONSE

Neither Congress nor the Executive Branch has been bashful about testing the limits of its authority. For that reason, a "lack of historical" precedent is often "the most telling indication" that Congress lacked the power to pass a law, or that an agency lacked the power to promulgate a regulation. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quotation omitted); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

This case involves a historically unprecedented administrative command. Relying on a decades-old statute pertaining to workplace dangers—the "Emergency Provision," 29 U.S.C. §655(c)—OSHA promulgated a rule regulating the private healthcare decisions of tens of millions of Americans. This rule, the "Vaccine Mandate," requires that all companies with at least 100 employees require their employees to either vaccinate themselves against COVID-19 or else submit to (expensive and impractical) weekly testing. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). No Administration in history has issued a comparable mandate.

This case does not present the question whether vaccine mandates are wise or desirable. Instead, it presents the narrow questions whether OSHA had authority to issue the Mandate, and whether it lawfully exercised whatever authority it had. For

"our system does not permit agencies to act unlawfully," even during a pandemic and "even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam). Here, the Emergency Provision's text confirms what the lack of historical precedent suggests: OSHA lacked the power to issue the Vaccine Mandate. Because the petitioners will likely prevail on the merits, and because they satisfy the remaining stay-pending-review factors, this Court should deny OSHA's motion to dissolve the Fifth Circuit's stay. *See* Gov't Mot. to Dissolve Stay, Doc. 69 ("Mot.").

I. The States will likely prevail on the merits

OSHA promulgated the Vaccine Mandate under the "Emergency Provision," which states:

> The Secretary shall provide … for an emergency temporary standard to take immediate effect … if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. §655(c)(1). For at least four reasons, OSHA exceeded its power under this provision when it promulgated the Vaccine Mandate.

A. COVID-19 is not an occupational danger that OSHA may regulate

1. The goal of statutory interpretation is to "interpret the words consistent with their ordinary meaning ... at the time Congress enacted the statute." *Wisconsin*

Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018) (quotation omitted). This case thus requires the Court to consider how ordinary English speakers would understand the phrase "grave danger from exposure to substances or agents … or from new hazards," as it appears in a sentence about risks to which "*employees* are exposed." In that context, ordinary English speakers would understand the phrase as referring to dangers presented by work, not those presented by human life generally. Thus, the Emergency Provision is best read to reach dangers to which employees are exposed *because* they are employees—work-related dangers, like mercury exposure in a manufacturing plant—not to dangers (like COVID-19 or violent crime or air pollution or ultraviolet sunlight) presented by the mere fact of existence.

Consider, for example, the dangers posed by violent crime and regional air pollution. The former is a hazard, the latter a danger that arises from a substance or agent. Employees may well confront those risks at work. But these risks, for most employees, do not arise from the work itself and would not naturally be described as risks to which "employees are exposed." Dangers to which "employees are exposed," and that the Emergency Provision may therefore cover, are those typically described as "occupational dangers." In other words, "for coverage under the Act to be properly extended to a particular area, the conditions to be regulated must fairly be considered *working* conditions, the safety and health hazards to be remedied

occupational, and the injuries to be avoided *work-related*." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

Context bolsters the point. The Occupational Safety and Health Act, of which the Emergency Provision is a part, often refers to "substances," "agents," and "hazards," but always in connection with dangers arising from work. One provision mandating the agency to make a report "listing … all toxic *substances in industrial usage*." 29 U.S.C. §675 (emphasis added). Another directs OSHA to develop "criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are *safe for various periods of employment*, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy *as a result of his work experience*." §669(a)(3) (emphasis added). And another requires the government to conduct studies on "the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, transported *from the workplaces* of such workers." §671a(c)(1)(A) (emphasis added). It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno v. Koray*, 515 U.S. 50, 56 (1995) (quotation omitted). And the just-discussed context makes it even more unnatural to read the Emergency Provision—the "most

dramatic weapon in" OSHA's "enforcement arsenal," *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984)—as reaching beyond dangers that are fairly described as occupational in nature.

From this, it follows that the Vaccine Mandate is illegal. For the vast majority of covered employees, the COVID-19-related risk presented by work is the same risk that arises from human interaction more broadly. Because it is not an occupational danger, it is not the sort of danger that the Emergency Provision empowers OSHA to address.

