Nos. 21A244, 21A247

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.
Applicants

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.
Respondents

OHIO, ET AL.
Applicants

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.
Respondents

ON APPLICATION FOR STAY OF ADMINISTRATIVE ACTION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATE APPLICANTS' REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Cicero famously observed that, in times of war, the laws fall silent. Perhaps that was true of the Roman system. It is not true of ours. In "our system," the government may not "act unlawfully" even in extraordinary times. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (*per curiam*). Some of this Court's most significant rulings respect that principle. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). "Things never go well" when the courts fail to do so. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

The States share OSHA's "'strong interest in combatting the spread' of a virus that has prematurely ended over three-quarters of a million American lives." App.B-8 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*) (quoting *Realtors*, 141 S. Ct. at 2490). But federal agencies cannot bend the law to pursue whatever means they think will most effectively bring about a worthy end. No doubt, courts must leave policymaking to policymakers. It is, however, emphatically the province of the judiciary to make clear that the law is "not to be obeyed or disobeyed as the circumstances of a particular crisis … may suggest." *Downes v. Bidwell*, 182 U.S. 244, 384 (1901) (Harlan, J., dissenting). The Court should stay the Vaccine Mandate to make that clear.

I. The States renew their request for an administrative stay

Many of the State applicants have adopted State Plans under 29 U.S.C. §667. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402-01, 61506 (Nov. 5, 2021). The Vaccine Mandate requires these States to

"notify Federal OSHA" regarding how and whether they will update their plans in response to the Vaccine Mandate. *Id.* OSHA initially gave the States until November 20, 2021, to make a decision. That deadline passed while the Fifth Circuit's stay was in place. After the Sixth Circuit dissolved that stay, at least one applicant State (Iowa) received notice from OSHA that the agency was extending the deadline only until January 7—the day the Court will hear argument in these cases. To spare the States from having to respond to OSHA (or face the consequences of failing to do so) before this Court can rule, the States respectfully renew their request for an immediate administrative stay.

II. The Court should stay the Vaccine Mandate pending disposition of the petitions for review

All four of the factors governing the question whether to enter a stay, *see Nken v. Holder*, 556 U.S. 418, 434 (2009), favor awarding one here. OSHA insists that the injunction-pending-appeal standard should govern. That is wrong. This Court has previously "*stayed*" illegal agency actions "pending disposition of … petitions for review." *West Virginia v. EPA*, 577 U.S. 1126 (2016) (emphasis added). Regardless, the standards differ only in that applicants seeking an injunction must "clearly establish[] their entitlement to relief." *Roman Catholic Diocese*, 141 S. Ct. at 66. The various applicants easily clear even that higher hurdle.

A. The States and other applicants will prevail on the merits

OSHA may bypass the notice-and-comment process, and issue an "emergency temporary standard," if the Secretary of Labor 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). This statute—the "Emergency Provision"—gave OSHA no authority to issue the Vaccine Mandate. *First*, COVID-19 is not (for most employees) an occupational danger that OSHA may regulate. *Second*, even according to OSHA's own reasoning, COVID-19 does not present a "grave" danger for many employees subject to the Mandate. *Third*, the Vaccine Mandate does not satisfy the Emergency Provision's necessity requirement. *Fourth*, the challenged standard is not a "temporary" response to an "emergency." *Finally*, three interpretive principles—the major-questions doctrine, the federalism canon, and the constitutional-doubt canon—resolve any doubts in the States' favor.

OSHA agrees that it can regulate only "work-related dangers." Response in Opposition ("Resp.") at 45 (quoting States' Stay Application at 9). But it defines that concept to include every hazard one might encounter at work, including dangers fairly characterized as "hazard[s] of *life*"—hazards that arise out of typical human interaction and human existence generally. App.B-37–38 (Bush, J., dissenting from the denial of initial hearing *en banc*). OSHA then defines "necessary," Resp.44 (quotation omitted), to mean "useful," defines "grave danger" to encompass every risk that is capable of causing death and that the Secretary chooses to regulate, Resp.23–30, and insists that emergency *temporary* standards may require *permanent* abatement measures, Resp.54. The result? A nearly limitless delegation of authority to require any precaution that OSHA thinks will help protect employees from any hazard capable of causing death or serious injury—without notice-and-comment or any other

rigorous standard-setting process. That is not what the Emergency Provision means. If it were, the law would be unconstitutional.

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

a. The "Occupational Safety and Health Act gives the Secretary power to address only *occupational* health and safety risks." App.B-6 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); *accord* App.A-49 (Larsen, J., dissenting). It does not extend to other risks. The Emergency Provision—part of that Act—contains precisely the same limitation. It applies when "*employees* are exposed to grave danger," and empowers OSHA to issue standards "necessary to protect *employees* from" such dangers. §655(c) (emphasis added). Every ordinary English speaker would understand this employee-centric language as empowering OSHA to regulate "workplace hazards with workplace solutions." App.A-51 (Larsen, J., dissenting). The language would not be understood as empowering OSHA to regulate endemic diseases, violent crime, ambient air quality, or any other dangers that cannot fairly be characterized as work-related.

b. OSHA concedes that it may regulate only "work-related dangers." Resp.45 (quotation omitted). (Given that concession, OSHA's attempt to characterize the argument as "non-textual," Resp.44, is hard to understand.) So the question becomes: What makes a danger "work-related" in the relevant sense?

