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.

MOTION FOR STAY OF EMERGENCY TEMPORARY STANDARD PENDING JUDICIAL REVIEW AND FOR TEMPORARY ADMINISTRATIVE STAY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Petitioners challenge OSHA's "Emergency Temporary Standard" that imposes a vaccine mandate on two-thirds of the U.S. workforce at a single stroke. OSHA lacks statutory authority to issue this mandate, and its decision to do so is unconstitutional. And OSHA studiously disregarded critical aspects of the problem. If not stayed, this ETS will cause economic pain and disruption to millions of working families. The Court should stay this unlawful action.

FACTUAL BACKGROUND

On September 9, 2021, President Biden announced his *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, *at* https://www.whitehouse.gov/covidplan/ (the "Plan"). The Plan states that "[t]he President's plan will reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace." *Id.* The Plan announced that "[t]he Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this

requirement." *Id.*

The decision to implement this standard came from the White House, and OSHA had little prior notice. On September 10, 2021, the New York Times reported that OSHA "only learned about plans for the standard during roughly the past week, so current OSHA officials did not have a chance to prepare extensively before Mr. Biden's announcement." Michael D. Shear and Noam Scheiber, *Biden Tests Limits of Presidential Power in Pushing Vaccinations*, N.Y. TIMES (Sept. 10, 2021), *at* https://www.nytimes.com/2021/09/10/us/politics/biden-vaccines.html. "'The White House is asking OSHA how fast they can do it, and OSHA said, "Who the hell knows?"' said Jordan Barab, a deputy director of the agency under Mr. Obama. 'They only had a week's notice.'" *Id.*

Two months later, on November 5, 2021, OSHA published an "emergency temporary standard" (ETS). 86 Fed. Reg. 61,402 *et seq.* (Attachment A to the Petition for Review). The ETS adopts the same policy that the President dictated to OSHA in advance: it requires employers with 100 or more employees to require vaccination, or else require unvaccinated workers to undergo intrusive weekly testing (at their own expense). *See id.*

On November 5, 2021, the undersigned coalition of States and private employers ("Petitioners") filed their Petition for Judicial Review in this Court, challenging the validity of OSHA's ETS. The same day, Petitioners filed this motion

for stay of the standard pending judicial review. 29 U.S.C. § 655(f).

STANDARD OF REVIEW

Section 655(f) provides that "a stay of the [emergency temporary] standard" may be "ordered by the court." 29 U.S.C. 655(f). In considering whether to stay an ETS, courts consider: "(1) a substantial likelihood of success on the merits; (2) danger of irreparable harm if the court denies interim relief; (3) that other parties will not be harmed substantially if the court grants interim relief; and (4) that interim relief will not harm the public interest." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 418 & n.4 (5th Cir. 1984).

The Court may grant a temporary administrative stay "to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal." *Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011); *see also Taylor Diving*, 537 F.2d at 820 n.4. The Court should grant one here.

ARGUMENT

Section 655(f) provides that "[a]ny person who may be adversely affected by a standard issued under this section may … file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard." 29 U.S.C. § 655(f).

Petitioners here are adversely affected by the ETS. Petitioners include States and private employers that employ more than 100 employees. The private employers are "adversely affected" by the ETS. *See* Exs. H-L. The States face sovereign and pocketbook injuries from the ETS, and each State sues as *parens patriae* on behalf of the "substantial segment of its population" that is adversely affected by the ETS. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607-08 (1982). *See* Exs. A-G. In addition, several Petitioners are "State plan States" that are directly affected under the OSH Act, *see* https://www.osha.gov/stateplans/. *See* Exs. D, E, G.

I. The ETS Is Not Supported by Substantial Evidence in the Record.

Section 655(c) authorizes OSHA to issue an ETS only if it "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) (emphases added). "The key to the issuance of an emergency standard is the necessity to protect employees from a grave danger." *Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Labor*, 489 F.2d 120, 124 (5th Cir. 1974).

The Court reviews OSHA's determinations to see if they are "supported by substantial evidence in the record considered as a whole." 29 U.S.C § 655(f). The "substantial evidence" standard is more "rigorous" than the APA's arbitrary-and-

capricious standard. *Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Labor*, 489 F.2d 120, 127 (5th Cir. 1974). In reviewing an ETS, the Court "must take a 'harder look' at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 421 (5th Cir. 1984).

Courts have subjected OSHA's emergency temporary standards to particularly close scrutiny, because "[e]xtraordinary power is delivered to the Secretary under the emergency provisions of the Occupational Safety and Health Act. That power should be delicately exercised…." *Florida Peach Growers*, 489 F.2d at 129–30; *see also Asbestos Information Ass'n*, 727 F.2d at 422. Here, OSHA's exercise of that power was unlawful.

A. The ETS is a blatant *post hoc* rationalization for a standard dictated to the agency in advance.

First, the ETS is unlawful because OSHA did not first identify a "grave danger" to employees and then devise a standard "necessary" to protect them, as the statute requires. 29 U.S.C. § 655(c)(1). Instead, the White House dictated the standard to OSHA in advance, and then OSHA reverse-engineered an elaborate justification for that standard. The entire ETS is thus a quintessential "*post hoc* rationalization"—a justification invented afterward for a predetermined conclusion.

Here, "*post hoc* rationalizations cannot be accepted as basis for our review." *Asbestos Information*, 727 F.2d at 422; *Dry Color Mfrs. Ass'n v. Dep't of Labor*, 486 F.2d at 104 n.8 (same); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907, 1909 (2020) (holding that it is a "foundational principle of administrative law" to reject an agency's "impermissible *post hoc* rationalizations"). An ETS is inherently suspect if "[n]o new data or discovery leads OSHA to invoke its extraordinary ETS powers." *Asbestos Information*, 727 F.2d at 418. Where pretextual considerations motivate the agency's action, the regulation cannot stand. *Florida Peach Growers*, 489 F.2d at 125-26; *Asbestos Information*, 727 F.2d at 426.