2. OSHA's motion stresses that COVID-19 is a "hazard" and that the disease-causing virus is an "agent." *See* Mot.10, 12–13. The States, however, do not argue otherwise. Their point is that the Emergency Provision speaks only to hazards and substances (like saws without safety guards or asbestos-containing brake pads) that employees face because of their employment—not to hazards and substances (like violent crime or SARS-CoV-2) that employees confront at work only because these dangers are implicated by daily life and human interaction.

What is more, the States are happy to assume that viruses *are* a covered danger in some workplaces. For example, COVID-19 could be a workplace risk at a lab that works with SARS-CoV-2; in that setting, work itself would expose employees to a COVID-19-related danger. Similarly, "bloodborne pathogens" present a workplace

danger to employees whose jobs require work with such pathogens. Mot.16. (Along the same lines, OSHA's "workplace sanitation and fire rules," *id.*, address workplace risks: employees forced to work in unsanitary or unsafe conditions face risks *because of* their work.) But no ordinary English speaker would describe the risk of contracting an endemic illness as a danger arising from work. OSHA counters that COVID-19 "*is* a particularly acute workplace hazard," since the "nature of workplaces is that employees come together in one place for extended periods and interact." Mot.15. But that is just another way of describing dangers humans face as a result of being alive.

Finally, OSHA posits that it must have authority under the Emergency Provision to order vaccinations, since *another* provision in the Occupational Safety and Health Act "expressly indicates that OSHA can require 'immunization,' including to 'protect[] the health or safety of others.'" Mot.16 (quoting 29 U.S.C. §669(a)(5)). This chopped up quotation presses the limits of the duty of candor that lawyers owe to this Court. Here is the relevant passage, which appears in a statutory subsection empowering a different agency—the Department of Health and Human Services—to take actions regarding occupational illness:

> Nothing 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.

§669(a)(5). All this means is that, *if* some provision empowers the government to require vaccinations, the government must respect religious objections. The question here is *whether* the Emergency Provision empowers OSHA to mandate COVID-19 vaccinations. So this statute, contrary to OSHA's misleading discussion, is irrelevant.

B. COVID-19 does not present the type of "grave" danger that the statute requires

1. The word "grave," at the time of the Emergency Provision's passage, meant exactly what it means today: "very serious; dangerous to life." *Grave*, Webster's Third New International Dictionary (2003); *see also Grave*, The American Heritage Dictionary of the English Language (1973) ("Fraught with danger; critical"). While all dangers are (by definition) dangerous, the adjective "grave" requires more than mere danger—it requires especially serious danger. That insight is bolstered by the fact that the Emergency Provision uses the phrase "grave danger" in connection with the phrase "from exposure to substances or agents determined to be toxic or physically harmful." Under "the principle of *noscitur a sociis*," words in a statute are known by the company they keep. *BST Holdings LLC v. OSHA*, 17 F.4th 604, 613 (5th Cir. 2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)). When the phrase "grave danger" appears alongside a phrase "connoting *toxicity* and *poisonousness*," the first phrase cannot reasonably be interpreted to include dangers

(including "airborne virus[es]") that are "both widely present in society" and "non-life-threatening to a vast majority of employees." *Id.*

OSHA's own data show that COVID-19, while dangerous, is not a "grave" danger. The Vaccine Mandate cites a study showing that unvaccinated individuals aged 16 or older—a group that includes elderly retirees, who are far more at risk than a typical worker—face a 0.6 percent chance of death if they contract COVID-19 and a 1.5 percent chance of being admitted to an intensive care unit. *See* Jennifer B. Griffin, et al., *SARS-CoV-2 Infections and Hospitalizations Among Persons Aged ≥16 Years, by Vaccination Status—Los Angeles County, California, May 1–July 25, 2021*, MMWR Morb Mortal Wkly Rep 2021; 70(34): 1172, https://perma.cc/4ZV3-94SA (relied upon at Vaccine Mandate, 86 Fed. Reg. at 61418). These risks are not significantly greater than the risks faced by *vaccinated* individuals who contract COVID-19; those individuals have a .2 percent chance of death and a .5 percent chance of being admitted to an intensive-care unit. *Id.* While unvaccinated workers are more likely to die or be hospitalized, a multiple of a small risk is still a small risk. So both groups face a small risk of serious illness.

