UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY; STATE OF IDAHO; STATE OF KANSAS; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF TENNESSEE; and STATE OF WEST VIRGINIA; Petitioners, v. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR; DOUGLAS L. PARKER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES FREDERICK, Deputy Assistant Secretary of Labor for the Occupational Safety and Health; MARTIN J. WALSH, Secretary of Labor, in his official capacity Respondents.	)	Docket No. 21-4031

EMERGENCY MOTION FOR STAY PENDING FINAL JUDGMENT

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INTRODUCTION

Throughout our Nation's history, 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 authority to pass a law, or that an agency lacked authority to promulgate a regulation. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

That principle matters here because the Occupational Health and Safety Administration—"OSHA," for short—has done something unprecedented. Relying on a decades-old statute, it promulgated an "emergency temporary standard" regulating the private healthcare decisions of tens of millions of Americans. More precisely, OSHA has mandated that all companies with 100 or more employees require those employees to either receive a COVID-19 vaccination or else submit to (expensive and impractical) weekly testing. No Administration in history has imposed a com-

parable standard. And even *this* Administration has previously acknowledged that the federal government lacks authority to do so. Yet it promulgated the regulation anyway—apparently thinking that in pandemic times the law falls silent.

The Court should immediately stay the emergency temporary standard, which this motion calls the "Vaccine Mandate."[1] In addition to being illegal, the Vaccine Mandate will have disastrous consequences. Without a stay, employers already barely scraping by after a pandemic-caused recession will be forced either to pay massive fines or lay off unvaccinated workers—some of whom will leave on their own to take jobs with smaller companies. And without a stay, employers (including some States) will need to begin preparing *now* to implement the Vaccine Mandate: employers must comply with the emergency standard's requirements within 30 and 60 days of the Vaccine Mandate's publication in the Federal Register. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402, 61554 (Nov. 5, 2021) (proposed

[1] While it is not clear that FRAP 18 would apply here, Petitioners are not required to move first for a stay before OSHA because the emergency temporary standard did not issue from an administrative proceeding in which such a motion could be filed and the urgency caused by the implementation of the emergency temporary standard would otherwise make a motion before OSHA impracticable.

29 C.F.R. §1910.502(m)). What is more, the Vaccine Mandate requires Kentucky and Tennessee—both of which have *state* OSHA plans—to inform the federal government by November 20 whether they will incorporate the emergency temporary standard into their own law. *Id*. at 61506.

Should the Mandate be held illegal, all the resources invested in preparations will have gone to waste, and the resulting economic devastation will have been for nothing. In contrast, issuing a stay will cause no serious harm. The federal government waited for almost a year after the first COVID-19 vaccination was approved for emergency use before announcing its intention to mandate vaccines, OSHA took another two months drafting the "emergency" standard, and the final standard does not even require immediate compliance. So the government cannot plausibly complain about pressing pause while the parties litigate this matter, presumably on an expedited basis.

That is especially so because the promulgation of this standard implicates deeply important issues that deserve serious consideration. If the federal government can regulate the private healthcare decisions of tens of millions of American workers, then "the concept of a government of separate and coordinate powers no longer has meaning." *Morrison v.*

Olson, 487 U.S. 654, 703 (1988) (Scalia, J., dissenting). Our Constitution gives the federal government no "general license to regulate an individual from cradle to grave." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) (op. of Roberts, C.J.). "Any police power to regulate" individuals' private healthcare decisions "remains vested in the States." *Id*. So we can have our Constitution or we can have the Vaccine Mandate. We cannot have both.

The States respectfully request a ruling on this request for a stay pending final judgment by no later than **November 12, 2021.** This will allow the States to seek immediate relief at the Supreme Court before the compliance dates should this Court deny relief.

To facilitate a ruling by this date, the States propose the following briefing schedule:

- Response brief: due **Tuesday, November 9**
- Reply brief: due **Wednesday, November 10, at 5 PM**

BACKGROUND

1. The Occupational Safety and Health Act, signed into law in 1970, is designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

The Act created OSHA and empowered the Secretary of Labor to standardize, through OSHA, health and safety conditions in worksites across the country. In the decades since its enactment, the Secretary has used these powers to promulgate "occupational safety and health standards." *See e.g.*, 29 C.F.R. pt. 1910. Once OSHA sets a standard, those who violate it face severe penalties. Employers are liable for up to $70,000 in civil fines per violation. 29 U.S.C. § 666(a). And they face six months' imprisonment if the violation results in death. *Id.* § 666(e).

The standard-setting process is deliberate and technical. As of 2012, the formal consideration and promulgation of proposed rules took on average 93 months. U.S. Government Accountability Office, *Workplace Safety and Health*, GAO-12-330, at 8 (Apr. 2012), https://perma.cc/J4Q8-FXWW. And it took roughly 3 years to progress from a notice of proposed rulemaking to a final rule. *Id.*

In extremely limited circumstances, the Secretary can bypass this lengthy process and create, without input or warning, an "emergency temporary standard." 29 U.S.C. § 655(c). Employers who violate an emergency temporary standard face precisely the same consequences as

those who violate standards set through the traditional process. Not surprisingly, then, the Act significantly limits the Secretary's power to issue emergency standards. In particular, the Secretary may use the emergency process *only if*: (1) "employees" are "exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards"; and (2) the "standard is necessary to protect employees from such danger." *Id.* For ease of reference, we call § 655(c) the "Emergency Provision."

The Secretary has issued emergency temporary standards under the Emergency Provision only eleven times—and, before the diktat at issue in this case, just once since 1983. *See* Congressional Research Service, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19* at 27 (Sept. 13, 2021), https://perma.cc/DZF6-P9NT. Putting aside this case, parties have challenged seven of those standards, with one subject to a still-ongoing challenge. *Id.* Of the six concluded challenges, *five* resulted in orders vacating or staying the emergency temporary standard, in whole or in part. *Id.*

As these outcomes suggest, the Secretary faces a high bar while enacting emergency temporary standards; the "extraordinary powers granted to the Secretary in Section 6(c) of the Act 'should be delicately exercised, and only in those emergency situations which require it.'" *Taylor Diving & Salvage Co. v. U. S. Dep't of Lab.*, 537 F.2d 819, 820–21 (5th Cir. 1976) (quoting *Fla. Peach Growers Ass'n v. U.S. Dep't of Lab.*, 489 F.2d 120, 129–30 (5th Cir. 1974)).

