Lead Case No. 21-7000
(Member Case Nos. 21-4033, 21-4088, 21-4097)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In Re: MCP No. 165;

OSHA Rule on COVID-19 Vaccination and Testing

On Petitions for Review of an Emergency Temporary Standard from the Occupational Safety and Health Administration

RELIGIOUS PETITIONERS' JOINT RESPONSE TO THE GOVERNMENT'S MOTION TO DISMISS

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The Southern Baptist Theological Seminary, Asbury Theological Seminary, Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools, The King's Academy, Cambridge Christian School, Home School Legal Defense Association, Inc., and Christian Employers Alliance ("Religious Petitioners") submit this response to the government's motion to dismiss the petitions as moot (Dkt. 408).

Religious Petitioners do not object to the government's motion provided that this Court also vacates its December 17 order dissolving the Fifth Circuit's stay, *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021). *See Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 716–17 (6th Cir. 2011) (Vacatur is "particularly" in order when "mootness results from unilateral action of the party who prevailed below." (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'Ship*, 513 U.S. 18, 25 (1994)).

1. Through a *per curiam* opinion, the Supreme Court held unequivocally that OSHA's vaccine mandate is unlawful. Specifically, the Supreme Court agreed with the challengers that the Occupational Safety and Health Act ("OSH Act") does not "plainly authorize[ ] the Secretary's mandate." *Nat'l Fed'n of Indep. Business v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) ("*NFIB*"). As the OSH Act's text makes it clear, "[t]he Act empowers the Secretary to set ***workplace*** safety standards," and "no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise." *Id.* (citing 29 U.S.C. §§ 651, 652(8), 653, 654(a)(2), 655(b)–(c), 657).

2. The Supreme Court explained that COVID-19 "is not an ***occupational*** hazard in most [workplaces]," and "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.* OSHA's attempt to impose a nationwide vaccine mandate to address an issue "that is untethered, in any casual sense, from the workplace" is "beyond the agency's legitimate reach." *Id.* at 666. The Supreme Court stayed OSHA's vaccine mandate pending judicial review. *See id.* at 666–67.

3. Justice Gorsuch—joined by Justices Thomas and Alito—wrote a concurring opinion. They explained that, "[o]n the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate." *Id.* at 669 (Gorsuch, J., concurring). "On the other hand, if the statutory subsection the agency cites really ***did*** endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." *Id.*; *see also id.* at 670 (observing that "[t]here are some 'important subjects, which must be entirely regulated by the legislature itself . . . .' And on no one's account does this [vaccine] mandate qualify as some 'detail'" that may be filled in by OSHA (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 6 (1825)).

4. After suffering defeat at the Supreme Court, OSHA unilaterally withdrew its vaccine mandate as an emergency temporary

standard. *See* 87 Fed. Reg. 3928, 3928–39 (Jan. 26, 2022). OSHA then moved this Court to dismiss Religious Petitioners' petitions as moot. However, OSHA stated that "it is ***not*** withdrawing the ETS to the extent that it serves as a proposed rule under section 6(c)(3) of the Act." *Id.* at 3928 (emphasis added). The OSH Act requires OSHA to "promulgate a standard under [§ 655(c)] no later than six months after publication of the emergency standard."[1] 29 U.S.C. § 655(c)(3).

5. "When a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below . . . .'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (alterations and omissions in original) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Similar considerations apply to vacaturs of prior panel decisions in a case that became moot by "unilateral action of the party who prevailed in the lower court." *See id.* at 72; *see also Ohio State Conf. of*