This data dooms OSHA's case, because the agency *concedes* that fully vaccinated workers face no "grave" danger from COVID-19. 86 Fed. Reg. at 61434. OSHA has not explained how the higher-yet-still-small risk faced by unvaccinated

workers crosses the line from a not-grave danger to a grave danger. Indeed, the risks to both groups are comparable to well-known risks that no one would describe as "grave." The odds of dying in a motor-vehicle crash at some point during one's life, for example, are 1 in 107 (.93 percent). *See Odds of Dying*, National Safety Council, https://perma.cc/3FTE-376P.

OSHA's focus on unvaccinated individuals gives rise to another problem: the agency cannot measure the existence of a "grave" danger by focusing exclusively on the subset of workers (the unvaccinated) most at risk from COVID-19. If it could, then almost any "substance" or "agent" could be said to pose a grave danger. Peanut butter, for example, creates immense danger for individuals with severe allergies. But surely OSHA could not justify a nationwide emergency standard regarding the workplace use of peanut butter on the ground that it creates a grave risk for this small subset of individuals. Similarly here, even if OSHA could establish that *unvaccinated* employees face a "grave" danger, the Mandate would still be illegal because OSHA has not shown that employees *in general* face a grave danger from COVID-19. (Conversely, OSHA cannot rely on purported harms from the virus to society at large—instead, it must home in on the risk presented in the workplace. As many elderly individuals are at the highest risk but also retired, population-wide statistics cannot prove a grave danger to the workforce.)

In the end, the Mandate is nothing more than a pretext for increasing the number of vaccinated Americans. The White House Chief of Staff thinks so. He publicly endorsed, on Twitter, the view that OSHA's "vaxx mandate … is the ultimate workaround for the Federal govt to require vaccinations." *BST*, 17 F.4th at 612 n.13 (citation and emphasis omitted). "In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements." *Id.* at 614; *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019). Courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 139 S. Ct. at 2575 (quotation omitted).

That principle applies with special force here, where the agency's actions are inconsistent with its warnings of grave danger. If OSHA really believed that COVID-19 satisfied the "grave danger" standard, what could possibly justify limiting the Vaccine Mandate to companies with 100 or more employees? OSHA says it chose this number because the agency "is less confident that smaller employers" can implement the standard's requirements "without undue disruption." 86 Fed. Reg. at 61403. It is inconceivable that OSHA would take administrative ease into account in deciding whether small businesses must protect their employees from a risk that is actually "grave."

2. OSHA responds that COVID-19 has "killed hundreds of thousands of people in the United States and caused 'serious, long-lasting, and potentially permanent health effects' for many more." Mot.11 (quoting 86 Fed. Reg. at 61424). OSHA does not, however, engage with the fact that both vaccinated employees (whom OSHA concedes are not in grave danger) and unvaccinated individuals face low risks of death and serious illness if they contract COVID-19. *See above* 8–9. Moreover, the vast majority of the American workforce is non-elderly, and thus faces a substantially lower risk. OSHA insists that, even for the young and those who are otherwise not at high risk, vaccination decreases the odds of illness and death. Mot.34. That is irrelevant. The fact that these workers would further decrease their already-low odds of serious illness by vaccinating themselves does not show that they faced a "grave" danger to begin with.

OSHA's attempt to square its finding of "grave danger" with the Vaccine Mandate's small-business exemption also falls short. It notes that federal law exempts smaller companies from other important legal requirements (like those of Title VII), Mot.26–27, and that governments "need not address all aspects of a problem in one fell swoop," Mot.27 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015)). The States, however, are not faulting OSHA for failing to apply its illegal

mandate even more broadly. They are pointing to the Mandate's underinclusiveness because it proves that the risk is not actually "grave."

OSHA's approach to the meaning of "grave" is aptly summarized in this passage from its motion:

> The decline in national cases since the pandemic's most recent peak says little about the current state of workplace exposure and transmission. And the fact that case numbers have been higher at points in the past says nothing about whether there is a present, grave danger.

Mot.29 (internal citations omitted). In other words, COVID-19 will continue to create a "grave" danger even when it stops presenting so high a risk. If "human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Does 1-3 v. Mills*, _S. Ct._, No. 21A90, 2021 WL 5027177, *3 (2021) (Gorsuch, J., dissenting). OSHA's definition of "grave danger" portends just that sort of perpetual proclamation.