2. On November 5, 2021, OSHA issued an emergency temporary standard entitled *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). The emergency standard applies to most employers with 100 or more employees. *Id.* at 61551 (proposed 29 C.F.R. § 1910.501 (b)(1)). The rule does not apply to otherwise-covered employers and their employees in only a few circumstances. First, it does not apply to "[w]orkplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors." *Id.* (proposed 29 C.F.R. § 1910.501(b)(2)(i)). That guidance imposes even more onerous vaccination requirements. Second, it does not apply to "[s]ettings where any employee provides healthcare services or healthcare support services when

subject to requirements of [29 C.F.R.] § 1910.502." *Id.* (proposed 29 C.F.R. § 1910.501(b)(2)(i)). Third, it does not "apply to the employees of covered employers: (i) Who do not report to a workplace where other individuals such as co-workers or customers are present; (ii) While working from home; or (iii) Who work exclusively outdoors." *Id.* (proposed 29 C.F.R. § 1910.501(b)(3)(i)–(iii)).

Every covered employer: "must determine the vaccination status of each employee"; must "require each vaccinated employee to provide acceptable proof of vaccination status"; must "maintain a record of each employee's vaccination status"; and "must preserve acceptable proof of vaccination." *Id.* at 61552 (proposed 29 C.F.R. § 1910.501(e)(1), (2), (4)). Covered employers must affirmatively facilitate vaccinations by giving every employee "up to 4 hours paid time, including travel time, at the employee's regular rate of pay." *Id.* at 61553 (proposed 29 C.F.R. § 1910.501(f)(1)(ii)). And the 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." *Id.* (proposed 29 C.F.R. § 1910.501(f)(2)). Employers must require employees who refuse to vaccinate to obtain an approved test once every seven days—a test

they may require the employee to pay for. *Id.* (proposed 29 C.F.R. § 1910.501(g)). Employers must "keep" unvaccinated employees who do not produce test results "removed from the workplace" until they do. *Id.* (proposed 29 C.F.R. § 1910.501(f)(2)). And they must maintain a record of test results. *Id.* (proposed 29 C.F.R. § 1910.501(f)(4)). Unvaccinated employees must be required to wear masks at work, except when they are "alone in a room with floor to ceiling walls and a closed door," "[f]or a limited time while . . . eating or drinking at the workplace or for identification purposes," while wearing a "respirator or facemask," or when "the employer can show that the use of face coverings is infeasible or creates a greater hazard." *Id.* (proposed 29 C.F.R. § 1910.501(i)).

The standard is effective immediately, and it requires employers to come into compliance with almost all of its requirements by December 6, 2021. *Id.* (proposed 29 C.F.R. § 1910.501(m)). Employers have until January 4, 2022 to comply with weekly testing requirements for employees who are not fully vaccinated. *Id.* at 61554 (proposed 29 C.F.R. § 1910.501(g), (m)).

STANDARD OF REVIEW

On a motion to stay, the Court must consider four factors: (1) the moving party's likelihood of success on the merits, (2) the likelihood the moving party will be irreparably harmed if the standard is enforced, (3) the potential harm to others if the stay is granted, and (4) the public interest. *See Kentucky ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). If, however, a party seeks a stay "on the basis of a potential constitutional violation," as the States do here, typically the first factor is determinative. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

STANDING

Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To establish standing, "a litigant must demonstrate that it" (1) "has suffered a concrete and particularized injury that is either actual or imminent," (2) "that the injury is fairly traceable to the defendant," and (3) "that it is likely that a favorable

decision will redress that injury." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007). States are entitled to "special solicitude in [the] standing analysis." *Id.* at 520; *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

Injury in fact. The Vaccine Mandate has caused the States to sustain at least two "concrete and particularized injur[ies]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

First, the Vaccine Mandate invades the States' sovereignty by regulating a matter that our Constitution reserves to the States. The federal government's invasion of States' sovereignty constitutes an injury in fact. *See Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985); *see Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536 (op. of Roberts, C.J.) (referring to the police power as a "general power of governing, possessed by the States but not by the Federal Government"). By issuing an emergency rule that requires employers with 100 or more employees

to require COVID-19 vaccines or weekly testing, the federal government has assumed for itself a power the Constitution reserves to the States.

Second, Kentucky and Tennessee are also injured because they are employers subject to the emergency temporary standard. *See* 86 Fed. Reg. at 61462, 61506 (citing 29 CFR § 1953.5(b)); *see also* 29 U.S.C. § 667(c)(6). If a "State . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated," it "shall submit a State plan for the development of such standards and their enforcement." 29 U.S.C. § 667(b). When a State chooses to have its own program, it must generally "establish and maintain an effective and comprehensive occupational safety and health program applicable to *all employees of public agencies of the State* and its political subdivisions." *Id.* § 667(c)(6) (emphasis added). And, of particular importance here, the State Plan's standards must be "*at least as effective* in providing safe and healthful employment and places of employment as the standards promulgated under section 655"—the same section that empowers the Secretary to issue emergency temporary standards. *Id.* § 667(c)(2) (emphasis added).

Thus, once the Secretary issues an emergency temporary standard, States with approved plans must adopt those standards too, and those standards apply to the State and political subdivisions as employers. The Vaccine Mandate imposes its requirement on these States expressly, noting that the adoption of the emergency temporary standard by State Plans "must be completed within 30 days of the promulgation date of the final Federal rule." *See* 86 Fed. Reg. at 61506 (citing 29 C.F.R. § 1953.5(b)(1)). Further, "State Plans must notify Federal OSHA of the action they will take" by November 20, 2021. *Id.*

Kentucky and Tennessee are among the twenty-two States and Territories with State Plans that cover both public- and private-sector employees. *Id.* Each of them has well over 70,000 public sector employees.[2] Both, then, have interests and will sustain injuries like those of similarly situated private employers. These include the financial injuries resulting from lost workers who choose not to receive a vaccine or undergo weekly testing, as well as the massive administrative burden

[2] As of 2020, Kentucky and Tennessee employed approximately 70,361 and 71,353 full-time employees, respectively. *See* U.S. Census Bureaus, *2020 ASPEP Datasets & Tables* (Oct. 8, 2021), https://www.census.gov/data/datasets/2020/econ/apes/annual-apes.html. These figures do not even include part-time or local government employees, whom the emergency temporary standard would also apply to.

and costs associated with weekly testing and maintaining documentation of test results for unvaccinated employees.

States have standing to seek redress for these proprietary injuries in court. *See Alfred L. Snapp & Son*, 458 U.S. at 601–02. Further, "if the complainant is an object of the action (or forgone action) at issue—as is the case usually in review of a rulemaking" there "should be little question that the action or inaction has caused him injury." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733–34 (D.C. Cir. 2003) (Garland, J.) (quotation omitted). Because Kentucky and Tennessee are employers subject to the emergency temporary standard, they are the "object[s]" of the action they seek to challenge. *Id.* They have therefore sustained an injury in fact.

That the other States will not experience this second injury does not matter: every State suffered the first injury in fact; and, regardless, this Court may proceed if even one plaintiff has standing to sue, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).)

Traceability and Redressability. The second and third standing requirements flow from the first. There is no doubt that the just-discussed injuries are fairly traceable to the Vaccine Mandate—nothing else

is causing the States to sustain these injuries. Nor is there any doubt that an order enjoining or setting aside the Vaccine Mandate will redress the States' injuries. Therefore, the States have standing to sue.

