No. 21-3494

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATES OF MISSOURI, ARIZONA, MONTANA, NEBRASKA, ARKANSAS, IOWA, NORTH DAKOTA, SOUTH DAKOTA, ALASKA, NEW HAMPSHIRE, WYOMING, AAI, INC., DOOLITTLE TRAILER MANUFACTURING, INC., CHRISTIAN EMPLOYERS ALLIANCE, SIOUX FALLS CATHOLIC SCHOOLS D/B/A BISHOP O'GORMAN CATHOLIC SCHOOLS, AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION, INC.,
Petitioners,

v.

JOSEPH R. BIDEN, JR., *et al*.,
Respondents.

REPLY IN SUPPORT OF PETITIONERS' MOTION FOR STAY OF EMERGENCY TEMPORARY STANDARD PENDING JUDICIAL REVIEW AND FOR TEMPORARY ADMINISTRATIVE STAY

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OSHA's Emergency Temporary Standard (ETS) exceeds its statutory authority, violates the Constitution in several ways, tramples on principles of federalism, fails to engage in basic reasoned decision-making, and threatens immediate and painful economic injury to millions of working families. The Court should stay this unlawful mandate.

I. Petitioners Face Immediate Irreparable Injury.

The Government claims that "petitioners claim little prospect of harm until the Standard takes full effect in January." Respondent's Opposition to Stay Motions ("Opp."), at 5. But OSHA requires state-plan States (including Petitioners Iowa, Arizona, Alaska, and Wyoming) to adopt standards "at least as effective" as the ETS, and to "notify Federal OSHA of the action they will take within 15 days," effectively requiring action now. 86 Fed. Reg. 61,506.

Likewise, the ETS purports to preempt any State laws that restrict vaccine mandates. 86 Fed. Reg. 61,507-61,510. Petitioner States have many such laws. *E.g.,* 2021 Alaska Sess. Laws ch. 2, § 17; Ark. Code § 20-7-143; Ariz. Exec. Order 2021-18 (Aug. 16, 2021); Mo. Rev. Stat. § 67.265; Mont. Code Ann. § 49-2-312(1)(b). Absent a stay, "the State[s] will, in effect, be precluded from applying [their] duly enacted legislation," which "would seriously and irreparably harm the State[s]." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020).

The States also represent millions of citizens who face the mandate's painful consequences *now*. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). The ETS is effective January 4, 2022, but "95 percent [of vaccinated employees] have received either Pfizer or Moderna," 86 Fed. Reg. 61,479, and it takes five weeks to become fully vaccinated with Pfizer and six weeks with Moderna, *id.* at 61,484. Thus, most employees must decide whether to comply almost immediately. Working families facing job losses in early January will feel the economic pinch now. And the ETS "threatens to decimate [the] workforces" of covered employers now as well. *BST Holdings, LLC v. OSHA*, No. 21-60845, Slip. Op. 4 (5th Cir. Nov. 12, 2021) (attached as Exhibit A); Stay Mot. Exs. H-L.

II. OSHA Lacks Statutory Authority for the ETS.

The ETS "grossly exceeds OSHA's statutory authority." *BST Holdings*, Slip. Op. 7. OSHA's authority is limited to *workplace* hazards, not hazards that are ubiquitous inside and outside the workplace. Stay Mot. 14-17. The Government's contrary argument wrenches the vague terms "agent" and "hazard" from their context. Opp. 6, 10-11. The OSH Act must be interpreted through "the language and structure of the Act," which includes the statutory context. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 641 (1980) (plurality op.) ("*Benzene*"). The Act's provisions repeatedly confirm its focus on *workplace-specific* harms, not hazards ubiquitous in society. Stay Mot. 14-17 (citing, *inter alia*,

29 U.S.C. §§ 651(a), 651(b), 652(8), 655(c)).

Fundamentally, the Act is concerned with "*occupational*" hazards. *See* 29 U.S.C. § 652(8) (authorizing OSHA to promulgate "*occupational* safety and health standards"). As the Government's own dictionary confirms, "occupational" means *job-related*. MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/occupational (defining "occupational" as "of or relating to a job or occupation"); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1560-61 (2002). The risk of contracting COVID-19, which pervades personal interactions in society, is not "occupational" under this plain meaning, as OSHA admits: "COVID-19 is not a uniquely work-related hazard," and "not exclusively an occupational disease." 86 Fed. Reg. 61,407, 61,411.

The Government's analogy to air pollution, Opp. 12, undermines its position. Air pollution that afflicts every person in a community—whether they are breathing the air inside or outside the workplace—is not an "occupational" hazard. *See id.* Polluted drinking water that afflicts an entire community both inside and outside the workplace is not an "occupational" hazard. Thus, these hazards are regulated by EPA, not OSHA. Adulterated foods that people consume during their lunch breaks—as well as at home—are not "occupational" hazards, and OSHA is not the FDA. Traffic accidents that afflict commuters, just like all other motorists, are not "occupational" hazards, and OSHA is not the NHTSA. And so forth.