The States have an answer: a work-related danger is a danger "that arise[s] directly out of the workplace." App.B-15 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). That *generally* excludes risks that arise out of routine

human interaction as opposed to work or the workplace—risks like COVID-19 and violent crime. And it *generally* excludes other risks that we face by virtue of living on Earth in the present day—risks like exposure to community-wide air pollution. The qualifier "generally" is necessary because, for *some* employees at *some* workplaces, work might create a risk from these dangers distinct from the risk inherent in interacting with people or existing on the planet. For example, a researcher who works with SARS-CoV-2 could plausibly describe COVID-19 as a workplace-related danger—a danger arising directly out of the workplace. A lawyer or chef or carpenter could not.

If common risks of life *were* workplace risks for all employees simply because they might also present themselves at work, what would be the limiting principle? Homicide is a danger one might confront anywhere, including at work. *See* CDC, *Preventing Homicide in the Workplace, National Institute for Occupational Safety and Health* (June 6, 2014), https://perma.cc/G3R3-JPZQ. May OSHA mandate that all employers take steps to decrease the risk of violence? Could it force all employers to hire armed guards? Could it issue "workplace" regulations preempting state laws (and overriding company policies) that forbid or permit carrying a gun at work? OSHA refuses to engage with the inquiry. Resp.47–48.

When the scope of OSHA's workplace-related authority is properly defined, the Vaccine Mandate is blatantly illegal. The Mandate acknowledges that the risk of contracting COVID-19 is inherent in human interaction. To quote the rule itself, COVID-19 is a workplace risk because the virus is transmitted through routine

human interaction and "workplaces … are areas where multiple people come into contact with one another, often for extended periods of time." 86 Fed. Reg. at 61411. Thus, the danger arises not from work, but from routine human interaction. And so it is *not* work-related.

Instead of addressing the States' argument or offering a limiting principle, OSHA knocks down straw men. It accuses the States of arguing that "OSHA is powerless to address" COVID-19 because it "is not uniquely a workplace danger" or more likely to occur there. Resp.45. As just explained, that is not the States' argument—nor was it an argument that Chief Judge Sutton (joined by seven of his colleagues) or Judge Larsen raised in their opinions below. OSHA may certainly regulate hazards (like the risk of fire or the risk of bacterial infection or the danger from nonfunctioning toilets, Resp.48) that occur both at work and outside of work. *See Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1444 (4th Cir. 1985) (*en banc*). But it may regulate those risks only insofar as they "arise directly out of the workplace." App.B-15 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); *see also Forging*, 773 F.2d at 1443–44. That means OSHA has no power to regulate risks that are more fairly characterized as "hazard[s] of *life*." App.B-37–38 (Bush, J., dissenting from the denial of initial hearing *en banc*). OSHA never responds to that argument.

Finally, OSHA dedicates substantial effort to arguing that SARS-CoV-2 is an "agent" or "substance," and that COVID-19 is a "hazard." Resp.17–23. Again, the States are not disputing this. *See* States' Stay Application at 12. They instead argue that OSHA can regulate agents, substances, and hazards only insofar as they

constitute a work-related threat. For the vast majority of workers subject to the Mandate, neither SARS-CoV-2 nor COVID-19 qualify.

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

a. Every danger is dangerous. So when the Emergency Provision speaks of *grave* dangers, it must mean particularly serious dangers. States' Stay Application at 14–15. To qualify as "grave," the danger in question must pose "a risk of 'incurable, permanent, or fatal consequences to workers.'" App.A-48 (Larsen, J., dissenting) (quoting *Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Labor*, 489 F.2d 120, 132 (5th Cir. 1974)). There must also be a sufficiently high likelihood that those consequences will occur. To illustrate, consider that plane crashes threaten near-certain death. But given the vanishingly low odds of crashing, passengers face little risk, let alone a grave risk. A grave risk entails a potentially serious consequence *and* a serious likelihood of the consequence's occurring. *Cf.* App.A-48–49 (Larsen, J., dissenting).

For at least two reasons, OSHA has not shown that the disease constitutes a "grave" danger for many of the employees it covers. (Those so inclined can view this as an argument regarding whether the Mandate is "necessary"—after all, it is *unnecessary* for the Mandate to cover individuals who are not in "grave danger.") *First*, OSHA's own data show that COVID-19 poses no "grave" risk, even on OSHA's interpretation of that phrase, to significant numbers of American workers. Remember, OSHA says that *no* vaccinated workers are in grave danger from COVID-19. *See* 86 Fed. Reg. at 61434. But research OSHA cited suggests that vaccinated *and* unvaccinated workers are unlikely to be admitted to an intensive care unit or die because

of COVID-19, even if they contract it. States' Stay Application at 15. Perhaps more important, the government's own data show that younger, unvaccinated people face risks that are roughly identical to older, vaccinated workers. States' Stay Application at 15–16; App.A-49 (Larsen, J., dissenting). "So an unvaccinated 18-year-old bears the same risk as a vaccinated 50-year-old. And yet," according to OSHA, "the 18-year-old is in grave danger, while the 50-year-old is not. One of these conclusions must be wrong; either way is a problem for OSHA's rule." App.A-49 (Larsen, J., dissenting).