C. The Vaccine Mandate does not satisfy the Emergency Provision's necessity requirement

1. The Emergency Provision forbids the issuance of emergency temporary standards except in cases where they are "necessary." 29 U.S.C. §655(c)(1). Thus, OSHA must show not just that the emergency standard is a good idea or effective, but also that the agency has little practical choice except to regulate without first subjecting its regulation to notice and public comment. That is what "necessary"

means: "needed for some purpose or reason; essential." *Black's Law Dictionary* 1241 (11th ed. 2019). This necessity requirement, which is far more demanding than the "reasonably necessary or appropriate" standard applicable to most OSHA regulations, 29 U.S.C. §652(8); *see also Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615 (1980), shows that "Congress intended a carefully restricted use of the emergency temporary standard," *Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Lab.*, 489 F.2d 120, 130 n.16 (5th Cir. 1974).

OSHA has not established that its Vaccine Mandate is necessary. For one thing, because vaccines are freely available to all workers who want them, the government need not mandate vaccines to make workers safe—workers can elect to take vaccines or not, and those who do will, on OSHA's own telling, be free from any "grave" danger. More importantly, however, the Mandate's remarkable breadth defeats any claim to necessity. With the Vaccine Mandate, OSHA irrationally requires the same thing of *every* covered workplace and worker. This means that workers who are significantly spaced out whenever they are inside (in a warehouse or a barn, for example) are treated the same as employees bunched together in close, poorly ventilated quarters. *BST*, 17 F.4th at 615. And it means that the Vaccine Mandate unnecessarily applies even to the many workers who acquired natural immunity from a

previous infection. *Id.*; Attachment A-1 to Stay Motion of Indiana, Decl. of Dr. Bhattacharya, Doc.150, ¶23.

OSHA seems to confuse necessity with efficacy. It trumpets the effectiveness of vaccines and masks, but it does little to explain why these specific measures are *required* to address the threat. Wearing a hazmat suit, for instance, might be an effective way to stem the spread of COVID-19. But no one would reasonably suggest that such a step is "necessary" to establish a safe workplace. The agency needs to tie the gravity of the threat to the aggressiveness of the required measures and establish that no less-restrictive means would suffice. It has not done that.

2. OSHA insists that its broad standard is "necessary" because "employees *can be* exposed to the virus in almost any work setting," regardless of the other precautions taken. Mot.35 (quoting 86 Fed. Reg. at 61411) (emphasis added). The mere possibility of exposure hardly proves the Mandate is "essential" in all or even most settings where it applies. *Black's Law Dictionary* at 1241. To justify a broad mandate, OSHA needs to show that the mandate is essential with respect to the broad scope of the workplaces it covers. It has not done that. OSHA says it would be too hard to make that showing given the varied nature of American workplaces. Mot.38. But the difficulty of proving necessity does not free OSHA from its statutory obligation to do so. OSHA counters: the possibility that it could "devise more elaborate and

tailored standards for different settings … does not" make the Vaccine Mandate unnecessary. Mot.31. Yes it does. The availability of narrower options proves, by definition, a lack of necessity.

Perhaps sensing this problem, OSHA notes that employers have no obligations with respect to employees "who work alone, remotely, or exclusively outdoors." Mot.35. That will exclude almost no one, however. How many employees at companies with 100 or more individuals "work alone" or "remotely" all the time? Presumably almost none. And how many employees work "exclusively outdoors"? Again, almost none: the roofer or paver or carpenter who works outside likely enters a garage to retrieve a truck in the morning or an office to drop off keys at day's end. Exempting an insignificant number of employees does nothing to advance OSHA's case for necessity.

D. The major-questions doctrine and the constitutional-doubt canon require the States' reading

Two interpretive principles require the Court to resolve any lingering ambiguity in the States' favor.

1. The major-questions doctrine precludes OSHA's interpretation of the Emergency Provision

The major-questions doctrine compels the States' reading. *BST*, 17 F.4th at 617–18; *id.* at 619 (Duncan, J., concurring). This doctrine requires "Congress to

speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air*, 573 U.S. at 324 (quotation omitted); *see also Realtors*, 141 S. Ct. at 2489. The question whether Congress can conscript employers as the muscle behind a mandate aimed at private healthcare decisions certainly fits the bill. That is especially true in light of the unprecedented nature of this standard. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Id.* (quotation omitted). Because the Emergency Provision does not *unambiguously* allow for the sweeping Vaccine Mandate, it does not allow for the Mandate at all.