ARGUMENT

Over a year and a half into this pandemic, the executive branch claimed to have discovered a power to regulate the healthcare decisions of American workers. After President Biden announced his plan to mandate vaccinations through an emergency temporary standard, it took OSHA almost two months to issue that standard. The "emergency" standard, for its part, will not even go into full effect until next year. Given the immensely important issues the case presents, and given the likelihood that the States will prevail on the merits, maintaining the *status quo ante* a bit longer is amply justified. The Court should immediately stay enforcement of the Vaccine Mandate pending final judgment.

I. The States will likely succeed on the merits, because the Vaccine Mandate exceeds OSHA's authority

OSHA has the burden of proving its standards' validity. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. ("API")*, 448 U.S. 607, 653 (1980) (plurality opinion). OSHA must provide substantial evidence to support both its factual findings and its policy decisions. 29 U.S.C.

§ 655(f); *AFL-CIO v. OSHA*, 965 F.2d 962, 970 (11th Cir. 1992). To survive scrutiny under the substantial evidence test, OSHA must have "acted within the scope of its authority"; "followed the procedures required by statute and by its own regulations"; "explicated the bases for its decision[s]"; and "adduced substantial evidence in the record to support its determinations." *AFL-CIO v. Marshall*, 617 F.2d 636, 650 (D.C Cir. 1979), *judgment vacated in part on other grounds by* 452 U.S. 490 (1981). OSHA must state its reasons for its action in the Federal Register. 29 U.S.C. § 655(e). Those reasons must include the facts relied upon, methodologies used, and explanations as to why alternatives were not adopted. *AFL-CIO v. OSHA*, 965 F.2d at 651.

OSHA will not carry that burden because the Emergency Provision did not authorize it to issue the Vaccine Mandate. An "agency literally has no power to act … unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (quotation omitted). The Secretary claims that the Act's Emergency Provision empowered him to issue the Vaccine Mandate. That provision says, in relevant part:

> The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary

> standard to take immediate effect upon publication in the Federal Register 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) (emphasis added).

For four reasons, the Emergency Provision does not empower the Secretary to issue the Vaccine Mandate. *First,* the Emergency Provision empowers the Secretary to promulgate standards addressing dangers employees face at work *because of work*—it does not permit the Secretary to promulgate standards addressing dangers that are no more prevalent at work than in society generally. *Second*, the Secretary cannot prove that employees face a "grave" risk, as that term is used under the relevant statutory framework, from exposure to COVID-19 at work. *Third*, the overbroad Vaccine Mandate, which applies to tens of millions of jobs with little regard for the at-work risk, is not "necessary" to avert at-work danger. *Finally*, if any ambiguity exists as to the Emergency Provision's reach, the constitutional-doubt canon and the major-questions doctrine bar the courts from reading the provision to implicitly grant OSHA such immense power over the personal healthcare decisions of millions of workers.

A. The Emergency Provision does not empower the Secretary to regulate dangers typical of workplaces and non-workplaces alike.

The Emergency Provision empowers the Secretary to issue emergency standards *only* if he learns that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." *Id.* § 655(c). Properly understood, this provision allows the Secretary to issue emergency temporary standards pertaining to *workplace* dangers; it does not extend to risks typical of workplaces and non-workplaces alike. Because exposure to COVID-19 is not a workplace-specific danger for the vast majority of employees that the Vaccine Mandate covers, the Secretary lacks authority to issue it.

1. 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). This case concerns the meaning of the phrase "danger from exposure to substances or agents . . . or from new hazards"—which, critically, appears in the context of a law about *occupational* safety. 29 U.S.C. § 655(c). The

Occupational Safety and Health Act, as its name suggests, addresses work-related hazards. Congress said so when it enacted the law and codified its purpose: preventing "personal injuries and illnesses *arising out of work situations*." *Id.* § 651(a) (emphasis added).

This context is crucial. The ultimate goal of statutory interpretation is to give effect to the ordinary or natural meaning of the statute's words. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994). And there is little doubt how ordinary members of the public would understand the phrase "grave danger from exposure to substances or agents" as it appears in a sentence about risks to which "*employees* are exposed": a typical English speaker would understand the phrase as referring to dangers presented by work rather than those endemic in society generally. For example, every virus is an "agent," but no ordinary English speaker would interpret the phrase "danger from exposure to substances or agents," as it appears in a law about occupational safety, to encompass exposure to viruses like the common cold that are just as prevalent at home as they are at work—unless, of course, the nature of the workplace presents a heightened or different risk. Nor would any ordinary English speaker understand the phrase "danger . . . from a new hazard" as referring to perils

with no specific connection to work, such as the danger presented by violent crime. When a law about occupational safety refers to dangers, it is naturally understood as referring to *workplace* dangers.

Additional context bolsters the point. The Act often refers to "substances," "agents," and "hazards," but in each case it is addressing dangers faced *at work*.[3] Consider, for example, the provision mandating the agency to make a report "listing . . . all toxic *substances in industrial usage*." 29 U.S.C. § 675 (emphasis added). Along the same lines, 29 U.S.C. § 669(a)(3) 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*." (emphasis added). Another section, 29 U.S.C. § 671a, requires the government to conduct studies on "the contamination of workers' homes with hazardous chemicals and substances,

[3] Those inclined to consider legislative history might also note that the Senate Report accompanying the Act addresses hazards presented by the workplace specifically—ultrasonic energy, beryllium metal, epoxy resins, and so on. *See* S. Rep. No. 91-1282, at 2 (1970).

including infectious agents, *transported from the workplaces* of such workers." (Emphasis added).

In the past, OSHA has recognized that its authority extends only to work-related risks. Consider its bloodborne-disease standards. In promulgating that standard, OSHA recognized (as did commenters) that the risk OSHA must address is exposure to hepatitis B and HIV in the workplace—not exposure to those diseases in general. Thus OSHA created a formula: "The risk attributable to occupational exposure is the difference between the risk faced by exposed workers and the background risk faced by the general population." 56 Fed. Reg. 64004, 64027 (Dec. 6, 1991). "After adjusting for background risk, OSHA has estimated between 5,814 and 6,645 cases of occupational exposure to Hepatitis B virus. Compliance with the standard is estimated to prevent between 5,058 and 5,781 cases of occupationally induced HBV infection per year, of which 1,265 to 1,445 would have resulted in acute symptoms, and 113 to 129 in death." *Id.* at 64037.

Similarly, OSHA has long understood the Act's use of "exposure" to include not *all* exposures, but exposures different than those confronted in non-occupational situations. OSHA requires employers to provide

their employees and the agency access to "relevant exposure and medical records" to detect, treat, and prevent occupational disease. 29 C.F.R. § 1910.1020(a). And employers must preserve records that "monitor[] the amount of a toxic substance or harmful physical agent to which the employee is or has been exposed." *Id.* § 1910.1020(e)(2)(i)(A)(1). Critically, however, exposure excludes "situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace *in any manner different from typical non-occupational situations*." *Id.* § 1910.1020(c)(8) (emphasis added).