Second, OSHA tried to gerrymander its way to a "grave danger" finding. The agency supported its "grave danger" finding by noting that *unvaccinated* individuals face a grave risk. But again, it conceded that *vaccinated* workers face no grave risk. If the agency can declare a grave danger based exclusively on a particular at-risk group, then the "grave danger" requirement will no longer do much work. After all, even many overwhelmingly safe substances, like peanut butter and latex, present an especially high risk to some subset of individuals. *See* States' Stay Application at 16–17.

b. OSHA responds by not responding. It never addresses the gerrymandering problem at all, forfeiting any right to do so. *See Descamps v. United States*, 570 U.S. 254, 277 n.6 (2013). And its response to the first problem consists of obfuscation. Over the course of several pages, it cites data showing that COVID-19 causes unacceptably high hospitalization and death rates for "working age Americans (*18-64 years old*)," Resp.25 (emphasis added, quotation omitted), and that COVID-19 is far

more dangerous to unvaccinated workers than to their vaccinated peers, Resp.38–40. But the data fail to address the fact that the risk to young, unvaccinated employees is roughly equivalent to the risk faced by older, vaccinated employees.

Indeed, some of the very studies on which OSHA relies hammer home the point. One study, cited in both OSHA's response and the Vaccine Mandate, *see* 86 Fed. Reg. at 61418; Resp.39, found that a vaccinated person, 65 or older, was twice as likely to die of COVID-19 relative to a not-fully-vaccinated individual in the 18-to-49 age cohort. Heather M. Scobie, et al., *Monitoring Incidence of COVID–19 Cases, Hospitalizations, and Deaths, by Vaccination Status—13 U.S. Jurisdictions, April 4–July 17, 2021*, MMWR Morb Mortal Wkly Rep 2021, at 1287 Table (September 17, 2021), https://perma.cc/NEB9-BABU (comparing incidence rates of death of 0.4 and 0.5 per 100,000 in vaccinated persons, 65 and older, to 0.2 and 0.2 in not-fully-vaccinated 18-to-49-year-olds in the April 4–June 19, 2021 and June 20–July 17, 2021 time periods, respectively).

The CDC's own data reveal similar problems. Take the last week of October, for instance, from which OSHA's brief cherry-picks certain comparative metrics. Although OSHA compares the death rate in unvaccinated 18-to-29-year-olds to the rate among their vaccinated peers, it compares the death rate in the unvaccinated 30-to-49 age bracket with that of vaccinated 50-to-64-year-olds. Resp.39–40. Those very metrics, presented fairly, paint a different picture. Unvaccinated 18-to-29-year-olds were about as likely to die from COVID-19 as vaccinated 50-to-64-year-olds and five times *less likely* to die than vaccinated individuals between the ages of 65 and 79.

CDC, *COVID Data Tracker*, go.usa.gov/xt3kf (for the week ending Oct. 30, 2021, death rate per 100,000 by age group was 0.17 for unvaccinated 18-to-29-year-olds, 0.20 for vaccinated 50-to-64-year-olds, and 1.00 for vaccinated 65-to-79-year-olds). That same week, unvaccinated 18-to-49-year-olds were about as likely (at just 1.3 times the likelihood) to be hospitalized as vaccinated persons 65 and older. CDC, *COVID Data Tracker*, go.usa.gov/xt3km (for the week ending Oct. 30, 2021, hospitalization rate per 100,000 by age group was 17 for unvaccinated 18-to-49-year-olds, and 12.7 for the vaccinated 65-and-over age cohort).

To be clear, the States are not gainsaying the dangerous and potentially fatal nature of COVID-19. Their point is that a finding of "grave danger" for employees as a whole is irreconcilable with OSHA's own definition of "grave danger," which excludes older, vaccinated individuals while including younger, unvaccinated individuals who face roughly equivalent risks. In other words, OSHA determined that equivalent risks are both grave and not grave. This is a "problem" for OSHA under any standard of review. App.A-49 (Larsen, J., dissenting).

What is more, the government's statements continue to be "incongruent with" its actions. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). For example, the CDC is now advising that fully vaccinated employees who contract COVID-19 can return to work after five days of isolation *without regard* to whether they are still testing positive. *See* CDC, *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population* (Dec. 27, 2021), https://perma.cc/C722-PMTH. And on December 27, OSHA decided to withdraw the emergency temporary

standard applicable to healthcare workers instead of completing a final rule in the "timeframe … contemplated by the OSH Act." OSHA, *Statement on the Status of the OSHA COVID-19 Healthcare ETS* (Dec. 27, 2021), https://perma.cc/F9V7-BQVG. If all unvaccinated workers faced a grave risk demanding swift action, both decisions would be unconscionable.

In truth, OSHA's actions have been inconsistent with the presence of a truly grave danger from the outset. *See* App.B-27–28 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). By the time OSHA acted, Americans had access to vaccines for nearly a year, better therapeutics than ever before, and a great deal of experience with the virus. *Id*. at B-22. OSHA responds by noting that "[d]angers can evolve." Resp.28. True enough, but the changed circumstances OSHA cites *lessened* the danger. As it notes, vaccines became more "widely available." Resp.29. And the FDA "granted approval (rather than the earlier Emergency Use Authorization) to one vaccine in August 2021." Resp.29–30. Finally, testing became more readily available. Resp.30. The fact that OSHA waited until after testing was widely available makes its delay even harder to explain. If, as OSHA candidly acknowledges, the goal of the Mandate is to encourage vaccination, *see* 86 Fed. Reg. at 61435–36, it would have been even more effective at achieving its goal when testing was harder to secure.

