Nos. 21-7000 (lead), 21-4027, -4028,-4031, 04032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

On Petitions for Review

BRIEF OF *AMICI CURIAE* THE OHIO CHAMBER OF COMMERCE, OHIO AUTOMOBILE DEALERS ASSOCIATION, OHIO WHOLESALE BEER & WINE ASSOCIATION, OHIO HOTEL & LODGING ASSOCIATION, OHIO BANKERS LEAGUE, AND THE OHIO GROCERS ASSOCIATION IN OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each amicus curiae submitting this brief states it is a non-profit organization, with no corporate parent, and is not owned in whole or in part by any publicly held corporation.

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INTEREST OF AMICI CURIAE

Ohio Chamber of Commerce

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

Ohio Automobile Dealers Association

The Ohio Automobile Dealers Association ("OADA") represents approximately 825 franchised automobile, truck, and motorcycle dealers throughout the State of Ohio. OADA has served the franchised motor vehicle dealer industry since 1932, promoting the common interests of the retail automotive industry. A vast majority of dealerships in Ohio are family-owned and most have been in business for multiple generations.

These dealerships contribute enormously to Ohio's economy. In 2018, franchised new automobile, trucks and motorcycle dealers generated $39.4 billion in retail sales in Ohio, representing 25% of the total of all retail sales (of any kind)

in the state. Ohio dealers collected approximately $2.0 billion in state sales tax revenue in 2018, which accounted for 15% of total sales tax collected by the State of Ohio. Ohio dealerships employ over 55,000 people in Ohio and pay over $2.8 billion in annual wages to their employees, of which the State of Ohio collects $615.2 million in Ohio income taxes per year. In addition, Ohio dealers pay $93.1 million annually in commercial activity tax to the state, and also pay approximately $70.0 million per year in real estate taxes. In short, the franchised motor vehicle dealerships in Ohio are a vital component of this State's economy.

Ohio Wholesale Beer & Wine Association

Founded in 1935, the Ohio Wholesale Beer & Wine Association is a non-profit entity consisting of independent, family-owned distributor companies in Ohio. The Ohio Wholesale Beer & Wine Association represents companies that distribute 95% of beer and wine sold in Ohio and focuses their advocacy at the statehouse on legislative, regulatory, and judicial issues impacting the alcohol distributor industry.

Ohio Hotel & Lodging Association

The Ohio Hotel & Lodging Association was formed in 1893 and serves as the leading voice for owners, operators, and professionals in every type of lodging business across the Buckeye State. Our mission is to support efforts that grow Ohio's travel economy, provide jobs for hospitality professionals, and maintain a prosperous hotel and lodging market. Through our advocacy, the association works

with policymakers throughout Ohio to advance the interests of our members at the Ohio Statehouse, the Governor's Office, and in local communities, so that Ohio is a welcoming state for travelers and the professionals who serve them.

Ohio Bankers League

The Ohio Bankers League (the "OBL") is a non-profit trade association that represents the interests of state-chartered and federally-chartered FDIC-insured commercial banks, savings banks, thrifts and savings associations, and their holding companies and affiliated organizations, doing business in Ohio. Members include depository institutions that are headquartered in Ohio, as well as institutions that are headquartered elsewhere but conduct a banking business in Ohio. The OBL presently has over 170 member organizations, which represents the majority of all depository institutions doing business in the state of Ohio. OBL membership includes the full spectrum of FDIC-insured depository institutions and their affiliates. OBL member institutions range from small savings associations that are organized as mutual thrifts owned by their depositors, to community banks that are the quintessential locally owned and operated businesses, to large regional, multistate and multinational financial institutions that have multiple bank and non-bank affiliates and conduct business from coast to coast and internationally. OBL member institutions directly employ more than 60,000 people across the State of Ohio.

Ohio Grocers Association

Founded in 1899, the Ohio Grocers Association has served Ohio's food industry for more than 120 years. With over 500 members, there is an OGA business located in nearly every community across Ohio. Our members range from small family-owned establishments to the State's largest grocery stores, food manufacturers, distributors, and wholesalers which uniquely positions us to represent the industry in front of Ohio's policymakers. As part of our mission, the association advocates for a better business and legal climate in Ohio that helps their members grow and advance Ohio's economic prosperity.