"OSHA should, of course, offer some explanation of its timing in promulgating an ETS, especially when, as here … it has known of the serious health risk the regulated substance poses," yet took no action until the President's order. *Asbestos Information*, 727 F.2d at 423. Indeed, OSHA's attempt to provide such an explanation, *see* 86 Fed. Reg. 61,429-61,432, somehow fails to mention the President's order as an "Event[] Leading to the ETS." *Id.* OSHA's justification is a "*post hoc* rationalization" in its entirety. *Asbestos Information*, 727 F.2d at 422.

B. The ETS overlooks obvious distinctions and fails to consider important aspects of the problem.

In addition, the ETS fails overlooks "obvious distinctions … that make certain regulations that are appropriate in one category of cases entirely unnecessary in another," *Dry Color*, 486 F.2d at 105, and because it "fail[s] to consider important

aspects of the problem." *Regents of the Univ. of Calif.*, 140 S. Ct. at 1910 (quoting *Motor Vehicle Manufacturers' Assn.*, 463 U.S. at 43).

1. No substantial evidence supports the ETS's finding of "grave danger" to workers with natural immunity from prior COVID-19 infection.

OSHA estimates that its mandate applies to 31.7 million unvaccinated workers. 86 Fed. Reg. 61,435. But it also estimates that at least 45 million Americans have natural immunity to COVID-19 from prior infection. *Id.* at 61,409. Thus, millions of employees subject to OSHA's mandate already have natural immunity to COVID-19. But the ETS does not exempt them; instead, OSHA finds a "grave danger" to unvaccinated workers with natural immunity—*i.e.*, those "previously infected with SARS-CoV-2." *See* 86 Fed. Reg. 61,421.

OSHA's finding of grave danger is insupportable by its own terms, because OSHA only finds (and only cites evidence) that the "previously infected" have a risk of "exposure to, and reinfection from, SARS-CoV-2," and only determines that previously infected are at higher risk in the aggregate than the vaccinated. *Id.* In its discussion, OSHA never finds that the previously infected on the whole face any "grave danger" of *severe health outcomes* from reinfection. *See id.* at 61,421-61,424. This contrasts sharply with its finding of "grave danger" to the unvaccinated without natural immunity, where OSHA openly states that "[t]his finding of grave

danger is based on the *severe health consequences* associated with exposure…" *Id.* at 61,403 (emphasis added).

OSHA's failure to find a grave danger of "severe health consequences," *id.*, to those with natural immunity is unsurprising, because "[b]oth vaccine-mediated immunity and natural immunity after recovery from COVID infection provide extensive protection against severe disease from subsequent SARS-CoV-2 infection." Ex. M, Bhattacharya Decl. ¶ 8. "Multiple extensive, peer-reviewed studies comparing natural and vaccine immunity … overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna)." *Id.* ¶ 11. Though OSHA cites evidence of exposure and reinfection among the previously infected (which the vaccinated also experience, as OSHA concedes), *see* 86 Fed. Reg. 61,421-61,424, OSHA cites no substantial evidence of any "grave risk" of *severe health outcomes* to those with natural immunity. *Dry Color*, 486 F.2d at 104 (holding that "some possibility" of a severe health outcome is not a "grave danger"). Thus, no "substantial evidence in the record considered as a whole," 28 U.S.C. § 655(f), supports OSHA's determination, and its analysis overlooks an "obvious distinction" that underlies the entire ETS.

2. OSHA fails to give meaningful consideration to the threat of mass resignations and layoffs across all sectors of the American economy.

Another "important aspect of the problem," *Regents*, 140 S. Ct. at 1910—indeed, the elephant in the room—is the prospect of mass resignations and layoffs across all sectors of the American economy as a result of this mandate. OSHA estimates that its mandate affects "two-thirds of the nation's private-sector workforce," 86 Fed. Reg. 61.512, including 31.7 million unvaccinated workers, *id.* at 61,435. Just last week, the Kaiser Family Foundation published a wide-scale survey of workers in which 37 percent of unvaccinated employees said that they would leave their jobs rather than complying with a mandate that required vaccination or weekly testing (*i.e.*, OSHA's mandate). Chris Isidore, et al., *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN.com (Oct. 28, 2021), https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html. If those numbers hold, that means OSHA's mandate would result in *11.28 million* American workers losing their jobs.

This number is staggering, and it foreshadows enormous pain and dislocation for millions of working families, widespread staffing shortages, small businesses in crisis, economic disruption, supply-chain chaos, and other problems. Yet OSHA's ETS gives scant consideration, at best, to these glaring risks of economic turmoil. Instead, OSHA paints a rosy picture for employers subject to the mandate, arguing that employers will "enjoy advantages" from the mandate—especially if they take the harsher option of mandating vaccines for all unvaccinated workers. 86 Fed. Reg.

61,437. But, under that harsher option, the Kaiser Family survey projects that 72 percent of unvaccinated workers would lose their jobs—which would result in *22.8 million* people losing their jobs, inflicting even more economic turmoil and hardship on working families. Isidore, *supra*. Suffice to say, the real-world anticipation of actual employers contrasts sharply with OSHA's sunny optimism[1] on this point. *See, e.g.,* Exs. H-L.

3. OSHA finds no "grave danger" to vaccinated workers, so its policy solely protects unvaccinated workers from risks they have voluntarily assumed.

President Biden aptly summarized the purpose of his policy: "The bottom line: We're going to protect ***vaccinated*** workers from unvaccinated co-workers." Joseph

[1] OSHA's only response to these risks is to argue that the survey data overestimates likely employee departures, and to assert (implausibly) that "it is very unlikely that this potential increase in employee turnover will exceed the ranges that industries have experienced over time." 86 Fed. Reg. 61,474. OSHA further asserts, optimistically, that "the number of employees who actually leave an employer is much lower than the number who claimed they might: 1% to 3% or less actually leave, compared to the 48-50% who claimed they would." *Id.* at 61,475. OSHA's analysis on this point, however, is facially unconvincing. First, OSHA never considers the costs to *employees* that are forced to leave their job by the mandate, considering "turnover" as strictly an employer-side problem. But ordinary workers are the ones harmed by this, because they will lose their jobs—workers who are disproportionately poor, and who may be ineligible for unemployment. Second, even from an employer-cost perspective, this is not ordinary employee "turnover" issue because the presence of the OSHA mandate necessarily closes off huge sections of the economy to individual employees who refuse to get the vaccine. Even if this is "only" 1-3% of the workforce—and it is almost certainly much more—that is potentially almost a million workers pushed out of the workforce entirely.