When OSHA eventually acted, it did so *only* with respect to employers with 100 or more employees. (Independent contractors that work with a business do not count as its employees. *See* 86 Fed. Reg. at 61513.) Individuals who work for smaller businesses are not covered by the Mandate. OSHA claims to have been "concerned

about imposing administrative burdens on smaller companies." App.B-27 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). But consider "how that argument would fare in another context." *Id.* "If the Secretary suddenly realized that exposure to a new chemical created a 'grave' danger of cancer, it is difficult to imagine anyone would permit an emergency rule targeting the problem to apply only to companies with over 100 employees in order to save the other companies money." *Id.* at B-27–28. Indeed, the Emergency Provision says that the Secretary "shall" issue an emergency temporary standard whenever necessary to protect employees from a grave danger. 29 U.S.C. §655(c).

OSHA responds that other important laws, like Title VII, also "include exemptions for small employers." Resp.27. That is irrelevant. The arguments for exempting small businesses from prohibitions on workplace discrimination, whatever their merits, have little purchase when it comes to laws, like the Emergency Provision, aimed at protecting employees from long-lasting, incurable, or fatal injuries.

OSHA suggests that the States and other applicants are exhibiting callousness toward the far-too-many Americans who lost their lives or loved ones to COVID-19. Resp.24–25. But it would seem far more callous for OSHA to refuse to take and to delay in taking actions that it believes are within its power and capable of saving thousands of lives. And if OSHA's statements regarding grave risks are to be believed, it failed to act for an inexplicably long time. This "failure to act" is "evidence that" there is no "true emergency." *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984).

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

a. An emergency temporary standard is legal only if it is "necessary." 29 U.S.C. §655(c)(1). "Sometimes, 'necessary' means simply 'useful.'" App.A-44 (Larsen, J., dissenting) (quoting *Necessary*, Black's Law Dictionary (5th ed. 1979)). "At other times, though, 'necessary' means 'indispensable.'" *Id.* (quoting American Heritage Dictionary of the English Language 877 (1976)). In the Emergency Provision, the word bears only this second sense. The standard governing *non*-emergency OSHA regulations requires OSHA to show that its standards are "reasonably necessary or appropriate." 29 U.S.C. §652(8). Congress's decision to drop "reasonably" and "appropriate" from the Emergency Provision shows that emergency temporary standards must be "necessary" in the "indispensable" sense. App.A-44 (Larsen, J., dissenting). What is more, with the Emergency Provision, "Congress 'narrowly circumscribed'" OSHA's "authority to issue emergency standards." *Id.* (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 651 (1980) (plurality)). In "this context especially, 'necessary' must be read as a word of limitation, not enlargement." *Id.*

The Vaccine Mandate is not "indispensable" to protecting workers. For one thing, OSHA has a *Chenery* problem. It never found that the Mandate was "indispensable," and courts "cannot uphold a rule based on a finding the agency never made." App.A-45 (Larsen, J., dissenting) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Instead, OSHA concluded that the Vaccine Mandate would be *effective* at mitigating the risk of COVID-19. *See, e.g.*, 86 Fed. Reg. at 61434–39. But

effectiveness does not entail necessity. And OSHA gave no consideration to many obvious, more-narrowly-tailored approaches to the dangers of COVID-19. App.A-45–48 (Larsen, J., dissenting); App.B-21 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 615 (5th Cir. 2021); *see also* States' Stay Application at 20–22.

b. To understand OSHA's position on necessity, one must begin with its definition of "necessary"—or, more accurately, its failure to offer any clear definition. While OSHA contests the States' definition of "necessary," it does not offer one of its own. But it appears to embrace the definition of "necessary" under which it means "useful" or "effective," Resp.44; *see* App.A-44 (Larsen, J., dissenting) (quoting *Necessary*, Black's Law Dictionary (5th ed. 1979)). That cannot be right, for all the reasons addressed above.

OSHA does not engage with those reasons. Instead, it contends that emergency temporary standards need not be "finely calibrated to impose the minimum requirements necessary to protect each and every employee" from grave danger. Resp.36. But no one is demanding that extreme degree of tailoring. The States, much like Judge Larsen and Chief Judge Sutton, maintain only that OSHA must "not overlook … obvious distinctions" that might make a rule's requirements "appropriate in one category of cases" but "entirely unnecessary in another." *Dry Color Mfrs. Ass'n, Inc. v. Dep't of Labor*, 486 F.2d 98, 105 (3d Cir. 1973). In other words, the agency must consider alternative approaches and justify its decision not to pursue meaningfully narrower options. That is how courts have interpreted the word "necessary" for

almost fifty years. *Id.* Courts have even invalidated past emergency temporary standards on the ground that OSHA failed to pursue less-demanding alternatives for protecting workers. *See Asbestos Info.*, 727 F.2d at 426–27.

OSHA protests that it would be "anomalous in the context of an emergency temporary standard" to demand much precision at all, since "the whole point" of the Emergency Provision "is to allow the agency to act swiftly." Resp.37. That hardly follows. Given that emergency temporary standards represent the "most dramatic weapon" in OSHA's arsenal, it makes perfect sense that the agency may promulgate only those rules that are truly "'necessary' to achieve the projected benefits." *Asbestos Info.*, 727 F.2d at 426. Again, "'necessary' must be read as a word of limitation, not enlargement," in this context. App.A-44 (Larsen, J., dissenting).