All this accords with the judiciary's limited statements on the matter. The D.C. Circuit, for example, has recognized that when the Act speaks of "hazard[s]," it is referring to dangers that workers encounter while engaged in "work or work-related activities." *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984). Along the same lines, the Eleventh Circuit has observed that, "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). A contrary interpretation would mean that OSHA's jurisdiction would reach into realms already regulated by other federal and state agencies.

2. For most employees, exposure to COVID-19 is not the sort of "danger" that the Emergency Provision empowers OSHA to address. For nearly all employees, the danger is no higher at work than it is in non-work settings like school or church or the Met Gala. To be sure, there may be some jobs that expose workers to a heightened risk: doctors who treat COVID-19 and researchers who work with SARS-CoV-2 (the virus that causes COVID-19) may well face a workplace-specific "exposure." But the Vaccine Mandate sweeps much more broadly than that. And because the vast majority of those it covers are not subject to "exposure" in the intended sense, the Secretary cannot justify the Vaccine Mandate under his authority to regulate workplace exposures to substances and agents. Indeed, just last year OSHA refused to issue a nationwide emergency temporary standard for COVID-19 because "COVID-19 is a com-

munity-wide hazard that is not unique to the workplace." Dep't of Labor's Response at 16, *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020). Another year of experience with COVID-19 has not expanded the Secretary's statutory powers.

OSHA asserts that it makes no difference whether COVID-19 is a uniquely work-related hazard and that employers nonetheless have a duty to protect their employees from on-the-job transmission. 86 Fed. Reg. at 61407. This remark is a red herring because the States do not dispute that employers have duties with respect to transmission risks (or other hazards) heightened or created by one's workplace. For example, a hospital employer that fails to provide personal protective equipment (masks, gloves, gowns) to employees working with COVID-19 patients could violate the duty to provide a place of employment free from recognized hazards likely to cause death or serious physical harm. *See* 29 U.S.C. § 654(a)(1); *see also, e.g.*, OSHA, *Inspection Detail for Blue Hills Therapeutics Inc.* (last visited Oct. 29, 2021), https://perma.cc/ZL2Y-JDGG. For these employers, the workplace presents an atypical risk with respect to which there are duties to act. Similarly, employers must abide by OSHA's general sanitation rules—failing to do so creates or

heightens a workplace risk. *See* 86 Fed. Reg. at 61407–08. None of that is relevant to the question here, which is whether risks typical of work and non-work settings constitute the types of "dangers" from substances, agents, or hazards that § 655(c)(1) speaks of. The answer to that question is "no."

B. The danger presented by COVID-19 does not meet the statutory threshold of "grave."

The Secretary can issue a *permanent* standard if he determines: (1) that the danger to be regulated poses "significant risk" to employee health, and (2) that significant benefits would be achieved through a new standard. *API*, 448 U.S. at 644. In sharp contrast, he can bypass the notice-and-comment process and issue an emergency temporary standard only if he concludes that "employees" are exposed to "grave danger." 29 U.S.C. § 655(c)(1). The Secretary claims that COVID-19 creates such a risk because: (1) "regardless of where and how exposure occurs, COVID-19 can result in death"; and (2) "the virus can cause serious, long-lasting, and potentially permanent health effects." 86 Fed. Reg. at 61424; *see also Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32376, 32411 (June 31, 2021) (incorporated by reference).

But the rule fails to establish a *grave* danger under the statute's framework. The word "grave," at the time of the Act's passage, meant exactly what it means today: "very serious; dangerous to life." *Grave*, Webster's Third New International Dictionary (2003); *Grave*, Random House Unabridged Dictionary (2d ed. 1993). And even though all dangers are concerning, by including the adjective "grave," Congress recognized that not every threat is serious enough to trigger the extraordinary power to issue emergency standards.

COVID-19 certainly does not fit the statutory test. The likelihood of dying from COVID-19, for a fully vaccinated person of any age, is 1 in 137,698, about equal to the risk of dying from a lightning strike (1 in 138,849). Kevin Dayaratna & Norbert Michel, *A statistical analysis of COVID-10 breakthrough infections and deaths*, Heritage Foundation (Aug. 12, 2021), https://perma.cc/68HL-ZLSL. The risk of being hospitalized from COVID-19 is 1 in 31,030, or .003 percent. *Id.* Every adult in America can take the vaccine for free, and nearly two hundred million have done so. For U.S. residents aged 40–49, 64 percent are fully vaccinated, and 75 percent have had at least 1 dose of the vaccine. *U.S.*

COVID-19 vaccine tracker: See your state's progress, Mayo Clinic (last visited Oct. 29, 2021), https://mayocl.in/3CuIXgx.

Many millions more have protective antibodies after recovering from a COVID-19 infection. The National Institutes of Health has reported that a *third* of the population likely contracted COVID-19 in 2020, *see* Francis Collins, *COVID-19 Infected Many More Americans in 2020 than Official Tallies Show*, NIH Director's Blog (Sept. 7, 2021), https://perma.cc/6UPC-2BSB, and those who did likely developed strong natural immunity, Sivan Gazit et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity* (Aug. 25, 2021), https://perma.cc/6JKH-JMQ5.

Even focusing only on those working-age Americans who have neither natural nor vaccine-conferred immunity, OSHA still cannot make the case that COVID-19 presents a grave danger. The median age in the labor force is 42 years old. *Median age of the labor force, by sex, race, and ethnicity*, U.S. Bureau of Labor Statistics (Sept. 8, 2021), https://perma.cc/X42L-BWCJ. For U.S. residents aged 40–49, 11,318 deaths in 2020 "involved" COVID-19, and that was *before* the vaccine. CDC, *Weekly*

Updates by Select Demographic and Geographic Characteristics (last visited Oct. 29, 2021), https://bit.ly/2XZAfIg. There are roughly 40.28 million people in that age group, meaning the risk of a COVID-19 related death in 2020 was 0.02 percent, or 1 in 3,559. In addition, OSHA recognizes that effective treatments, such as anti-SARS-CoV-2 monoclonal antibodies, now reduce morbidity and the severity of COVID-19 symptoms. 86 Fed. Reg. at 61530. Moreover, the United States plans to soon authorize and make available for free an antiviral pill that has been shown to reduce by half the risk of hospitalization and death in high-risk COVID-19 patients. *See Molnupiravir: The Game-Changing Antiviral Pill for COVID-19?*, Johns Hopkins Bloomberg School of Public Health (Oct. 18, 2021), https://perma.cc/AXH6-M5RL; *Britain Becomes First to Authorize an Antiviral Pill for Covid-19*, New York Times (Nov. 4, 2021), https://perma.cc/MEQ8-Q8A6.