Biden, Remarks at the White House (Sept. 9, 2021)[2] ("Biden Speech") (emphasis added). But this statement makes no sense as a matter of science. "[V]accinated workers," *id.*, face no significant threat of severe health outcomes from COVID-19 infection, because the vaccines provide very robust protection against hospitalization and death. *See, e.g.,* 86 Fed. Reg. 61,409, 61,417. OSHA had no plausible basis to find a "grave danger" to vaccinated workers. *Dry Color*, 486 F.2d at 104.

OSHA, therefore, beat a strategic retreat from the President's stated rationale. OSHA's ETS repeatedly emphasizes that it is *not* finding a "grave danger" from COVID-19 to *vaccinated* workers. *See, e.g.,* 86 Fed. Reg. 61,417, 61,419 ("Fully vaccinated workers are not included in this grave danger finding…."). Instead, OSHA finds a "grave danger" solely to *unvaccinated* workers. *Id.*

This fundamental shift in rationale undermines the entire justification for the ETS. Vaccines have been free and available for many months, yet millions of workers—for reasons of their own—have chosen not to receive them. OSHA's mandate thus seeks to "protect" unvaccinated workers from *their own decision to forego vaccination*. The ETS, therefore, is fundamentally not about workplace safety, because all these unvaccinated workers have voluntarily assumed the risks that OSHA predicts.

---

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

Respecting the personal freedom and voluntary assumption of risks by millions of people is an "important aspect of the problem." *Regents*, 140 S. Ct. 1910. But OSHA fails to give any meaningful consideration to this important issue. Instead, OSHA speaks dismissively of Americans' fundamental preference for freedom and personal responsibility. *See* 86 Fed. Reg. 61,444 (dismissing the fact that many Americans "resist curbs on personal freedoms" as irrational "psychological resistance"). OSHA's federal bureaucrats may view America's love of "personal freedom[]" as mere "psychological resistance," *id.*, but millions of ordinary Americans do not.

4. The ETS gives no consideration to the religious-autonomy doctrine for religious employers.

The ETS includes no exemption for religious employers. This omission demonstrates that OSHA failed to consider less restrictive "alternative kinds of regulations," as it was required to do. *Dry Color*, 486 F.2d at 107. The ETS requires religious employers to remove from the workplace or take adverse action against employees—including ministerial employees—who decline vaccination or weekly testing. *See* Exs. K-L. This violates the religious-autonomy doctrine for religious employers, and it imposes "interference by secular authorities" in their hiring decisions, including of ministers. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (rejecting "secular control and

manipulation" of religious employers). This is another critical aspect of the problem that OSHA was required to consider. *Cf. Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). OSHA did not.

5. OSHA's long delay in promulgating the ETS undercuts its finding of "grave danger."

In addition, the long delay before imposing OSHA's "emergency" temporary standard undercuts OSHA's findings of "grave danger" and "necessity." As OSHA acknowledges, it refused to impose COVID-19 workplace requirements by ETS for over a year and a half, including during the eight months since vaccines were available. *See* 86 Fed. Reg. 61,429-61,431. OSHA only imposed this policy after it was instructed by the President to do so. And OSHA waited almost two months to issue its standard after the President directed it to do so. OSHA has also delayed implementing the ETS for another two months, until January 4. These repeated delays undercut OSHA's belated claim for extraordinary "emergency" powers here. *See Florida Peach Growers*, 489 F.2d at 125-26.

In sum, "Congress intended a carefully restricted use of the emergency temporary standard." *Florida Peach Growers*, 489 F.3d at 130 n.16. The substantial-evidence test was designed to prevent "arbitrary burdens imposed by a massive federal bureaucracy." *Id.* at 128. That is exactly what has occurred here.

II. The ETS Exceeds OSHA's Statutory Authority and Violates the Constitution and Principles of Federalism.

The Supreme Court has recognized that policies on compulsory vaccination lie within the police powers of the States, and that "[t]hey are matters that do not ordinarily concern the national government." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). The ETS departs radically from this principle by purporting to impose a vaccine mandate on two-thirds of the U.S. workforce. In doing so, it exceeds OSHA's statutory authority, exceeds Congress's enumerated powers, violates the major-questions and non-delegation doctrines, and tramples on the States' traditional powers expressly reserved by the Tenth Amendment. Indeed, the "sheer scope of the … claimed authority … counsel[s] against" OSHA's assertion of statutory authority here. *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

A. Section 655 Does Not Authorize the Vaccine Mandate.

"OSHA's authority is limited to ameliorating conditions that exist in the workplace." *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442 (4th Cir. 1985) (en banc). This limitation is reflected in the OSH Act's plain language, which authorizes regulations only to address workplace-specific risks. Because the ETS seeks to ameliorate harms that are not workplace-related and instead addresses universal risks ubiquitous in society, it exceeds OSHA's authority.

The OSH Act's plain text makes clear that it focuses on hazards arising out of the workplace and on governing workplace conduct. For example, the key

Congressional finding underlying the OSH Act is that "personal injuries and illnesses *arising out of work situations* impose a substantial burden." 29 U.S.C. § 651(a) (emphasis added). Similarly, the Act declares its purpose to be to "assure … safe and healthful *working conditions*." 29 U.S.C. § 651(b) (emphasis added). And, most notably, OSHA is limited to imposing "occupational safety and health standard[s]," which are explicitly confined to regulations that are "reasonably necessary or appropriate to provide *safe or healthful employment and places of employment*." 29 U.S.C. § 652(8) (emphasis added).

Thus, OSHA's statutory authority is limited to ameliorating work-related hazards and must be limited to regulating *bona fide* working conditions. Indeed, "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, 1331-32 (11th Cir. 1983) (emphases added) (holding that "[m]igrant housing may well be unsafe and unhealthy, conditions that we deplore," but lie outside OSHA's authority). OSHA admits that "COVID-19 is not a uniquely work-related hazard," and "not exclusively an occupational disease." 86 Fed. Reg. 61,407, 61,411. Given the virus's ubiquity, these admissions "test[] the limits of understatement." *Gonzales v. Oregon*, 546 U.S. 243, 286 (2006) (Scalia, J., dissenting).