OSHA's remaining arguments collapse when "necessary" is properly defined. Start with the *Chenery* issue. OSHA insists that there is no *Chenery* problem, quoting passages from the Vaccine Mandate that describe the Mandate's terms as "necessary." Resp.42–43. But look more closely, and none of these passages uses "necessary" in the relevant sense. At least one of the quoted passages finds that "*an* ETS is necessary." 86 Fed. Reg. at 61403 (quoted at Resp.42) (emphasis added). That is inadequate. The Emergency Provision allows OSHA to issue an emergency temporary standard only if it finds "that *such* emergency standard"—in other words, the actual standard it decides to issue—is necessary. 29 U.S.C. §655(c) (emphasis added); *accord* App.A-45 n.4 (Larsen, J., dissenting). Nowhere did OSHA say that *the Vaccine Mandate* itself was indispensable to combating the grave danger of COVID-19. It

instead found: that it needed to do *something* to stop workers from being infected with COVID-19, 86 Fed. Reg. at 61432 (quoted at Resp.43); that "encouraging vaccination" would be "the most efficient and effective method for addressing the grave danger," 86 Fed. Reg. at 61434 (quoted at Resp.43); that encouraging or mandating vaccines was "necessary" in the sense of being the "single best method for protecting an unvaccinated worker from the serious health consequences of a COVID-19 infection," *id.* at 61435 (quoted misleadingly at Resp.43); and that a mask-and-test requirement for unvaccinated workers was "essential" in that it would "further mitigate the potential for unvaccinated workers to spread the virus at the workplace," 86 Fed. Reg. at 61439 (cited at Resp.33). One searches in vain for any rejection of obviously more tailored options, such as focusing on those most at risk, focusing on industries where the risk is heightened, and so on. It is hardly surprising that OSHA failed to consider this. Since OSHA misunderstood "necessary" to mean "useful," it would not have considered whether the Mandate was indispensable.

OSHA next contends the Vaccine Mandate actually is tailored, since it "does not apply to employees who work *exclusively* at home, alone, or outdoors." Resp.35 (emphasis added). These exemptions will cover very few employees. By OSHA's own estimates, only 9 percent of landscapers and 5 percent of highway-maintenance workers would qualify. 86 Fed. Reg. at 61461. So when OSHA says it "tailored the" Vaccine Mandate, Resp.35, "tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting).

Regardless, these exemptions do nothing to address the most obvious of all distinctions that the Vaccine Mandate ignores: the different risks faced by employees of different ages, *see above* 7–13, and the different risks presented by different work settings. *See* App.B-20–21 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). The fact that "employees *can be* exposed to the virus in almost any work setting," Resp.41 (quoting 86 Fed. Reg. at 61411) (emphasis added), hardly suggests that all industries and worksites pose comparable risks. Regarding its failure to draw age-based distinctions, OSHA claims that it "adopted the Standard in significant part to prevent employees from transmitting the virus to *other* employees—a risk presented by younger and older transmitters alike." Resp.40. But that cannot support the necessity finding, because OSHA concluded that those who are vaccinated face no grave risk at all. *See* 86 Fed. Reg. at 61434. Thus, preventing young-to-old transmission is not "necessary" to abate a grave risk according to OSHA itself: everyone who wants a vaccine can get one for free and avoid any grave risk.

Finally, OSHA's misunderstanding of "necessary" also leads it to misunderstand the States' argument that the Mandate could not have been *necessary* to protect workers since any workers who wanted a vaccine could obtain one for free. OSHA responds that its standards "routinely require the use of protective controls even if employees would prefer not to be subject to particular health or safety measures." Resp.52. But *those* standards are permanent standards, and permanent standards, unlike emergency temporary standards, need not be "necessary"—they need only to be "reasonably necessary or appropriate." 29 U.S.C. §652(8). Making employees take

precautions they prefer not to take may be reasonably necessary or appropriate for ensuring employee safety. It is not generally, however, "indispensable" to protecting them.

4. The challenged standard is not a "temporary" response to an "emergency"

a. The Mandate does not qualify as a "temporary" standard, and it was not issued in response to an "emergency" in the relevant sense. *See* App.B-21–23 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); *see also* App.A-51 (Larsen, J., dissenting). The lack of any emergency follows from the fact that nothing suddenly happened on November 5, 2021, to necessitate the Vaccine Mandate. Indeed, because OSHA concedes that vaccines eliminate any grave risk from COVID-19, and because more people were vaccinated against COVID-19 in November 2021 than ever before, "fewer people face[d] lethal risks from COVID-19." App.B-22 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). The measure is not "temporary" in any relevant sense, either. Because a "vaccine may not be taken off when the workday ends," it is permanent in a way that true *workplace* regulations are not. App.A-51 (Larsen, J., dissenting); *accord* App.B-22 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

b. OSHA responds that there is no "freestanding statutory requirement that the agency find the existence of an 'emergency.'" Resp.54. And it says that, as long as the emergency temporary standard is slated to lapse during the six-month period provided for by 29 U.S.C. §655(c)(2), it is sufficiently "temporary." Resp.54. But if a statute's "title" can be a "permissible indicator[] of meaning," Scalia & Garner,

Reading Law, §35, p.221 (2012), then surely the name of the action the statute authorizes can be, too. Here, the statute authorizes OSHA to set "emergency temporary standard[s]." §655(c). This suggests that the agency can act only in response to an emergency. And it certainly suggests that the standard's effects must be temporary. After all, if OSHA could demand *permanent* abatement measures via a temporary standard, then OSHA could evade the temporal limits that §655(c)(2) places on its emergency power.