Consider also the data on which OSHA itself relies. According to a recent study, the death rate for unvaccinated individuals aged 16 or older *who contract* COVID-19 (which overstates the risk of contracting *and* dying from COVID-19), is *0.6 percent*. And that number includes the risk faced by elderly individuals who are no longer in the workforce. The risk

to the same group of admission to an intensive-care unit is *1.5 percent*. *See* 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 202; 70(34): 1172, https://perma.cc/4ZV3-94SA (relied upon at 86 Fed. Reg. at 61418). The same study found that *fully vaccinated* individuals who contract COVID-19 face a *0.2 percent* of death and a *0.5 percent* chance of being admitted to an intensive-care unit. Yet OSHA correctly concedes that vaccinated employees *are not* in "grave" danger from COVID-19. 86 Fed. Reg. at 61434 (noting that "employees who are unvaccinated are in grave danger from the SARS-CoV-2 virus, but employees who are fully vaccinated are not"). OSHA cannot justify characterizing as "grave" the risks faced by just one of these groups. And 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.

Incidentally, if OSHA really believed that COVID-19 satisfied the "grave" 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 standards' requirements "without undue disruption." 86 Fed. Reg. at 61403. It is inconceivable that OSHA would say that about an *actual* grave danger. For example, even small companies dependent on the use of a substance found to be highly lethal would not be allowed to gradually phase out their use of that substance while their employees suffered; an emergency temporary standard is designed to address dangers so serious that *all* employers must take action to protect workers. That is precisely what the emergency temporary standard regarding asbestos did. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971). Risks demanding that degree of response are the types of risks the Emergency Provision exists to address. In contrast, risks that can be addressed "in a stepwise fashion," *id.,* fall outside the Emergency Provision's sweep. Thus, the emergency temporary standard, by doing nothing to address the risks faced by unvaccinated employees at businesses with 99 or fewer employees, confirms that the risk in question is not "grave."

To be clear, the data establishes that COVID-19 is dangerous to the unvaccinated. That is why the States urge their citizens to get a vaccine. But the question here is not whether COVID-19 is dangerous. It is whether it presents a "grave" danger—a danger so serious that it justifies allowing OSHA to skip the notice-and-comment process altogether. Bearing in mind that these statistics almost certainly *overstate* the risk to the workforce (since they include the elderly), given that not all unvaccinated workers will contract COVID-19, and given recent improvements in treatment, the risk to the typical unvaccinated worker is not "grave." Many workers, by failing to vaccinate, expose themselves to a risk that, while needless, is hardly "grave" in any ordinary sense of that word. To hold otherwise would be to read the qualifier "grave" as doing no meaningful work.

Finally, there is no reason the agency should be allowed to consider *only* the risk to the unvaccinated. Numerous substances, such as peanut butter, pose a grave risk to people severely allergic to those substances. Would anyone say that they pose a "grave" risk to employees simply because they pose a risk to a subset of employees with heightened sensitivity? Of course not. The ordinary English speaker would understand a

statute addressing "grave" risks to "employees" as addressing grave risks to employees *generally*. That is what the Emergency Provision does. OSHA should not be permitted to evade the demanding "grave danger" requirement by assessing the risk to employees *only* with respect to employees who face the greatest danger from COVID-19.

C. The standard is not "necessary."

The Secretary must also prove that the Vaccine Mandate is "necessary" to protect employees from grave danger. 29 U.S.C. § 655(c)(1). The eleven-month gap between emergency use authorization of the COVID-19 vaccine and the promulgation of this standard—plus another 1- to 2-month delay before the standard's promulgation and the compliance date—should resolve any question about whether even the Secretary believes the Vaccine Mandate is "necessary."

The emergency temporary standard is "OSHA's most dramatic weapon in its enforcement arsenal." *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984). Accordingly, OSHA must show that the emergency standard is not just a good idea, but that it has little practical choice except to regulate without first subjecting its regulation to notice

and public comment. OSHA must show that the Vaccine Mandate is necessary—that is, "essential," *Necessary*, Black's Law Dictionary (11th ed. 2019)—to protecting employees from grave danger.

The necessity standard exists in marked contrast to the standard governing permanent OSHA regulations, which must be only "reasonably necessary or appropriate." *API*, 448 U.S. at 615. To meet that lower standard, OSHA must show that its regulations are "reasonably essential or at least reasonably efficacious in reducing a significant risk of material harm." *Tex. Indep. Ginners Ass'n v. Marshall*, 630 F.2d 398, 410 (5th Cir. 1980) (quoting *Am. Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd on other grounds sub nom. API*, 448 U.S. 607 (1980)). Meeting the "necessity" standard is harder. That is no accident: "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).

The Vaccine Mandate is so remarkably broad that OSHA cannot meet that burden. The Mandate covers tens of millions of Americans, including those who work remotely for most (but not all) of the time, have limited social interaction, work almost entirely (but not "exclusively")

outdoors, or have natural immunity. What is more, as explained above, the government has already made the vaccine available, *for free*, to every working-age American who wants one.

Even last year, before a vaccine was available to every working-age American, OSHA argued that an emergency temporary standard to ensure the nationwide provision of personal protective equipment was *unnecessary* because "no 'one-size-fits-all' response would protect all the nation's workers equally." Dep't of Labor's Response at 31, *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020). As OSHA recognized then, "adequate safeguards for workers could differ substantially based on geographic location, as the pandemic has had dramatically different impacts on different parts of the country." *Id.* at 32. And such a "broad rule" would fail to take into account that "what would be required of employers in diverse industries . . . is likely to differ in substantial ways." *Id.* at 31–32. In short, by promulgating an emergency temporary standard "meant to broadly cover all workers with potential exposure to COVID-19—effectively *all* workers across the country"—the Secretary has "provid[ed] very little assistance at all" while risking "counterproductive" vaccine hesitancy and worker shortages. *Id.* at 30, 33.

As OSHA has acknowledged throughout the pandemic, States, local governments, and private employers have all *voluntarily* adopted measures to slow the spread of COVID-19. *See, e.g.*, *Does v. Scalia*, No. 3:20-1260, 2021 WL 1197669, at *9 (M.D. Pa. Mar. 30, 2021) (dismissing a petition for writ of mandamus where OSHA found that there was no "imminent danger" from COVID-19 at a meatpacking plant when the facility "had not had any reported COVID-19 for over a month" and "had implemented various mitigating" measures). Nearly two years into the pandemic, every American is familiar with social distancing, contact tracing, remote work, and personal protective equipment. OSHA had stated time and again that masking and similar measures were sufficient to protect employees. Indeed, in June, OSHA issued an emergency temporary standard for healthcare providers that required masking but *not* vaccination or weekly testing. *See* 29 C.F.R. § 1910.502.