COVID-19 is not uniquely—or even primarily—a work-related risk. Indeed, the virus is ubiquitous and poses risks *throughout society*, including the workplace—like virtually all other places in the U.S. The ETS regulates workers' private medical procedures to address risks encountered largely outside the workplace—or at least equally within and without the workplace. The ETS is not an adoption of "practices, means, methods, operations, or processes" at the workplace. 29 U.S.C. § 652(8).

Though worker vaccination rates may tangentially *affect* working conditions, this does not mean that the Vaccine Mandate qualifies as an "*occupational* safety and health standard" under Section 652(8). *Id.* On such an expansive understanding, OSHA could regulate anything which affects or improves working conditions, no matter how remote from the workplace—such as requiring workers to eat more broccoli, or mandating that vaccinated workers receive a higher minimum wage than the unvaccinated. But that is not the law; OSHA's mandate is more limited. And as courts have recognized, OSHA cannot exceed its mandate even for the ostensible benefit of workers. *See, e.g.*, *Frank Diehl Farms*, 696 F.2d at 1391; *Taylor Diving & Salvage Co. v. U. S. Dep't of Lab.*, 599 F.2d 622, 625 (5th Cir. 1979). Accordingly, even when regulating contagious disease in the past, OSHA has not attempted to mandate vaccination. *See, e.g.*, *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 825 (7th Cir. 1993) (upholding bloodborne pathogens rule, but observing that it did not require vaccination); Occupational Exposure to COVID-19; Emergency

Temporary Standard, 86 Fed. Reg. 32,376 (Jun. 21, 2021) (encouraging, but not requiring, vaccination among healthcare workers).

In the ETS, OSHA repeatedly complains that it would be too "challenging" and "complicated" for OSHA to adopt a "comprehensive and multi-layered standard" that would actually address workplace safety in an industry-specific fashion. *See, e.g.,* 86 Fed. Reg. 61,434; *id.* at 61,437-38. Instead, OSHA opts to regulate two-thirds of the entire U.S. workforce at one stroke. But "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. The statute was not designed to make it convenient for OSHA to dictate economy-wide public health policies; rather it was designed to protect against "arbitrary burdens imposed by a massive federal bureaucracy." *Florida Peach Growers*, 489 F.3d at 128.

"It would be one thing if Congress had specifically authorized the action that [OSHA has] taken. But that has not happened." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

B. If Adopted, OSHA's Expansive Interpretation of Its Own Authority Would Be Unconstitutional on Numerous Grounds.

For similar reasons, if OSHA's sweeping interpretation of its own authority were upheld, the statute would be unconstitutional on numerous grounds. The Court should follow the Supreme Court's clear-statement rules to prevent this outcome.

The phrase "occupational safety and health standard" in 29 U.S.C. § 652(8), fails to provide any clear mandate for OSHA's extraordinary action here.

First, OSHA's interpretation violates the Supreme Court's major-questions doctrine. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). For "a question of deep 'economic and political significance' … had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 576 U.S. 473, 485 (2015). "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 Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). So also here. The OSH Act's plain language, focused on workplace safety, does not confer authority on OSHA to federalize public-health policies. The statute is focused on workplace hazards and work conditions. The ETS governs neither. Instead, it advances the President's overarching policy goal to increase the number of vaccinated Americans by whatever form of government compulsion is available. *See* Biden Speech, *supra*.

Second, OSHA's interpretation of its own authority, if upheld, would violate nondelegation requirements. The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. *See Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). Congress must provide

an "intelligible principle to guide the delegee's use of discretion" in the exercise of delegated power. *Id.* at 2123. Courts and scholars have long been concerned that the OSH Act's language, read broadly, raises grave nondelegation concerns. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?* 94 Va. L. Rev. 1407 (2008). A plurality of Justices in the *Benzene* case recognized that a maximalist reading of OSHA's broad mandate could give it "unprecedented power over American industry." *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (Stevens, J.) (plurality op.) ("*Benzene*"). To avoid nondelegation concerns, the *Benzene* Court read OSHA's authority narrowly. *Id.* at 652. Until now, OSHA has largely avoided interpretations of its own authority that would test the limits of this doctrine. No longer: "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Third, on OSHA's interpretation, the statute exceeds Congress's authority under the Commerce Clause. Just as the federal government cannot mandate the purchase of health insurance, it cannot mandate vaccination. *NFIB v. Sebelius*, 567 U.S. 519, 548-559 (2012) (holding that Congress lacked authority under the commerce power to mandate the purchase of health insurance). The personal decision whether to get vaccinated, like "[t]he possession of a gun in a local school zone" is "in no sense an economic activity." *Lopez v. United States*, 514 U.S. 549, 567 (1995). Deeming every American's personal choice whether to vaccinate as

"interstate commerce" would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

Further, "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (citations omitted). "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. Again, no such clear indication exists here.

Fourth, the ETS violates the Tenth Amendment by trampling on the traditional authority of the States to regulate public health within their borders, including on the topic of mandatory vaccines. President Biden vowed that, if States adopt policies favoring personal freedom in this area, he would "get them out of the way." Biden Speech, *supra*. Likewise, OSHA's ETS repeatedly announces that it preempts state and local policies to the contrary. *See* 86 Fed. Reg. 61,437, 61,440, 61,505.

But the Constitution does not allow the President to "get [States] out of the way" whenever he deems them inconvenient. Rather, it "leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 188 (1992) (cleaned up). "[T]he police power of a state" includes, above all, the authority to adopt regulations

seeking to "protect the public health," including the topic of mandatory vaccination. *Jacobson*, 197 U.S. at 24–25; *see also Zucht v. King*, 260 U.S. 174, 176 (1922). The States "did not surrender" these powers "when becoming . . . member[s] of the Union." *Jacobson*, 197 U.S. at 25. "The safety and the health of the people . . . are, in the first instance, for [the States] to guard and protect." *Id.* at 38. These matters "do not ordinarily concern the national government." *Id.*

So also, where (as here) the federal government alters the federal-state framework by displacing the States' traditional authority over public health within their borders, the Court should "insist on a clear indication that Congress meant to reach" such a result "before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Bond v. United States*, 572 U.S. 844, 860 (2014); *see also SWANCC*, 531 U.S. at 172 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). OSHA's ETS would require an extremely "clear statement from Congress," *Bond*, 572 U.S. at 857—which the OSH Act does not contain.