OSHA silently concedes that the major-questions doctrine requires the States' reading *if* the doctrine applies. But it insists that the Emergency Provision unambiguously supports its position, making the doctrine irrelevant. Mot.20. The discussion above proves that wrong.

2. The Vaccine Mandate is unconstitutional

Statutes should be construed so as to avoid placing their constitutionality in doubt. *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012). The Emergency Provision is unconstitutional, on two separate grounds, if it empowers OSHA to issue the Vaccine Mandate.

Commerce Clause. The Commerce Clause, which entitles Congress "[t]o regulate Commerce … among the several States," U.S. Const. art. I, §8, cl. 3, is the only enumerated power that conceivably empowered Congress to enact the Emergency Provision. While courts have broadly construed the Clause's language, two limiting principles prove relevant here. First, the Supreme Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (quotation omitted). Because Congress has no police power, and because regulating public health and safety is part of the police power, *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905), the Commerce Clause gives Congress no power to regulate public health and safety. Second, the Commerce Clause does not permit the regulation of private inactivity, such as the decision not to purchase healthcare. *NFIB v. Sebelius*, 567 U.S. 519, 557–58 (2012) (op. of Roberts, C.J.).

If the Emergency Provision authorizes the Vaccine Mandate, it runs afoul of both limits. First, the Vaccine Mandate is a public-health regulation: it regulates private healthcare decisions by making life harder for citizens who refuse to care for themselves in the federally approved manner. Second, the Vaccine Mandate regulates private inactivity: those who fail to vaccinate will either be fired or forced to obtain expensive weekly testing.

OSHA responds that, because the Vaccine Mandate requires employers to enforce its terms, the Vaccine Mandate simply regulates the economic activity of employers engaged in commerce, *not* the inactivity of citizens or the public health. Mot.18–20. That gloss on the Mandate's operation is creative but unavailing. The Mandate regulates private inactivity by requiring employers to enforce the Mandate's terms in response to employees' private inactivity—namely, the decision not to vaccinate. That constitutes an impermissible regulation of private inactivity. To illustrate, remember that Congress cannot, under the Commerce Clause, make individuals buy health insurance. *NFIB*, 567 U.S. at 558 (op. of Roberts, C.J.). No court would permit Congress to evade that rule by passing a law forbidding employers from retaining uninsured employees. That hypothetical law, just like the requirement to buy health insurance at issue in *NFIB*, would regulate private inactivity. So does the Vaccine Mandate.

Nondelegation doctrine. OSHA's broad reading of the Emergency Provision would turn the statute into an unconstitutional delegation of legislative authority. "[A] statutory delegation" of policymaking power "is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quotation and alterations omitted). In

other words, when Congress empowers an agency to regulate, it must lay down "specific restrictions" that "meaningfully constrain[]" the agency's exercise of authority. *Touby v. United States*, 500 U.S. 160, 166–67 (1991).

The Emergency Provision contains no intelligible principle if it is read to permit the Vaccine Mandate. On OSHA's reading, all viruses are "agents" or "substances" for purposes of the Emergency Provision, and those viruses cause a "grave" danger whenever they threaten serious health effects to even a small subset of the overall population. Read in that manner, the Emergency Provision empowers OSHA to demand whatever measures it thinks are necessary in response to almost every remotely serious germ known to mankind. That almost-limitless grant of authority contains no intelligible principle.

*

One final note on the likelihood-of-success factor. OSHA questions "whether the State petitioners can properly invoke this Court's jurisdiction under 29 U.S.C. §655(f)." Mot.50 n.17. They can. "Any person" may petition for review of an emergency temporary standard. §655(f). "Person" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." §652(4). That broad definition encompasses States, as the D.C. Circuit recognized in interpreting the APA's analogous provision.