[1] As Chief Judge Sutton observed already, it seems "improbable" that OSHA will "finish the notice-and-comment process . . . by May 5, 2022" as the private-employer ETS involved a complex issue and OSHA had already extended the comment period by 45 days. *In re MCP No. 165*, 20 F.4th 264, 279–80 (6th Cir. 2021) (Sutton, C.J., dissenting from the initial hearing en bac). And the government concedes this point. In a separate lawsuit involving the separate ETS for healthcare workers only, OSHA acknowledged it failed to abide by the 6-month requirement for the healthcare ETS. Gov't Br. 1, *Nat'l Nurses United v. OSHA*, No. 22-1002 (D.C. Cir. Jan. 21, 2022). It explained that this failure was due to the shifting of its priority to the private-employer ETS and that it will now re-prioritize finalizing the healthcare ETS, which will take an additional six to nine months. *See id.* 1, 6. OSHA's prioritization of the healthcare ETS—in addition to existing factors—makes it even more improbable, if not impossible, that OSHA will complete rulemaking in the private-employer ETS at issue in this case within the 6-month period. Nevertheless, it still appears that OSHA plans to push ahead to issuing a final, permanent rule. *See* Dkt. 408, at 2 n.1.

NAACP v. Husted, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (vacating a prior panel opinion that became moot); *Hirschfeld v. ATF*, 14 F.4th 322, 328 (4th Cir. 2021) (same). "Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English*, 520 U.S. at 71 (quoting *Munsingwear*, 340 U.S. at 40). Furthermore, vacatur exists to protect a losing litigant from having to "live with the precedential and preclusive effects of [an] adverse ruling without having had a chance to appeal it." *Fialka-Feldman*, 639 F.3d at 716.

6. Vacatur of any decisions based on mootness is an equitable remedy that considers who is at fault for causing mootness and unfairness in depriving a party of an opportunity to seek further review. *U.S. Bancorp*, 513 U.S. at 25 ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of the circumstances, ought not in fairness be forced to acquiesce in judgment."); *Ford v. Wilder*, 469 F.3d 500, 505 (6th Cir. 2006) ("The question of fault"—in causing mootness—"is central to our determination regarding vacatur.").

7. Here, although the Supreme Court ultimately sided with the challengers on the question of OSHA's statutory authority, *see NFIB*, 142 S. Ct. at 665, because the statutory question was a threshold issue, the Supreme Court did not have to reach other potentially dispositive issues—including whether OSHA adequately justified the issuance of the ETS with substantial evidence or whether OSHA's vaccine mandate is unconstitutional.

8. This Court's December 17 order dissolving the Fifth Circuit's stay reached those issues, however, and ruled in favor of OSHA. *See In re MCP No. 165*, 21 F.4th at 374–87. Without a vacatur, the challengers will have to "live with the precedential . . . effects" of this Court's December 17 order. *Fialka-Feldman*, 639 F.3d at 716. This Court's local rules consider ***all*** published opinions—including those concerning stays and preliminary injunctions—to be binding precedents. 6 Cir. R. 32.1(b) ("Published panel opinions are binding on later panels."). The challengers could not obtain a reversal on these issues from the Supreme Court, because they prevailed on the threshold issue of the statutory question. And now, OSHA has taken an "unilateral action" of withdrawing the "emergency" vaccine mandate and seeks to moot this litigation, essentially locking in the parts of this Court's order that the Supreme Court did not need to address while leaving Religious Petitioners no ability to appeal.

9. This kind of situation is precisely what the equitable remedy of vacatur is designed to address. *See Munsingwear*, 340 U.S. at 39. Having prevailed at the Supreme Court on a threshold issue, which made it unnecessary to reach other issues, the challengers "ought not in fairness be forced to acquiesce" in other aspects of this Court's December 17 order that OSHA seeks to insulate from further review. *U.S. Bancorp.*, 513 U.S. at 25. "When [the vacatur] procedure is followed, the rights of ***all*** parties are preserved; none is prejudiced by a decision in which in the

statutory scheme was only preliminary." *Munsingwear*, 340 U.S. at 40 (emphasis added).

CONCLUSION

Before dismissing the petitions, the Court should vacate its December 17, 2021, order dissolving the Fifth Circuit's stay.

Respectfully submitted,

/s/ *Ryan L. Bangert*

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Dated: February 4, 2022

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b), this document contains 1,433 words according to the word count function of Microsoft Word 365.

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/s/ Ryan L. Bangert

Date: February 4, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Ryan L. Bangert

Date: February 4, 2022