Despite living with the COVID-19 pandemic since the early months of 2020, OSHA did not issue an emergency temporary standard to mandate vaccines for employers. In fact, in December 2020, then President-Elect Biden publicly declared that it was not necessary to impose a vaccine mandate. Robby Soave, *Biden's Vaccine Mandate is a Big Mistake*,

N.Y. Times (Sept. 10, 2021), https://perma.cc/B6N5-M3PZ. On his second day in office, President Biden issued an executive order directing OSHA to consider whether any emergency temporary standards related to COVID-19 were necessary. Exec. Order No. 13,999, 86 Fed. Reg. 7211 (January 21, 2021). A resultant draft emergency temporary standard, reported to be over 780 pages long, was never published. Julia Zorthian, *Labor Dept. Officials Frustrated with White House Over COVID-19 Vaccine and Testing Mandate*, Time (Sept. 27, 2021), https://perma.cc/QMQ8-RUCA.

This prior choice not to act—which was clearly a product of extensive deliberation—undermines the argument that an emergency temporary standard is now necessary. It also led millions of regulated entities relying on the *absence* of a mandate to develop individualized response plans to mitigate COVID-19. And they have long had resources adequate to help them do so. For example, the CDC promulgated guidance for employers to aid in these individualized efforts. CDC, *Workplaces and Businesses: Plan, Prepare, and Respond* (last visited Oct. 29, 2021), https://bit.ly/3pQ3rNu. So did many States. A record high number of employers transitioned employees to remote work, instituted various

other social distancing, cleaning, masking, and vaccine policies. Kim Parker et al., *How the Coronavirus Outbreak Has-and Hasn't-Changed the Way Americans Work*, Pew Research Center (Dec. 9, 2020), https://perma.cc/MA7Z-GCV3. The emergency temporary standard abandons this comprehensive, individualized approach and replaces it with a harsh choice: vaccinate, undertake onerous testing, or get out.

OSHA gestures at a justification for its decision to change course and mandate vaccines when it notes that the Delta variant "caused a spike in hospitalization and death in the United States." 86 Fed. Reg. at 61431. This justification does not withstand scrutiny. The Delta spike has now waned, and the hospitalization rate is lower today (1.53 per 100,000 people) than it was in August, when OSHA was declining to impose an emergency standard (1.55 per 100,000 on August 1, 2020). *See COVID Data Tracker: New Hospital Admissions*, CDC (last visited Nov. 4, 2021), https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions. Factual changes regarding the risks presented by COVID-19, if anything, make the emergency temporary standard *less* necessary today than in August or in the many months before that.

Given the diversity of workplaces and existing efforts to combat COVID-19, the Secretary's overbroad and inexact Vaccine Mandate is not "necessary" to meet the danger that COVID-19 poses. It is a one-size-fits-all approach to regulating the diverse needs of a heterogeneous society.

D. Interpretive principles limit OSHA's authority to regulate private health decisions.

To the extent that uncertainty exists on *any* of the foregoing points, two canons of interpretation require resolving the lingering ambiguity in the States' favor.

Constitutional-doubt canon. "If a statute is susceptible of two plausible constructions, one of which would raise a multitude of constitutional problems, the other should prevail." *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012) (quotation omitted). Here, construing the Act to permit OSHA to impose the Vaccine Mandate would create at least two significant structural problems under the Constitution.

First, the Secretary's construction of the Act offends the non-delegation doctrine. "[A] statutory delegation 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). Put differently, Congress must offer "specific restrictions" that "meaningfully constrain[]" the agency's exercise of authority. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Congress cannot "confer[] authority to regulate the entire economy on the basis of" an overly vague standard, just as it cannot provide the agency "literally no guidance." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citation omitted). And "[i]n applying the nondelegation doctrine, the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (quotation omitted) (finding that an expansive construction of the CDC's powers would offend the non-delegation doctrine).

OSHA has struggled with non-delegation issues before. In *API*, for example, OSHA argued that it was not required to establish a "significant risk" before promulgating a safety standard. 448 U.S. at 646. The Supreme Court disagreed, holding that if that view were correct, "the statute would make such a 'sweeping delegation of legislative power' that it

might be unconstitutional." *Id.* The Court therefore read the "significant risk" requirement into the Act. Similarly, the D.C. Circuit applied a saving construction of the OSHA statute that required the agency to conduct a cost-benefit analysis before implementing a new standard. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1316 (D.C. Cir. 1991). Of particular relevance here, the D.C. Circuit rejected "OSHA's [contrary] proposed analysis" of the Act because it "would give the executive branch untrammeled power to dictate the vitality and even survival of whatever segments of American business it might choose." *Id.* at 1318; *see also* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1409 (2008) (observing that the Act presents "one of the few settings in federal law in which [the non-delegation] problem seems real").

As in *API* and *International Union*, the Court should avoid a non-delegation problem by rejecting the Secretary's construction of the Act. In implementing a Vaccine Mandate untethered from issues arising specifically from the workplace and the kind of work-related hazards traditionally regulated by OSHA, the Secretary has claimed an unconstrained power to act as the nation's public-health officer. If OSHA is right that

it can decide issues of this sort, then the only remaining constraint on the agency's power is the requirement that an emergency temporary standard be necessary. But a "necessity" requirement would not provide guidance sufficient to satisfy the non-delegation doctrine. *See Tiger Lily*, 5 F.4th at 672 (explaining that the CDC Director's claimed power to "do anything it can conceive of to prevent the spread of disease . . . would likely require greater guidance than 'such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases'" (quoting 42 U.S.C. § 264(a)). The Secretary's construction imbues him with nearly unlimited legislative power. The States' contrary interpretation is the only way to maintain meaningful and constitutionally required guardrails on the Secretary's discretion.

Second, any construction of the Emergency Provision that permits the Vaccine Mandate would conflict with the Commerce Clause—the only clause that even arguably empowered Congress to pass the Emergency Provision. *See* 29 U.S.C. § 651(b). The Commerce Clause grants Congress the authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art I, § 8, cl. 3. The Founders originally understood this limited, enumerated power to allow Congress to regulate the actual

interstate exchange of goods. *Cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although the federal government has persistently tried to expand its power, 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) (quoting *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring)).

While the Supreme Court has allowed vaccination measures as exercises of *state* "police power" to protect public health and safety, *see, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (upholding a locally-mandated $5 fine for those who declined a smallpox vaccine), it has never even suggested that the federal government's enumerated powers include a power broad enough to justify issuance of a vaccine mandate. The Supreme Court explained in *Jacobson* that the power to establish regulations to "protect the public health and the public safety" is included within the powers "which the state did not surrender when becoming a member of the Union under the Constitution." *Id.* at 25. Granting OSHA the power to mandate inoculation or weekly testing for tens of millions of Americans would require converting the Commerce Clause into a federal

police power. The Supreme Court has never been willing to do that. *See Morrison*, 529 U.S. at 618 (explaining that "the Founders denied the National Government" "the police power" and instead "reposed [it] in the States" and noting that the Court has "*always* [ ] rejected readings of the Commerce Clause" that would create such a power (quotation omitted)).