So also, an outbreak of contagious disease that poses risks for every member of the community is not an "occupational" hazard. Other governmental entities—notably, the States—have responsibility in this area, not OSHA. *Indus. Union Dep't*, 448 U.S. at 647 (the OSH Act does not cover "a place in Florida where mosquitoes are getting at the employee"). Nor does the fact that there may be "clusters" or "outbreaks" of COVID-19 in workplaces, Opp. 12, transform the risk into an "occupational" hazard, because there are "clusters" or "outbreaks" of COVID-19 everywhere it is transmitted. In short, "health agencies do not make housing policy, and occupational safety administrations do not make health policy." *BST Holdings*, Slip Op. 20.

III. The ETS Violates the Constitution and the Supreme Court's Clear-Statement Rules.

Even if there were ambiguity in the statute, a host of constitutional problems would resolve any doubt against OSHA.

A. This is a textbook case for the major-questions doctrine.

The major-questions doctrine alone resolves this case. *See BST Holdings*, Slip Op. 22 (Duncan, J., concurring). "In the absence of a clear mandate in the [OSH] Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view…." *Indus. Union Dep't*, 448 U.S. at 645.

Here, the ETS "derives its authority from an old statute employed in a novel

manner, imposes nearly $3 billion in compliance costs, involves broad medical considerations that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues." *BST Holdings*, Slip op. 17-18. The major-questions doctrine prevents this overreach. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2487-89 (2021) (per curiam). In *Alabama Association of Realtors*, the CDC, like OSHA here, took vague terms in a seldom-used statute, wrenched them from context, and discovered in them sweeping newfound powers to respond to the COVID-19 pandemic. *Id.* at 2487. Like the CDC, OSHA's ETS power "has rarely been invoked—and never before to justify" a vaccine mandate. *Id.* "Even if the text were ambiguous, the sheer scope of [OSHA's] claimed authority under § [655(d)] would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* at 2489 (citations omitted).

B. The ETS violates fundamental principles of federalism.

The Government contends that the ETS does not "alter[] the balance of federal and state power." Opp. 10. That statement is egregiously wrong. The ETS was *designed* to prevent States from adopting freedom-favoring policies when it comes to vaccination. *See* 86 Fed. Reg. 61,432, 61,437, 61,440, 61,445, 61,550, 61,505-61,506, 61,507-61,510. OSHA calls out by name States that have eschewed vaccine

mandates, such as Petitioners Arizona, Arkansas, and Montana. *Id.* at 61,432, 61,507, 61,508. Indeed, OSHA asserts *field* preemption, taking the astonishing view that the ETS preempts any State or local law that limits employer vaccine mandates, even if such laws *do not conflict with the ETS*. *Id.* at 61,508-61,509.

Thus, the whole point of the ETS is to federalize vaccine policy, take it out of the States' control, and make it mandatory. Joseph Biden, Remarks at the White House (Sept. 9, 2021)[1] ("Biden Speech") (vowing to "get [States] out of the way"). OSHA deliberately tramples on the States' well-established authority in an area where the federal government has no enumerated power or historic competence. Compulsory-vaccination policies lie within the State's "police power—a power which the state did not surrender when becoming a member of the Union under the Constitution." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). As *Jacobson* states:

> The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. ***They are matters that do not ordinarily concern the national government.*** So far as they can be reached by any government, they depend, primarily, upon such action as ***the state***, in its wisdom, may take….

Jacobson, 197 U.S. at 38 (emphases added).

The ETS "alters the federal-state framework by permitting federal

[1] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/

encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). OSHA "intrudes into an area that is the particular domain of state law," and "[o]ur precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Realtors*, 141 S. Ct. at 2489. There is no "exceedingly clear language" here.

C. The ETS exceeds federal authority under the Commerce Clause.

OSHA admits that the ETS can only be justified as "an exercise of Congress's Commerce Clause authority." 86 Fed. Reg. 61,505. But "[a] person's choice to remain unvaccinated and forego regular testing is noneconomic inactivity." *BST Holdings*, Slip Op. 16. Under the Commerce power, Congress cannot compel *commercial* activity by forcing people to buy health insurance. *NFIB v. Sebelius*, 567 U.S. 519 (2012). *A fortiori*, it cannot compel *noncommercial* activity by forcing people to vaccinate or undergo weekly testing. The ETS "invokes the outer limits of Congress' [Commerce] power," and requires "a clear indication that Congress intended that result," which does not exist. *SWANCC*, 531 U.S. at 172-73.

D. The ETS violates the non-delegation doctrine.

The Government offers no limiting principle that would restrict OSHA from federalizing all public-health issues or restricting any germ, pollutant, drug, or other potentially harmful "agent" that might be transmitted in or affect the workplace—

including the common cold, seasonal flu, drinking-water contaminants, air pollutants, illegal drugs, firearms, or traffic accidents, among many others. Opp. 8-9. OSHA sees itself as another EPA, FDA, DEA, ATF, NHTSA, and CDC (among others), all rolled into one and vested with immense coercive power. "[H]ard hats and safety goggles, this is not." *BST Holdings*, Slip Op. 18 n.20.