Gov't of Manitoba v. Bernhardt, 923 F.3d 173, 181 (D.C. Cir. 2019). Indeed, the same section that defines "person[s]" provides that "employer" includes "a *person* engaged in a business affecting commerce who has employees, *but does not include* … *any State or political subdivision of a State*." §652(5) (emphasis added). There would be no need to expressly exclude government entities from the definition of "employer" if, as OSHA claims, a government were not a "person" under the statute.

II. The States and their citizens will be irreparably harmed if this Court dissolves the stay.

If the stay is dissolved, the States will sustain three irreparable injuries.

First, without the stay, OSHA will irreparably harm the States by intruding on their sovereign authority to enact and enforce policies that conflict with the Vaccine Mandate. *See* 86 Fed. Reg. at 61406. A State "suffers a form of irreparable injury" any time it is prevented from "effectuating" laws "enacted by representatives of its people." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). The Vaccine Mandate inflicts this type of harm: its preemptive policy will interfere with the States' sovereign prerogative to develop vaccine policies best suited to their populations. *See, e.g.*, 2021 Tenn. Pub. Acts, 3d Extraordinary Sess., ch. 6 (to be codified at Tenn. Code Ann. §§14-2-101 to -103); 2021 W. Va. Pub. Acts, 3d Extraordinary Sess., ch. 32 (to be codified at W. Va. Code §16-3-4b); Idaho Code §39-9003.

Second, because the Vaccine Mandate invades the States' constitutional prerogatives, it necessarily causes irreparable harm. For when "constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

Third, some States will suffer irreparable harm from unrecoverable compliance costs. The Occupational Safety and Health Act permits States to adopt State OSHA plans, 29 U.S.C. §667(b), which apply "to all employees of public agencies of the State and its political subdivisions," §667(c)(6). States with these plans are considered employers bound by the Mandate. *See* 86 Fed. Reg. at 61462, 61506. Thus, absent a stay, States with OSHA plans, just like all other covered employers, will be required to expend money complying with the Mandate's terms. Plus, the States must enforce these plans against local companies. Because the money expended enforcing state OSHA Plans will be unrecoverable in light of the federal government's sovereign immunity, those expenditures constitute irreparable harm. *See Kentucky v. United States*, 759 F.3d 588, 599–600 (6th Cir. 2014).

III. Staying the unlawful Vaccine Mandate will promote the public interest and will not substantially harm others.

If the Vaccine Mandate is illegal, staying it necessarily promotes the public interest. After all, "the public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants" seek relief, "and

ultimately … upon the will of the people … being effected in accordance with" law. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation omitted). For that reason, it is always "in the public interest not to perpetuate the unconstitutional," or otherwise illegal, "application of a statute." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). Along the same lines, "no substantial harm to others can be said to inhere" in the enjoining of an unlawful law or policy. *Deja Vu of Nashville, Inc. v. Metro. Gov't*, 274 F.3d 377, 400 (6th Cir. 2001). Further, the Vaccine Mandate will cause harms to others and injure the public interest by undermining our federalist constitution. For while COVID-19 is a national problem, it is a problem that state "borders add tools and flexibility for fixing." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 5 (2021). By blocking the States from adopting policies best suited to their populations, the Mandate prevents States from experimenting with the best ways to combat COVID-19.

OSHA responds that the Vaccine Mandate will save lives. Mot.40–45. OSHA's ominous calculation—it says the stay costs precisely "77 lives and 3128 hospitalizations per day"—is hard to square with the agency's sluggishness in promulgating the Mandate and in seeking relief from the Fifth Circuit's stay. Mot.41. Regardless, even if its calculation is accurate, the government cannot violate the law in

pursuing well-intentioned, or even critically important, policies. *See, e.g.*, *Realtors*, 141 S. Ct. at 2490; *Boumediene v. Bush*, 553 U.S. 723, 798 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). "The laws and Constitution are designed to survive, and remain in force, in extraordinary times." *Boumediene*, 553 U.S. at 798. That is why, even at the stay- or injunction-pending-appeal stage, this Court and others have refused to let governments violate the law in pursuit of pandemic-related policies—policies the government *always* insists will save lives. *See Realtors*, 141 S. Ct. at 2490; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam).

CONCLUSION

The Court should deny OSHA's motion to dissolve the stay.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this response complies with the type-volume requirements and contains 5,172 words. *See* Fed. R. App. P. 27(d)(2)(A).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, the foregoing petition was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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