Fifth, for all the foregoing reasons, the doctrine of constitutional avoidance requires rejecting OSHA's interpretation. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

III. The Balancing of Harms and the Public Interest Support a Stay.

Given Petitioners' overwhelming likelihood of success on the merits, the other three equitable factors also decisively favor a stay. *See Asbestos Information*, 727 F.2d at 418 & n.4. Here, the "danger of irreparable harm" to Petitioners, *id.*, is clear. The States face immediate intrusions on their sovereignty that impose *per se* irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.). The private employers face a vast array of economic, religious, and other injuries for which the law will provide no remedy. *See* Exs. H-L. And the ETS forces millions into a Hobson's choice between losing their jobs and subjecting themselves to OSHA's unlawful diktat, which constitutes irreparable injury of the first order. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that the loss of similar "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

On the flip side, the Government will suffer no injury from a stay because it has no cognizable interest in maintaining an unlawful mandate. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (holding that the government "has no legitimate interest in enforcing an unconstitutional ordinance"). Likewise, "[t]he public has no interest in enforcing an unconstitutional" policy. *Id.* And the public interest always favors compelling the Government to comply with federal statutes, such as the OSH Act's provisions at issue here. *See Virginian Ry.*

Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) (a duly enacted statute "is in itself a declaration of public interest and policy").

CONCLUSION

This Court should stay OSHA's ETS pending judicial review. The Court should also grant a temporary administrative stay pending consideration of this stay motion, and order expediting briefing on the stay motion.

Dated: November 5, 2021

Respectfully submitted,

ERIC S. SCHMITT
Attorney General of Missouri

/s/ D. John Sauer
D. John Sauer, #58721MO
Solicitor General
Jesus A. Osete
Michael E. Talent
Office of the Attorney General
Supreme Court Building
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
Tel. (573) 751-8870
Fax (573) 751-0774
John.Sauer@ago.mo.gov

Counsel for Petitioners

Additional Counsel:

MARK BRNOVICH
Arizona Attorney General
/s/ Drew C. Ensign
Drew Ensign
Deputy Solicitor General
Arizona Attorney General's Office
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
Drew.ensign@azag.gov
Counsel for State of Arizona

AUSTIN KNUDSEN
Attorney General of Montana
KRISTIN HANSEN
Lieutenant General
/s/ David M.S. Dewhirst
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN B. CORRIGAN
Assistant Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
406-444-2026
David.Dewhirst@mt.gov
Christian.Corrigan@mt.gov
Counsel for State of Montana

DOUGLAS J. PETERSON
Attorney General of Nebraska
/s/ James A. Campbell
James A. Campbell
Solicitor General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
jim.campbell@nebraska.gov
Counsel for State of Nebraska

LESLIE RUTLEDGE
Arkansas Attorney General
/s/ Nicholas J. Bronni
Nicholas J. Bronni
Solicitor General
Vincent M. Wagner
Deputy Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
Nicholas.bronni@arkansasag.gov
Counsel for State of Arkansas

JEFFREY S. THOMPSON
Solicitor General
/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ
Assistant Solicitor General
Office of the Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov
Counsel for State of Iowa

WAYNE STENEHJEM
Attorney General of North Dakota
/s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
State Bar ID No. 05613
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
masagsve@nd.gov

JASON R. RAVNSBORG
South Dakota Attorney General
/s/ David M. McVey
David M. McVey
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: 605-773-3215
E-Mail: david.mcvey@state.sd.us
Counsel for State of South Dakota

TREG R. TAYLOR
Attorney General of Alaska
/s/ Charles E. Brasington
Charles E. Brasington
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-6612
charles.brasington@alaska.gov
Counsel for State of Alaska

JOHN M. FORMELLA
New Hampshire Attorney General
/s/ Anthony J. Galdieri
Anthony J. Galdieri
Solicitor General
Counsel of Record
NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
Tel: (603) 271-3658
Anthony.J.Galdieri@doj.nh.gov
Counsel for State of New Hampshire

BRIDGET HILL
Wyoming Attorney General
/s/ Ryan Schelhaas
Ryan Schelhaas
Chief Deputy Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov
Attorneys for the State of Wyoming

AAI, Inc.
/s/ Jefferson Downing
Jefferson Downing
Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248
Lincoln, Nebraska 68501
(402) 475-8230
jd@keatinglaw.com
Counsel for AAI, Inc.

Doolittle Trailer Manufacturing, Inc.
/s/ Matthew W. Murphy
Matthew W. Murphy, MO47786
Vessell Bridges Murphy Law Offices
3901 S. Providence Road, Suite D
Columbia, Missouri 65203
(573) 777-4488
matt@vbmlaw.com
Counsel for Doolittle Trailer Mfg., Inc.

Christian Employers Alliance
Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools
Home School Legal Defense Association, Inc.
/s/ Ryan L. Bangert
David A. Cortman
John J. Bursch*
Ryan L. Bangert*
Matthew S. Bowman
440 First Street, NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690
Facsimile: (202) 347-3622
dcortman@adflegal.org
jbursch@adflegal.org
rbangert@adflegal.org
mbowman@adflegal.org
*admitted to Eighth Circuit; not licensed in D.C.
Counsel for Christian Employers Alliance, Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools, and Home School Legal Defense Association, Inc.

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 5,193 words as determined by the word-count feature of Microsoft Word.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 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 with all Exhibits to: zzSOL-Covid19-ETS@dol.gov.

/s/ D. John Sauer

DECLARATION OF SHANNON O. ROYCE

I, Shannon O. Royce, hereby declare and state as follows:

1. I am over 21 years of age and make this declaration on personal knowledge.

2. I am the President of Christian Employers Alliance (CEA).

3. CEA is a 501(c)(3) nonprofit corporation incorporated in the state of North Dakota.

4. CEA is a Christian membership ministry that exists to unite and serve Christian nonprofit and for-profit employers who wish to live out their faith in every-day life, including in their homes, schools, ministries, businesses, and communities.

5. CEA's mission is to unite, equip, and represent Christian-owned businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish.