Through this amicus brief, each of the Amici seek to ensure that the Court has the benefit of their perspective on the practical burdens and issues that the ETS creates for their members and their employees.[1]

ARGUMENT

This Court should deny Respondents' Emergency Motion To Dissolve The Stay. As with any agency action, the fundamental question is whether or not the agency action is arbitrary and capricious. And as with any OSHA standard, including an ETS, it must be both economically and technologically feasible. A

[1] Amici certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than amici, their members, and their counsel contributed money intended to fund this brief.

standard is economically feasible under the OSH Act if it neither threatens "massive dislocation to" nor upsets the "competitive stability of" the regulated industries. *United Steelworkers of Am., AFL-CIO-CLC* v. *Marshall* , 647 F.2d 1189, 1265 (D.C. Cir. 1980). As will be seen, the ETS here is arbitrary and capricious in part because it upsets the competitive stability of the wide range of industries that are subject to the ETS.

The 100-employee threshold is an unreasonable, arbitrary, and capricious exercise of OSHA's authority because it violates the fundamental principle that similarly situated employers and employees should be treated similarly. This unequal treatment also creates a variety of perverse incentives for employers and employees, in large part resulting from the fact that OSHA waited 18 months into the pandemic to take any action at all, and then acted precipitately without seeking any public comment or input.

A. The 100-employee threshold has no basis in the law.

The Preamble to the ETS, where OSHA set forth its justification for the 100-employee threshold, contains little to justify that threshold, and the logic relied upon by OSHA would support its selection of virtually any threshold from 1 to 500 or more.

The discussion in the Preamble to the ETS acknowledges (indeed, relies upon) studies showing that employers with less than 250 employees are far less equipped

from an HR standpoint to handle the required recordkeeping, but by mere *ipse dixit* declares that this supports the 100-employee threshold. 86 Fed. Reg. 61402, 61511.

Likewise, in the portion of the Preamble that adopts "we've done it this way before" as a justification for the ETS, OSHA cites to statutory and regulatory thresholds of 500 (in the Families First Coronavirus Response Act and American Rescue Plan Act), and 50 (Family and Medical Leave Act). *See* 86 Fed. Reg. 61402, 61513. Only the 100-employee threshold for small employers in the Affordable Care Act matches the 100-employee threshold here – and even then, contrary to what the Preamble states, the Affordable Care Act sets 50 employees as the threshold (*see* 42 U.S.C. § 18024(b)(2). It only allows states the option to expand that definition to 100. 42 U.S.C. § 18024(b)(3). In short, OSHA was unable to cite to a single instance where the cutoff for small employers is 100 employees.

B. The 100-employee threshold creates insurmountable practical challenges, rendering it unfair as applied.

The practical implications of OSHA's arbitrary rule of 100 employees are far-reaching and insurmountable. Discussed below, this rule is devastating for employers of all sizes and creates 'winners' and 'losers' where each employer should be treated the same.

First, as is well-known, employers of all sizes are having great difficulty finding sufficient capable employees. Many are operating with reduced hours, or are even forced to close on certain days, due to workforce issues. The ETS confronts

employers who are slightly under the 100-employee threshold with the difficult choice of trying to hire adequate staff but become subject to the ETS and the potential loss of qualified staff who do not wish to take the vaccine, or staying below the 100-employee threshold but suffering the loss of business that results from a lack of staff. On the flip side, employees who do not wish to be vaccinated or undergo the required testing (and whether the supply of tests is sufficient for testing even to be an option is open to question) will have the incentive to seek employment with a company that has less than 100 employees.

Second, these issues are compounded by the fact that the ETS takes effect during the middle of the holiday season, a time when many businesses across many industries need to hire additional workers to meet the wide variety of customer demands that increase during this time of year.

Third, OSHA does not acknowledge these substantial issues. But even worse, it likewise does not demonstrate benefits sufficient to justify the burdens imposed by the ETS. In the first place, OSHA does not explain why, after it has heavily resisted taking any action with regard to the pandemic for 18 months, only now is there not only an issue worthy of its intervention but one that justifies use of its ETS authority. Further, it offers no explanation for why an employer with 101 employees falls on the "grave danger" side of the scale but an employer with 99 employees does not.