5. The major-questions doctrine, the federalism canon, and the constitutional-doubt canon require the States' reading

As the States explained in their application, the major-questions doctrine, the federalism canon, and the constitutional-doubt canon all require resolving any ambiguity in the States' favor. *See* States' Stay Application at 25–31. OSHA's contrary arguments are wrong, wrong, and wrong again.

a. Major-questions doctrine

OSHA does not deny, and never has denied, that the question whether to impose the Vaccine Mandate presents a "major question." It thus (wisely) abandons the Sixth Circuit's contrary determination below. *See* App.A-15–16 (majority op.). Rather than fighting on this front, OSHA maintains that the Emergency Provision unambiguously empowered it to issue the Vaccine Mandate. *See* Resp.55. (The same lack of ambiguity, it claims, prevents the Court from relying on the constitutional-doubt canon. *See* Resp.73.) But the foregoing, if nothing else, shows that Congress stopped well short of *clearly* empowering OSHA to issue the Vaccine Mandate. And indeed, the vast majority of judges to have written or joined an opinion in these cases

agree with the States' interpretation. *See* App.A-39 (Larsen, J., dissenting); App.B-6 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); App.B-33 (Bush, J., dissenting from the denial of initial hearing *en banc*); *BST*, 17 F.4th 604.

OSHA's attempts at showing that Congress clearly empowered the agency to mandate vaccinations all fall short. First, citing 29 U.S.C. §669(a)(5), OSHA claims "Congress expressly contemplated that" OSHA could require immunization. Resp.56. The cited statute does not, however, come close to suggesting that Congress "completed" OSHA might mandate vaccines for endemic illnesses. It gives another department—HHS—authority to take actions regarding occupational illnesses. It then states:

> 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.

All this means is that, *if* some provision empowers the government to require vaccinations, it must respect religious objections when exercising that authority. The question here is *whether* the Emergency Provision empowers OSHA to mandate COVID-19 vaccinations. Section 669(a)(5) sheds no light on that question.

March 2021 legislation appropriating money to OSHA so that it may "carry out COVID-19 related worker protection activities" is equally irrelevant. Resp.56 (citation omitted). As an initial matter, this legislation did not amend 29 U.S.C. §655. At most, it reflects Congress's interpretation of OSHA's authority. And Congress's views concerning the meaning of "a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan v.*

Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part). In any event, this legislation says nothing at all about whether OSHA has authority to mandate COVID-19 vaccinations. Most important of all, the States are not denying that OSHA *could* take some enforcement actions in response to COVID-19. Again, for some jobs, COVID-19 likely is a work-related risk. Because the States' position envisions a role for OSHA in connection with COVID-19, it is consistent with Congress's appropriations.

Finally, OSHA insists that this Court's decision in *Alabama Realtors* has no bearing on the present matter. Its argument appears to be that the statute in *Alabama Realtors* had different words. That is true, but irrelevant. The Emergency Provision fails to clearly authorize the Vaccine Mandate, just as the statute at issue in *Alabama Realtors* failed to clearly authorize the eviction moratorium in that case. And as Judge Larsen noted below, it is "hard to think of a" more on-point precedent than *Alabama Realtors*. App.A-54 (Larsen, J., dissenting). The Court there "emphasized that the CDC's moratorium covered '80% of the country, including between 6 and 17 million tenants,' all to 'combat[ ] the spread of COVID-19.'" *Id.* (quoting *Realtors*, 141 S. Ct. at 2489–90). In issuing the moratorium, the agency claimed "a power of 'vast economic and political significance.'" *Id.* (quoting *Realtors*, 141 S. Ct. at 2489–90). Here, "OSHA's rule covers two-thirds of the private sector, including 84 million workers (26 million unvaccinated), also to combat COVID-19." *Id.* "If it is not clear on its face that OSHA's vaccinate-or-test mandate covering most of the country is significant, then *Alabama Association of Realtors* tells us it is." *Id.*

b. Federalism canon

Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Realtors*, 141 S. Ct. at 2489 (quotation omitted). The rule applies here because the OSH Act, if indeed it empowered OSHA to regulate the private medical decisions of every working American, would empower OSHA to regulate public health—a matter traditionally reserved to the States. App.B-14 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*). Because the Emergency Provision contains no "exceedingly clear language" effecting this transfer of authority, it cannot be read to permit the Vaccine Mandate.

OSHA responds, again, by attacking an argument the States did not make. It seems to think the States' federalism-canon argument is a Tenth Amendment argument. Resp.69–70. It is not: the federalism canon is a clear-statement rule, not a constitutional prohibition on federal intrusion into matters traditionally left to the States.

c. Constitutional-doubt canon

Statutes should be construed so as to avoid placing their constitutionality in doubt. *See Clark v. Martinez*, 543 U.S. 371, 379 (2005). OSHA's interpretation of the Emergency Provision does not simply create doubt—it undoubtedly causes the statute to violate both the Commerce Clause and the nondelegation doctrine. *See* States' Stay Application at 28–31. Thus, the Court should either reject this reading or else hold that the States are likely to prevail on the ground that the Vaccine Mandate was issued pursuant to an unconstitutional statute.