6. Members of CEA are employers, and they include both for-profit businesses and nonprofit organizations.

CEA Members' Christian Values

7. One of CEA's primary purposes is to support Christian employers and develop strategies for them, so that they, as part of their religious witness and exercise, may engage in employment practices in a manner that is consistent with a set of religious practices and beliefs consistent with biblical Christianity and determined by CEA's Board of Directors ("Christian Values").

8. To become a Member of CEA, an entity must adhere to CEA's Christian Values, including those discussed herein.

9. Members place Jesus Christ as the center and foundation of their organizations and are called to live out their faith in every aspect of their operations, including in the workplace.

10. Members must subscribe to a Statement of Faith, have a Christian highest executive officer or majority of its governing body, and have Section 501(c)(3) status or receive special approval by the CEA President.

11. For-profit members must be owned by a 51% majority of Christians and have a 51% majority of Christians on the member's governing body.

12. Members are dedicated to the health and well-being of their employees, physical and spiritual, because they have God-given inherent dignity.

13. Members exercise their faith in every area of their lives, including in business.

14. Members are committed to the principle that God granted their owners, and employees the right to exercise faith freely without improper interference from the government.

CEA Membership

15. CEA has multiple members throughout the United States. They include both for-profit and nonprofit entities.

16. On November 4, 2021, OSHA filed with the Office of the Federal Register and placed on public display its "COVID-19 Vaccination and Testing; Emergency Temporary Standard," available at https://www.federalregister.gov/public-inspection/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard ("ETS").

17. The ETS applies to employers with 100 or more employees.

18. The ETS is to be published in the Federal Register on November 5, 2021.

19. Upon publication in the Federal Register, the ETS is effective immediately, and employers must comply with various requirements in it either by 30 days or 60 days after publication.

20. Well over two dozen of CEA's members throughout the United States have 100 or more employees, and are not healthcare entities subject to other employee vaccine requirements.

21. For example, CEA has a Member located in Arkansas with over 300 employees (CEA's Arkansas Member).

22. CEA's Arkansas Member is a for-profit business that adheres to CEA's Christian Values.

23. CEA's Arkansas Member has a substantial number of employees who are unvaccinated, and some of those employees are unvaccinated because of their conscientious objections.

24. CEA's Arkansas Member, like CEA's other Covered Members, is dedicated to the health and well-being of its employees, physical and spiritual, because it believes the employees have God-given inherent dignity.

25. CEA's Arkansas Member, like CEA's other Covered Members, seeks to exercise its faith in every area of its business.

26. CEA's Arkansas Member, like CEA's other Covered Members, is committed to the principle that God granted the right to exercise faith freely without improper interference from the government.

27. Consequently, CEA's Arkansas Member encourages its employees to get vaccinated for COVID-19, but, like CEA's other Covered Members, CEA's Arkansas Member opposes being forced to either require the employees to be vaccinated against their consciences (because that would be a harm to their dignity), or to be subject to the significant costs of otherwise complying with the mandate or of penalties for noncompliance.

28. CEA's Arkansas Member, like CEA's other Covered Members, opposes the substantial burden on its religious beliefs that the ETS imposes by substantially pressuring the business to coerce its employees to get vaccinated in violation of the employees' consciences.

29. CEA also has several Members around the country that have more than 100 employees and operate as 501(c)(3) nonprofit religious organizations.

30. Many of those members share CEA's Arkansas Member's conviction that employees should not be forced to get vaccinated against their conscientious beliefs. They also fear losing committed, trained employees due to a vaccination or testing requirement from the federal government.

CEA's Stance on the OSHA Vaccination Mandate

31. CEA is not opposed to COVID-19 vaccines.

32. CEA is opposed to improper interference from the government in CEA's Members' operating activities.

33. Under CEA's Christian Values, CEA Members exercise their faith through all aspects of their business, including how they treat their employees.

34. According to CEA's Christian Values, CEA Members exercise their religious liberty in all aspects of how they carry out their business.

35. CEA's Members are committed to treating their employees with dignity, including refraining from engaging in improper coercion of their consciences.

36. Therefore, it is one of CEA's goals to represent the interests of its Members against actions such as OSHA's unlawful vaccine mandate.

The Costs of OSHA's Unlawful Vaccine Mandate

37. For the dozens of CEA Members with more than 100 employees, including the CEA Arkansas Member, they are covered by the recently issued Emergency Temporary Standard ("ETS") of the Occupational Safety and Health Administration ("OSHA").

38. CEA's Members covered by the ETS are referred to herein as "CEA's Covered Members."

39. The ETS forces each of CEA's Covered Members to administer its requirements.

40. The costs of the ETS to CEA's Covered Members, including CEA's Arkansas Member specifically, will be substantial.

41. OSHA's ETS mandates that CEA's Covered Members keep records to demonstrate compliance. This means that CEA's Covered Members' administrative and other staff will need to devote precious time, personnel, and resources to collect, verify, and record vaccination and/or testing information.

42. Because such information will contain employees' sensitive health information, such an endeavor will involve an implementation of careful policies and training.

43. Implementing those requirements will entail significant additional resources, time and expense for CEA's Covered Members.

44. The ETS itself estimates millions of dollars in compliance costs for covered employers, including but not limited to: the "Employer Policy on Vaccination, Information Provided to Employees, and Rule Familiarization"; "Support for Employee Vaccination;" "Reporting COVID-19 Fatalities and Hospitalizations to OSHA," and "Recordkeeping." ETS at 246, 256, 273, and 276.

45. The employees of CEA's Covered Members will be forced to devote a significant amount of time and/or effort to comply with the ETS.

46. Unvaccinated employees will need to comply with the ETS as imposed on them through their employer. One way they may do so is by receiving the vaccine, often in violation of their deeply held convictions.

47. CEA's Covered Members will be required to be the instrument by which that part of the ETS is implemented, implicating CEA's Covered Members in burdening the consciences of some of their employees.

48. Complying with the ETS by receiving the vaccine will involve a loss of work time for trips to receive vaccine doses, loss of time for any short-term side effects such as flu symptoms that are common for receipt of vaccine doses, and loss of time as well as possible workers' compensation costs for any less-common adverse events that employees suffer from receipt of the vaccine.