"If the Government was correct in arguing that" the OSH Act authorizes a national vaccine mandate, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in" the Supreme Court's non-delegation cases. *Indus. Union Dep't*, 448 U.S. at 646. "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

E. The canon of avoidance forestalls OSHA's interpretation.

Finally, "the Court will construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

IV. The ETS Fails Substantial-Evidence Review.

The ETS fails substantial-evidence review under 29 U.S.C. § 655(f) because it engages in *post hoc* rationalization, overlooks obvious distinctions, and fails to consider important aspects of the problem.

First, the ETS is a *post hoc* rationalization for a predetermined outcome. The President directed OSHA to adopt *this specific policy* in advance. *See* Biden Speech, *supra*. His directive uses the OSH Act as the "ultimate work-around," *BST Holdings*, Slip Op. 7 n.13, to compel as many people as possible to undergo vaccination by whatever coercive powers are available to the federal government. Biden Speech, *supra*. This Court need not blind itself to openly stated pretext, just as it is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

By directing the agency to adopt a specific policy in advance, the President also violated the separation of powers, because Congress delegated to the *agency*, not the President, the authority to devise occupational safety and health standards. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

The ETS's pretextual nature is particularly evident in OSHA's explanation for the inherently arbitrary 100-employee cutoff. To justify exempting one-third of the workforce from its "emergency," OSHA speculates that employers with 99 or fewer employees might face administrative difficulties in complying, while it finds the exact same burdens to be trivial for larger employers. *See* 86 Fed. Reg. 61,511-61,512. OSHA's justification for the 100-employee threshold also relies heavily on the prospect of "staff shortages" at smaller businesses, *id.* at 61,511, which directly contradicts its own implausible finding that the vaccine mandate poses *no significant*

risk of staff turnover and will actually result in "an influx of potential workers." 86 Fed. Reg. 61,474-61,475.

Even worse, OSHA considers only effects on *employers*, and never considers negative effects on *employees* who will lose their jobs under the mandate. *See id.* OSHA insists that it does not have to consider economic harms to workers and their families in its assessment of "economic feasibility," 86 Fed. Reg. 61,459, and then gives those harms no weight *anywhere else in its analysis*. This is another "important aspect of the problem" that OSHA "fail[s] to consider." *Department of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1910 (2020).

Moreover, a large proportion of those covered already have natural immunity to COVID-19 from prior infections. Opp. 18-20. The Government effectively concedes that OSHA never made any finding of risk of *severe health consequence* for those with natural immunity. *Id.* The Government points out that OSHA discussed studies indicating some risk of *transmission* for those with natural immunity, *see id.*, but a finding of "grave danger" cannot rest on transmission alone—it requires a risk of "severe health consequences" or "severe health effects," as OSHA admits again and again. *See* 86 Fed. Reg. 61,403, 61,419, 61,424, 61,433.

Further, the Government contends that OSHA exempts religious *employees*, Opp. 21, but OSHA overlooks the religious-autonomy doctrine that bars "secular control and manipulation" of religious *employers*. *Kedroff v. St. Nicholas Cathedral*,

344 U.S. 94, 116 (1952). The religious-autonomy doctrine prevents governmental interference with religious organizations' "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The ETS inflicts such unconstitutional interference. Stay Mot. Exs. J, K, L. And OSHA capriciously overlooks religious employers' more robust protections under the federal RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).

V. The Other Equitable Factors Support Staying the ETS.

In discussing the other equitable factors, the Government focuses near-exclusively on OSHA's projections of severe health outcomes absent its mandate. Opp. 23-28. In defending a policy that balances competing interests of freedom and safety, the United States Government discusses only safety and gives *freedom* no weight whatsoever. *See id.* The Government replicates OSHA's error in failing to consider the personal freedom and responsibility of those who have voluntarily assumed the risk of COVID-19 workplace infection by declining the vaccines for their own personal reasons. Stay Mot. 10-12. OSHA mentions "personal freedom," that most fundamental of American values, only to dismiss it as irrational "psychological resistance," 86 Fed. Reg. 61,444, and the Government gives it no shrift at all. Opp. 1-28. This is astonishingly capricious.

Likewise, neither OSHA nor the Government gives any weight to the

independent interests and sovereignty of the States. *Jacobson*, 197 U.S. at 38. Our system of federalism is designed to secure liberty, and upholding that balance is always in the public interest. *Bond v. United States*, 564 U.S. 211, 220-21 (2011). "The public interest is … served by maintaining our [federal] constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions…." *BST Holdings*, Slip Op. 20.

CONCLUSION

This Court should stay OSHA's ETS pending judicial review.

Dated: November 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, and that it contains 2,591 words as determined by the word-count feature of Microsoft Word.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing, along with the accompanying unsealed appendix, with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system. In addition, I have sent a true and correct electronic copy of the foregoing to: zzSOL-Covid19-ETS@dol.gov.

/s/ D. John Sauer