Commerce Clause. The Commerce Clause does not empower Congress to regulate inactivity—even *economic* inactivity. *See NFIB v. Sebelius*, 567 U.S. 519, 557–58 (2012) (op. of Roberts, C.J.). The Vaccine Mandate regulates *non-economic* inactivity. It does so by making life difficult for the unvaccinated. Those who refuse a vaccine must wear masks while working and can be forced to secure and self-finance weekly testing that may be administered only with the supervision of authorized persons. *See* 86 Fed. Reg. at 61530–32, 61551–53. The Mandate thus penalizes the unvaccinated for refusing to engage in the government's preferred activity (vaccination). It therefore exceeds the power conferred by the Commerce Clause. *NFIB*, 567 U.S. at 557–58 (op. of Roberts, C.J.).

OSHA responds that Congress's authority to regulate interstate commerce allows it to regulate working conditions and employer–employee relationships. Resp.65–69. That is true, but Congress cannot use its power to regulate working conditions to circumvent the limits on its powers. For example, Congress cannot, under the Commerce Clause, require individuals to buy health insurance. *NFIB*, 567 U.S. at 557–58 (op. of Roberts, C.J.). Could it evade that limit on its authority by requiring employers to fire anyone who declines to purchase health insurance? Health insurance surely supports the productivity and safety of the workforce. So could Congress justify this hypothetical law as nothing more than a regulation of "the working conditions of employees who produce goods or furnish services to entities whose activities unquestionably affect interstate commerce"? Resp.69. Could it require the termination or suspension of employees who refuse to exercise and who are

thus more at risk of workplace injuries? It is hard to see a limiting principle for OSHA's interpretation of the Commerce Clause.

OSHA also insists that the Vaccine Mandate is actually no mandate at all, since employees can mask and submit to weekly testing instead of getting a vaccine (if their employer allows that option). Resp.68. As an initial matter, this let-them-eat-cake argument betrays tremendous ignorance of the conditions in much of the country. Even during times when tests are not in short supply, weekly tests (especially self-financed tests) are not a practical option for many rural and lower-income workers. *See* Br. of *Amicus Curiae* Standard Process Inc. at 6–10; Br. of *Amici Curiae* Local Unions 1249 and 97 of the International Brotherhood of Electrical Workers at 8–9. In any event, the option to pursue testing is irrelevant. Those who declined health insurance in *NFIB* had the option to pay a fine. 567 U.S. at 557–58, 562–63 (op. of Roberts, C.J.). Putting them to the choice of paying that fine or buying health insurance did not make the Individual Mandate in *NFIB* any less a regulation of inactivity. Similarly, the mask-and-test option does not make the Vaccine Mandate any less a regulation of inactivity.

Nondelegation doctrine. The Emergency Provision, if it means what the States say it means, does not violate the nondelegation doctrine as that doctrine exists today. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The same cannot be said of OSHA's interpretation. On OSHA's understanding: OSHA can issue an emergency temporary standard in response to any grave danger that an employee may face at work, regardless of whether the risk has a direct relationship to work;

the agency can require any solution that is "useful" for addressing the danger, even if the solution is permanent, even if the solution will affect employees outside of work, and even if there are obviously narrower solutions the agency could pursue; and the Secretary has sole discretion to characterize as "grave" every danger that is capable of causing death or serious injury. Put all that together, and one gets an almost-limitless delegation of authority. It would seem that OSHA could, on this interpretation, regulate nearly every potentially fatal risk that people might encounter at work, as long as the regulation will (in the Secretary's judgment) prove effective in limiting the risk.

*

Before turning to the equities, the States pause to refute OSHA's tepid suggestion that the States may not be "person[s]" entitled to challenge an emergency temporary standard under 29 U.S.C. §655(f). Resp.81 n.14. "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. Indeed, it is materially identical to the APA's definition of "person"—"an individual, partnership, corporation, association, or public or private organization other than an agency," 5 U.S.C. §551(2)—which everyone agrees includes the States. *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019). The neighboring definition for "employer" removes any doubt. The OSH Act defines "employer" as "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 exclude government entities from the definition of "employer" if, as OSHA claims, governments were not "persons." In any event, as even OSHA concedes, the presence of so many private applicants means the Court plainly has jurisdiction to enter a stay. Resp.81 n.14.

B. The remaining factors support the entry of a stay

Irreparable harm. The Vaccine Mandate will irreparably harm the States by imposing unrecoverable compliance costs on States with OSHA Plans of their own, by preempting state vaccination policies, and by invading state prerogatives. *See* States' Stay Application at 31–32. OSHA does not dispute the compliance-cost injury, forfeiting its right to do so. *See Descamps*, 570 U.S. at 277 n.6. It mischaracterizes the other injuries as invoking "abstract notions of sovereignty." Resp.81. But the States' interests are quite concrete. The Vaccine Mandate expressly preempts state laws inconsistent with its terms. *See* 86 Fed. Reg. at 61437. There are quite a few such laws. *See, e.g.*, AZ Executive Order 2021-18 (Aug. 16, 2021) (cited by 86 Fed. Reg. at 61510 n.86); Fla. Stat. §381.00317; Mont. Code Ann. §49-2-312; Idaho Code Ann. §39-9003; Tenn. Code Ann. §14-2-102; W. Va. Code §16-3-4b; *see also* Ind. Code §22-8-1.1-16.2(b) (requiring the State to wait 60 days before updating its State OSHA Plan to implement new federal rules). The Mandate also overrides policies in States that have, in the main, let employers decide for themselves what works best for their businesses and employees. So the States are not appealing to abstract notions of sovereignty—they are suing to prevent their own already-in-force policies from being nullified. Interference with the constitutional operation of state law always

constitutes an irreparable injury. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). (The possibility that individual employers might obtain variances, Resp.34, does not affect the existence of the harms faced by the States. Indeed, the option to seek a variance does not bear on the irreparable-harm inquiry even for private employers. *See Taylor Diving & Salvage Co. v. Dep't of Labor*, 537 F.2d 819, 821 (5th Cir. 1976).)