49. As an alternative, if employees comply with the ETS by engaging in weekly testing, the employees will have to undergo a significant commitment of time and resources in receiving tests and results, and transmitting the results of the test to CEA's Covered Members.

50. Under the ETS, either the employer or the employee will have to pay the costs of weekly testing. If the employer pays, this will be a significant cost on the employer. If the employer makes the employees pay, this will impose significant costs on the employees, it will increase the coercive pressure on the employees to get vaccinated in violation of their conscience, and it will incentivize employees to leave the job because of the burdens and costs of testing.

51. CEA's Covered Members will incur significant expenses from complying with the ETS with respect to employees who comply by weekly testing if the employers pay for testing as might be necessary to retain employees and minimize pressure imposed on them, in the form of

costs of testing, costs of time for employees to obtain tests and test results and keeping records of test results.

52. In order to comply with the ETS either for vaccination or for testing, CEA's Covered Members will incur significant expenses from development of a policy to implement the ETS requirements, review by management of the ETS, related regulations, and subsequent guidance to ensure an understanding of the ETS's requirements, legal fees to ensure proper compliance with the ETS's requirements, training of staff to implement the policy, and compliance with investigatory requests by OSHA.

53. If CEA's Covered Members do not comply with the ETS, OSHA poses a threat of substantial fines which would injure and could shut down CEA's Covered Members.

54. OSHA's threat of punitive fines for non-compliance with the ETS may force CEA's Covered Members to terminate employees who do not submit to the mandates of the ETS.

55. CEA's Covered Members will therefore incur the human resources costs involved in the disciplinary process of non-compliant employees, their termination, and the process of finding and training new employees.

56. Especially in the current economy where there are labor shortages, the costs of replacing non-compliant employees will be significant for CEA's Covered Members.

57. Moreover, because CEA's Covered Members have a commitment to treat their employees with dignity according to CEA's and the Members' Christian Values, including CEA's Arkansas Member who opposes coercing its employees' consciences on the COVID-19 vaccine, the need to fire non-compliant employees may cause CEA's Covered Members to treat their employees in ways that violate the company's view of the dignity of their employees and their commitment to those employees.

58. For the nonprofit religious organizations that are among CEA's Covered Members, all of their resources are devoted to engaging in an overtly religious mission of ministry, education, expression, and Christian witness.

59. All of the ETS's burdens on the nonprofit religious organizations that are among CEA's Covered Members impose a substantial burden on those entities' religious exercise.

60. The need to fire any employee for non-compliance among those entities will violate their choice to engage in their religious exercise through the selection of each unique employee to fulfill its religious mission.

61. As religious organizations, the nonprofit religious organizations that are among CEA's Covered Members strongly believe that they should have autonomy in hiring their employees.

62. The ETS is already imposing its costs on CEA's Covered Members because it goes into effect immediately upon publication. Notwithstanding the 30 day or 60 day compliance deadlines for its various provisions, in order for employers to achieve full compliance by those dates, the Covered Members must begin developing and implementing compliance policies immediately in order to be considered compliant by OSHA within the timeframes allowed.

63. The costs the ETS imposes on CEA's Covered Members are irreparable because the Covered Members cannot recover their financial costs from OSHA, and the requirements leading them to treat their employees inconsistent with Christian Values, fire some employees, and lose key staff to fulfill their missions cannot be compensated financially.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Executed on November 4, 2021

Shannon O. Royce

DECLARATION OF KYLE L. GROOS

I, Kyle L. Groos, swear or affirm as follows:

1. I am over the age of 21 years of age and competent to testify to the matters attested herein.

2. I am the President of the Sioux Falls Catholic Schools—which conducts business as Bishop O'Gorman Catholic Schools ("Bishop O'Gorman")—and have held this position since July 2017.

Bishop O'Gorman Catholic Schools and Its Religious Mission

3. Bishop O'Gorman is a consolidated school system within—and constitutes a ministry of—the Diocese of Sioux Falls.

4. The Diocese of Sioux Falls is one of the two Dioceses of the Catholic Church located in the State of South Dakota. The Diocese includes 121 local parishes and has been serving the spiritual and sacramental needs of the Sioux Falls area for over 125 years. The Diocese touches the lives of the people it serves not only through proclaiming the message of the Gospel but also through offering various teaching ministries, such as Bishop O'Gorman.

5. The Diocese is led and shepherded by the Most Reverend Donald E. DeGrood, who was appointed Bishop of Sioux Falls by Pope Francis on February 13, 2020. As the head of the Diocese, Bishop DeGrood oversees all Diocesan ministries, including Bishop O'Gorman.

6. As the President of Bishop O'Gorman, I directly report to our Board of Directors.

7. The Bishop O'Gorman schools trace their lineage to Dominican sisters who began teaching classes for schoolchildren in South Dakota in 1905. Since then, the Bishop O'Gorman schools have been serving students from cities and towns across the southeastern part of South Dakota and even parts of Minnesota.

8. There are eight schools—six elementary schools, a junior high school, and a high school—within the Bishop O'Gorman system.

9. Catholic schools exist to instill faith in students and to train them "to live the newness of Christian life in justice and in the holiness of truth." Pope John Paul II, *Message of John Paul II to the National Catholic Educational Association of the United States* (Apr. 16, 1979), https://www.vatican.va/content/john-paul-ii/en/speeches/1979/april/documents/hf_jp-ii_spe_19790416_usa-scuola-catt.html.

10. As a Catholic school system, Bishop O'Gorman considers education of students and operation of its schools to be the fulfillment of the Church's mission and the free exercise of our Catholic faith.

11. Our mission is "to form a community of faith and learning by promoting a Catholic way of life through Gospel values and academic excellence."

12. And our vision is to make our Christ-centered community to be "a financially-viable, world-class education for an increasing number of children." We are happy to see an increasing number of students with whom we can share the love of Christ through their education.

13. The Catholic Church teaches that faith and reason complement each other. *The Catechism of the Catholic Church* ¶ 158. God reveals His Truth also through "reason on the human mind" so "[f]aith seeks understanding" in all branches of knowledge. *Id.* ¶ 159.

14. For that reason, in Catholic education—and in Bishop O'Gorman's schools—every subject, even those traditionally thought of as "secular"—are illumined by the light of faith in the pursuit of the Truth.