While it is true that OSHA has some discretion to draw lines when competing considerations are in play (*see* 86 Fed. Reg. 61402, 61513), that discretion is not limitless. This is particularly true here, where the claimed urgency of the need for the ETS is undermined by OSHA's 18 months of inaction prior to issuing the ETS.

Finally, OSHA's justification for using an employee threshold rather than a worksite threshold – that employers with over 100 employees are allegedly much more likely to have a worksite with over 50 employees – is irrational given that an employer with 100 employees or more is covered regardless of whether *any* of those employees ever come into physical proximity of any other employees.[2]

C. The Paid Time Off Provisions of the ETS Exceed OSHA's Authority

The ETS requires that employers provide up to 4 hours paid time off for employees to receive each dose of the vaccine if it is taken during work hours (and to provide a reasonable amount of work time for employees to get the vaccine, and also to provide reasonable paid sick leave to recover from side effects from each dose of the vaccine regardless of whether the vaccine was taken during work hours or outside of them). Failure to provide this time off could subject employers to significant penalties.

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[2] Employees who work alone or from home count for purposes of determining whether an employer is a covered employer but are not required either to be vaccinated or to test and wear a face covering. 86 Fed. Reg. 61515.

OSHA's statutory authority, however, does not go so far. The only reference to "cost" in the OSH Act's delegation of authority is in 29 U.S.C. § 655(b)(7), which allows OSHA to promulgate standards that, among other things, provide "medical examinations and other tests" that must be made available at the employer's cost to employees exposed to workplace hazards, "in order to most effectively determine whether the health of such employees is adversely affected by such exposure." Nothing in Section 655 authorizes a standard that requires an employer to bear the cost of vaccinations, let alone the cost of sick time resulting from the vaccination. Neither paid time off to get a vaccination, nor paid sick time off to recover from side effects is a medical examination or other test, nor would it help determine whether the employee is adversely affected by exposure to a workplace hazard.

Moreover, the requirement for paid sick time in the event of adverse side effects is flawed for another reason. The ETS requires that "[t]he employer must provide reasonable time and paid sick leave to recover from side effects experienced following any primary vaccination dose to each employee for each dose" (29 C.F.R. 1910.501(f)(2), but does not define how severe those "side effects" must be nor how to define what is reasonable. Anyone familiar with the legal system knows that what is "reasonable" is rarely capable of precise definition in advance, yet the nature and structure of OSHA enforcement means that an employer whose interpretation is

found to be unreasonable long after the fact could be subjected to significant penalties.

D. The ETS's Treatment of "related entities" is Arbitrary and Capricious.

The ETS contemplates treating "two or more related entities may be regarded as a single employer for OSH Act purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted." 86 Fed. Reg. 61402, 61513. This is insufficient and vague for two important reasons. First, the ETS does not give any guidance on what "safety matters" may be considered. In other words, the ETS does not specify whether common handling of *any* safety matter as one company is sufficient, whether the related entities must handle *all* safety matters as one company, or some point in between. Second, the ETS does not discuss whether OSHA intends to look at how an employer is treated under other employment laws when deciding if the employer is a single employer for purposes of the ETS.

Employers are left guessing as to what OSHA intends to encompass "safety matters", leaving them with no guidance but hefty penalties for failing to guess correctly. What if an employer has separate companies and separate EINs but they share in-person live training resources, or there is one safety manual for both, or there is one contract for both governing drug testing? As drafted, this is arbitrary and capricious, and no other federal law uses such a vague measuring stick.

CONCLUSION

The Court should deny Respondents' Emergency Motion. The ETS treats similarly-situated employers and employees in vastly different ways unsupported by any meaningful factual basis, which is the very essence of a rule that is arbitrary and capricious. Little of the evidence cited by OSHA supports the 100-employee threshold, and in fact much of it supports a significantly larger threshold. The ETS creates a perverse incentive for employers to try to get below the threshold, even though many would otherwise be adding staff during the holiday season. It creates another perverse incentive for vaccine-hesitant employees to seek out employment with a smaller company, not for better pay or better opportunity, but rather simply so they can continue to avoid getting vaccinated. And the benefits created by the ETS simply do not justify these perverse incentives. Accordingly, the Stay should be continued, and the Motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 2,503 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Time New Roman font.

Executed this 7th day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Court by using the appellate CM/ECF system on December 7, 2021.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 7th day of December 2021.

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