Indeed, in *NFIB v. Sebelius*, Chief Justice Roberts explained why the Commerce Clause does *not* grant the federal government the power to mandate healthcare decisions. 567 U.S. at 558. OSHA may not like that some Americans have "decide[d] not to" get vaccinated, but "construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 520–21. And the "Commerce Clause is not a general license" for the federal government "to regulate an individual from cradle to grave, simply because he or she" has sought employment. *Id.* at 557. The emergency temporary standard, which seeks to mandate vaccines on the basis of being employed at a company with 100 or more employees, is an obvious attempt to wield the Emergency Provision as just such a general license. If the Emergency Provision permitted this, it would be unconstitutional.

In sum, the Emergency Provision does not give OSHA the power to issue the Vaccine Mandate. But, if there were any ambiguity, this Court should interpret the Emergency Provision in a way that avoids these serious constitutional concerns, not to mention the individual rights that the Vaccine Mandate might infringe. Alternatively, if the Court holds that the Emergency Provision *does* confer such immense power on OSHA, it should hold the Emergency Provision unconstitutional and stay the Mandate's enforcement.

Major-questions doctrine. The major-questions doctrine also compels the conclusion that Congress did not give OSHA power broad enough to justify the Vaccine Mandate. "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." *Util. Air*, 573 U.S. at 324 (quotation omitted). Thus, courts require "Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (quotation omitted); *accord King v. Burwell*, 576 U.S. 473, 486 (2015). The "history and the breadth of the authority" asserted must drive the analysis. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S.

120, 160 (2000). And it is especially wrong to assume that Congress quietly delegated to an agency the power to resolve an issue that "has been the subject of an earnest and profound debate across the country." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation omitted).

The scale and breadth of the Vaccine Mandate are reason enough to conclude it presents a major question. OSHA has never before claimed a right to guide the personal medical decisions of tens of millions of Americans, especially to address threats that are not specific to the workplace and that touch on matters of significant controversy. The Vaccine Mandate will also have a significant economic impact. Although vaccinations are free for now, testing is usually not. More importantly, the Vaccine Mandate can be expected to cause upheaval in the workplace given the vaccine hesitancy that the agency itself has acknowledged. OSHA is imposing an additional barrier to employment that could make it harder for already strained employers to hire and keep staff. And even if the affected businesses do maintain full employment, they must still bear new costs of enforcement and monitoring.

History does not favor OSHA, either. No precedent exists for a mandate of this scale. "No mandatory vaccination programs are specifically authorized [under federal law], nor do there appear to be any regulations regarding the implementation of a mandatory vaccination program at the federal level during a public health emergency." Congressional Research Service, *Mandatory Vaccinations: Precedent and Current Laws* 9 (May 21, 2014), https://perma.cc/B4HK-JT8J. Even where Congress did contemplate a more aggressive public-health response from a federal agency, it assigned that power to the Department of Health and Human Services, not OSHA. *See* 42 U.S.C. § 247d(a) (providing that the Secretary of Health and Human Services may "take such action as may be appropriate to respond to [a] public health emergency," including "significant outbreaks of infectious diseases").

Further, the Vaccine Mandate strikes at the heart of state power. The Supreme Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted); *accord Bond v.*

United States, 572 U.S. 844, 862 (2014). The Vaccine Mandate undeniably upsets that balance, as compulsory vaccination has long been a traditional subject of state police power. *See Zucht v. King*, 260 U.S. 174, 176 (1922) ("[I]t is within the police power of a state to provide for compulsory vaccination."). And ultimately, "the police power[] belongs to the States and the States alone." *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring in the judgment). Thus, the Vaccine Mandate "intrud[es] into an area that is the particular domain of state law"—just like the CDC's recent (and now-invalidated) eviction moratorium. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

The Vaccine Mandate accordingly presents a major question. The only remaining issue, then, is whether Congress has spoken "clearly" to allow for this type of agency action.

Congress has not. The Secretary is drawing from statutes that speak in generalities, not from provisions that speak directly to vaccination or similar medical-related decisions. Certainly the statutes do not use language referring to the public health of the entire populace. Even if a general right to regulate in matters of health and safety could be creatively drawn from the text, that spin on the statute would in turn

allow OSHA to impose all manner of requirements that would be beyond the agency's apparent authority—including requirements for employees to diet or to exercise. These implausible outcomes imply that the statutes must be, at the very least, ambiguous. Courts should not infer that Congress intended to "house such sweeping authority in an ambiguous statutory provision." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021), *cert. granted* 2021 WL 5024616.

II. The States will be irreparably harmed absent a stay.

Absent a stay, Respondents will continue to intrude on the States' sovereign authority, violate the Federal Constitution, deny the States the opportunity to comment on what is not—in reality—a temporary standard, and impose unrecoverable compliance costs on States. All of these injuries are irreparable.

First, absent a stay, OSHA will irreparably harm the States by intruding on their sovereign authority to enact and enforce laws and policies that conflict with the emergency temporary standard. *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) (quoting

Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018) (same).

Here, the Vaccine Mandate intrudes upon the States' sovereign authority to enact and enforce their own statutes, executive orders, and policies in response to the COVID-19 pandemic. Each State has enacted its own laws and policies—or declined to issue certain mandates—in a way that balances the need for public health with the rights of its citizens. It is obvious that these issues are often politically sensitive and controversial, yet OSHA has attempted to remove them from consideration by locally accountable political officials.

Further, the Vaccine Mandate has handcuffed the States who administer State Plans. Those States have declined to issue emergency temporary standards that would mandate vaccination or weekly testing for their own or private employees, just as the federal OSHA had declined to do until now. And other States have longstanding laws protecting the right of their residents to "cho[ose] the mode of securing health care services free from the imposition of penalties, or the threat thereof." Idaho Code § 39-9003; *see also*, *e.g.*, W. Va. Code § 16-30-2 (explaining that the purpose of the West Virginia Health Care Decisions Act is to "ensure that

a patient's right to self-determination in health care decisions be … protected"). OSHA's one-size-fits-all approach runs roughshod over the sovereign right of each State to craft its own response to the COVID-19 pandemic.

Second, the States suffer irreparable harm from the violation of the constitutional structure. "When constitutional rights are threatened or impaired, irreparable injury is presumed." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 407 (6th Cir. 2017) (*quoting Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)); *see also ACLU v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003). A constitutional violation, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, the Vaccine Mandate, at a minimum, (1) violates the nondelegation doctrine, and (2) exceeds the federal government's enumerated power under the Commerce Clause. *See supra* section I.C. These constitutional violations constitute irreparable harm.