OSHA next cites dicta from one of this Court's cases for the proposition that a "State does not have standing as *parens patriae* to bring an action against the Federal Government." Resp.82 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982)). It is hard to see why. The just-discussed injuries on which the States rely are injuries to the States themselves—they do not rest on a *parens patriae* theory. Further, the States' standing is not in doubt. In addition to the costs associated with State Plans and the sovereign injuries discussed above, the States will face pocketbook harms when more of their citizens seek unemployment benefits after losing their jobs because of the Vaccine Mandate, when tax revenues dip because of the Mandate, when citizens who opt for the mask-and-test option seek testing provided for by state programs, and when the increases in testing requests cause at least one State's group-health-insurance costs to rise. *See, e.g.*, *In re: MCP No. 165*, No. 21-7000 (6th Cir.), Mtn. for Stay by Florida, et al., Doc. 161 at 83, 91–93, 96–97, 107–09, 160, 162–63 (Declarations of Donald, Dorfman, Heckman, Lewandowski, Stokes, Toomey); *BST Holdings, L.L.C. v. OSHA*, No. 21-60845 (5th Cir.), Mtn. for Stay by Texas, et al., Doc. 00516084105 (filed November 7, 2021) at 39, 50 (Exhibits 1 and 4).

Remaining factors. The remaining factors—harm to the opposing party and the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. And here, they both support issuance of a stay.

"It is hard to find harm to OSHA from delay, as it waited almost two years since the pandemic began, and nearly a year after vaccines became publicly available, to issue the mandate." App.A-56 (Larsen, J., dissenting). A stay will not cause legally cognizable harm to anyone else, either. While it is "indisputable that the public has a strong interest in combating the spread of" COVID-19, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Realtors*, 141 S. Ct. at 2490.

OSHA responds that the Vaccine Mandate will save many lives. Again, its own actions make that claim hard to buy. If a stay would be so damaging, why did OSHA wait eleven days to seek dissolution of the Fifth Circuit's stay in the Sixth Circuit instead of seeking immediate relief in this Court? And if it is so vital to have federally imposed workplace protections for individuals who may encounter COVID-19 at work, what could possibly explain OSHA's withdrawal of the emergency temporary standard applicable to healthcare workers? OSHA, *Statement*, https://perma.cc/F9V7-BQVG. In any event, the beneficial effects of an unlawful policy do not factor into the question whether to award a stay. *Realtors*, 141 S. Ct. at 2490. Upon determining that a challenged policy is illegal, a court may conclude that the illegal action is best abated through means other than a stay—through an impending expiration date, for example. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct.

2320, 2321 (2021) (Kavanaugh, J., concurring). But courts may not, relying on the equities, allow the government to keep acting illegally simply because they deem the illegal actions prudent. "[O]nce judges go beyond the modest task of determining whether statutes permit agency action, these broader considerations become exceedingly complicated—and well beyond [their] ken." App.B-31 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

OSHA concludes its equities argument by asking the Court, if it enters a stay, to stay "only the portion of the ETS concerning a vaccination requirement." Resp.83. That is, OSHA asks the Court to "leave in place during the pendency of litigation the ETS's requirement that employers implement a policy that requires unvaccinated employees to mask and test." Resp.83–84. This plea for tailored relief makes no sense. Nearly all of the applicants' various arguments apply with full force to a mask-and-test mandate: COVID-19 is a non-occupational danger for most employees and is thus a risk OSHA cannot regulate; the risk is not "grave" for many employees; a one-size-fits-all policy is not "necessary"; the nondelegation problems remain; and the narrower remedy *still* violates the Commerce Clause if (as is presumably the case) employees would be allowed to take off their masks and cease testing in the event they obtain a vaccine. Replacing one illegal rule with another is no relief at all.

III. In the alternative, the Court could grant certiorari before judgment

The States' request for certiorari before judgment is largely moot if this Court enters a stay. Any such order can make clear that the Vaccine Mandate is illegal and unenforceable, giving the applicants all the relief they need. As such, there is little

need to address OSHA's argument that, because the Sixth Circuit has not entered final judgment, the Court lacks jurisdiction to fully resolve this case on the merits after awarding a writ of certiorari before judgment. Resp.85–86. But that argument is wrong. Appellate jurisdiction, for constitutional purposes, entails review of a lower court's opinion. *See Marbury v. Madison*, 1 Cranch 137, 175 (1803). Here, the Court's appellate jurisdiction unquestionably allows it to review the lower court's stay-stage decision. By granting certiorari to address that question, it would be free to award permanent relief. *See Munaf v. Geren*, 553 U.S. 674, 691–92 (2008); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008).

CONCLUSION

The Court should immediately enter an administrative stay of the Vaccine Mandate. And it should stay the Vaccine Mandate's enforcement "pending disposition of" the applicants' "petitions for review." *West Virginia*, 577 U.S. at 1126.

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