Third, the Vaccine Mandate irreparably denies the States the statutory right to comment on the final standard because the emergency standard here is not practically temporary. Because emergency standards lack public input through the notice and comment process, Congress

required that the emergency standards be "temporary." An emergency temporary standard serves as a notice of proposed rulemaking, and the Secretary "shall" promulgate a final standard within six months of issuing the temporary one. 29 U.S.C. § 655(c)(3). This temporariness requirement shows that the Act contemplates a standard requiring conditions and practices that have a less-than-permanent effect.

But the Vaccine Mandate does not fit the mold. Once an employer complies, it is irrelevant what the final standard turns out to be six months later. Employees will have already taken the vaccine or been required to undergo weekly testing. And employers or their employees will be forced to spend enormous amounts of money on testing equipment. Workplace conditions to mitigate the spread of COVID-19—ventilation, social distancing, work-from-home policies—can be turned on and off; they can be temporary. Vaccine mandates are not temporary in the same way.

Fourth, the States will suffer irreparable harm from compliance costs that they will never recover from the federal government. Those States that administer State Plans, in particular, will have to expend resources drafting and promulgating their own emergency temporary

standards, enforcing the Vaccine Mandate against their own employees, and monitoring compliance of private companies. Although regulatory compliance costs do not constitute irreparable harm when the amount lost "may be recovered through monetary damages," *irrecoverable* costs cause irreparable injuries. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *Kan. Health Care Ass'n Inc., v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Temple Univ. v. White*, 941 F.2d 201, 214–15 (3rd Cir. 1991). Here, because of the federal government's sovereign immunity, the States likely cannot recover their compliance costs from OSHA or the federal government more generally. *Cf.* 5 U.S.C. § 702 (allowing "relief other than money damages"); 28 U.S.C. § 2680(a) (excluding monetary claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid"). Compliance costs that are irrecoverable due to sovereign immunity constitute irreparable harm. *See Kentucky v. United States*, 759 F.3d 588, 599–600 (6th Cir. 2014) (finding irreparable harm where "sovereign immunity bars" granting damages);

see also Idaho v. Coeur d'Alene Tribe, 794 F.3d 1039, 1046 (9th Cir. 2015) (determining that a State's economic harm was irreparable due to the Tribe's sovereign immunity barring recovery); *Chamber of Com. of the U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Accordingly, the States' irrecoverable compliance costs constitute yet another irreparable harm they will suffer if this Court does not stay the Vaccine Mandate.

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. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982).

In any event, a stay promotes the public interest both by protecting the authority of the States to respond to COVID-19 pandemic conditions particular to their own jurisdictions and by preventing the nationwide confusion and economic upheaval that the emergency temporary standard threatens.

Unless in conflict with individual citizens' constitutional rights, each State has the authority to respond to the COVID-19 pandemic as its elected officials deem proper. It is "in the public interest" that courts "give effect to the will of the people by enforcing the laws they and their representatives enact." *Thompson*, 976 F.3d at 619. This interest is "particularly" strong when "considerable disagreement exists about how best to accomplish" a challenge confronting the nation. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions." *Id.*; *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

Since the beginning of the COVID-19 pandemic, the States have fulfilled their function as laboratories of democracy. Each State has responded to the ebbs and flows of the pandemic. What was necessary at times in one State might not have been necessary, or may have become unnecessary, in others. And each State has encouraged its eligible citizens to get vaccinated. Millions have done so voluntarily. True, the COVID-19 pandemic has been a problem nationwide. "But it's a problem

in which [state] borders add tools and flexibility for fixing the problem." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 5 (2021). The Vaccine Mandate threatens to scrap this federalist solution to the pandemic's challenges by turning the entire country into one "single laboratory of experimentation." Jeffrey S. Sutton, *51 Imperfect Solutions: States & the Making of American Constitutional Law* 216 (2018); *see, e.g.*, 86 Fed. Reg. 61406. Only a stay of OSHA's one-size-fits-all Mandate will restore the constitutionally-guaranteed flexibility of the States to respond to the pandemic.

Additionally, by imposing the Vaccine Mandate nationwide, OSHA recklessly forces upon the entire country a "novel social and economic experiment[]" that "risk[s]" tearing our social and economic fabric. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). Employers are already facing enormous challenges as they respond to the COVID-19 pandemic while continuing to provide employment, goods, and services to our local and national economy. Record-breaking numbers of cargo container ships idle off the coasts due to a lack of longshoremen and truck drivers. *See, e.g.*, Jack Goodman & Micah Luxen, *Shipping disruption: Why are so many queuing to get to the US?*, BBC (Oct. 16, 2021), https://

perma.cc/228Q-C3DJ. And many employees' finances are already stretched thin from lost wages during COVID-19 shutdowns. Now, the federal government has threatened them with the loss of their livelihoods if they do not comply with the emergency temporary standard. A stay will preserve the status quo for employers and employees and give them more time to adapt to this shifting regulatory environment or to provide feedback to OSHA.

Such caution is in the public interest. Vaccine mandates in other States have already exacerbated worker shortages. *See, e.g.*, Maria Caspani & Nathan Layne, *New York Hospitals Fire, Suspend Staff Who Refuse COVID Vaccine*, Reuters (Sept. 28, 2021), https://perma.cc/7633-E4ES ("[R]esulting staff shortages prompted some hospitals to postpone elective surgeries or curtail services."). And, absent a stay, employers with unvaccinated employees will be left in the lurch if demand for COVID-19 tests exceed available supply.

Respondents, meanwhile, will suffer no harm if this Court grants the stay. Because the emergency temporary standard is procedurally and substantively unlawful, Respondents have no valid interest in enforcing it. *Deja Vu of Nashville, Inc. v. Metro. Gov't*, 274 F.3d 377, 400 (6th Cir.

2001) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment[.]"). And the Delta variant—President Biden's stated rationale for ordering OSHA almost two months ago to issue the emergency temporary standard—has already receded from many States. *See* The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), https://perma.cc/6D44-UBAK; *see also* John Cheves, *Kentucky's COVID numbers continue their plunge to lowest in 11 weeks as surge recedes*, Lexington Herald-Leader (Oct. 25, 2021), https://bit.ly/314JtnC; CDC, *COVID Data Tracker Weekly Review* (last visited Oct. 29, 2021), https://bit.ly/3Bn7wdT. A stay will not harm the public interest when the federal government itself delayed in issuing the Vaccine Mandate until *after* COVID-19 cases had declined.

Finally, a stay will not substantially harm others. That follows for many of the reasons already discussed in connection with the public interest. But in addition, it is worth emphasizing that those who want a vaccine can obtain one without regard to the stay.

CONCLUSION

This Court should stay enforcement of the emergency temporary standard pending the resolution of this case.

Dated: November 5, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on November 5, 2021, in accordance with 28 U.S.C. 2112(a), I served a copy of this Petition to Review the Occupational Safety and Health Administration's COVID-19 Vaccination and Testing; Emergency Temporary Standard on Respondent by delivering a copy via electronic mail to the agency designee:

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