15. Bishop O'Gorman cannot carry out religious and educational mission without our dedicated Catholic teachers who are convinced of the ideals of Catholic education and intent on teaching by word and example.

16. Our teachers play a key role as they strive to become the best examples and role models as Catholics; they bear witness through their actions to Truth and a Catholic way of life. Our teachers are expected to promote Bishop O'Gorman's mission and model in word and action the teachings of the Catholic Church.

17. For example, teachers accompany students to Weekly Mass and Adoration of the Blessed Sacrament. They also say prayers before school begins each day and offer daily prayers and petitions each class period within the classroom.

18. Staff members also play a crucial role in the spiritual life at Bishop O'Gorman. Our Campus Ministry offers for both teachers, staff, and students an opportunity to attend Spiritual retreats. And teachers and staff model the Catholic faith to the students by serving as Extraordinary Ministers of Holy Communion alongside our priests—and alongside the students—during Mass.

19. And of course, our teachers and staff personnel all contractually agree to adhere to a code of conduct consistent with the Catholic faith.

20. Our schools also cannot function and fulfill its religious mission without the dedicated and talented staff who also play key roles. Operating each school, as well as a consolidated school system, can be a difficult task. We depend on our staff to carry out our Catholic mission as much as we depend on our teachers. Every member of our staff is expected to understand and exhibit the core values of our schools, such as Faith, Unity, Excellence, and Integrity.

21. Bishop O'Gorman hires 329 employees. This includes 181 teachers, 18 administrative staff, and 130 support staff.

The Catholic Church's Stance on Vaccination

22. As a Catholic apostolate located within the Diocese, Bishop O'Gorman is obligated to obey the Church's teachings on faith and morals as well as the guidance of our Bishop.

23. Bishop DeGrood—in conjunction with Bishop Peter M. Muhich of the neighboring Diocese of Rapid City—issued two guidance documents on COVID-19 vaccines, first in December 2020, and again in August 2021.

24. In the August 2021 guidance, the Bishops, through their teaching office, explained the following:

a. As stated by the Vatican with Papal approval, "practical reason makes evident that vaccination is not, as a rule, a moral obligation."

b. The Catholic Church teaches and affirms that "free and informed consent is required prior to . . . vaccination."

c. Consent is free "if one has the ability to decline medical intervention following discernment of relevant information and in accord with one's certain conscience, without coercion or fear of punishment."

d. Catholics are "bound to follow [their] conscience."

e. "There is a general moral duty to refuse medical interventions that are in some way dependent upon cell lines derived from abortions."

f. "However, such are permissible if there is a proportional grave need, no alternatives are available, and one makes one's objection known. Even then, a

well-formed conscience might decline such interventions in order to affirm with clarity the value of human life."

g. "We must not be forced to act contrary to our conscience, *i.e.*, to be compelled to do something we believe to be wrong."

h. "If [a Catholic] thus comes to the sure conviction in conscience that they should not receive [COVID-19 vaccines], we believe this is a sincere religious belief, as they are bound before God to follow their conscience."

25. This statement by the Bishops is, to my knowledge, the first of its kind in the Catholic Diocese of Sioux Falls. Based upon such statement, Bishop O'Gorman has revised policies regarding the vaccination of its students. Bishop O'Gorman currently does not have a policy regarding the vaccination of its teachers and other employees.

26. In speaking with Bishop DeGrood, I understand that the Bishops fully appreciate and mourn that the pandemic brought great suffering for many. At the same time, the Bishops stand firm in their conviction that abortion is an unspeakable and grave evil. However, given the current lack of alternative vaccines free of any link to abortion-dependent cell lines, and the remote connection between the COVID-19 vaccines and the initial abortions that gave rise to the cell lines, the Bishops explained that the Church finds it morally permissible to receive the current vaccines under these circumstances.

27. It is my further understanding that the Bishops are of the position that this does not detract from the Church's teaching that abortion is a grave evil, that Catholics should avoid abortion-dependent medicine if possible, and that vaccination is a matter of free and conscientious choice.

28. To reiterate, it is my understanding from reading the Bishops' statement and speaking with Bishop DeGrood, that the Diocese of Sioux Falls does not categorically reject or disapprove of the vaccines. Quite to the contrary, the Diocese recognizes the objective benefits shown by the vaccines in scientific study, while also affirming that abortion-free alternatives should be developed and preferred, and that the decision to receive COVID vaccination is "intimate and personal."

The Impact of OSHA's Unlawful Vaccine Mandate

29. Bishop O'Gorman hires more than 100 in-person employees.

30. On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") published its Emergency Temporary Standard ("ETS") on COVID-19 vaccination, testing, and masking.

31. The ETS causes Bishop O'Gorman significant and irreparable injuries by forcing it to administer an onerous vaccination, testing, masking, and record-keeping mandate. Enforcement of the ETS would cause Bishop O'Gorman as an employer to violate its Catholic mission and to go against Catholic teaching.

32. It is my understanding that there are unvaccinated employees who work at Bishop O'Gorman.

33. We would not dictate our employees' private health decisions by imposing a requirement and thereby violate their religious freedom and the freedom of conscience which they have been given by God. Doing so would violate not only our employees' Catholic beliefs, but also cause Bishop O'Gorman to go against the Church's teaching about consent having to be given freely as was clarified by Bishop DeGrood very recently. A vaccine requirement as stipulated in the ETS would also intrude on the Church's teaching concerning abortion.

34. We would either have to bear the testing costs ourselves or pass them onto our employees. Both options substantially burden our religious mission and our faith. If we bear the testing costs, the costs will be significant and diverted from our resources that would otherwise go toward providing Catholic education. If we pass the costs to our employees, this will interfere with our ability to attract great faculty and staff who are needed to carry out our religious mission. This cost burden will certainly burden some of the employees' religious and conscientious decisions to remain unvaccinated. That would be contrary to our own Catholic belief regarding conscience. And we may need to reimburse those employees for testing costs.

35. Regardless of who bears the cost of testing, our religious mission and beliefs will be substantially and significantly burdened.

36. If OSHA's regulatory requirements mandate us to keep records to demonstrate compliance with the ETS, this could result in a significant cost to achieve compliance. This would mean that Bishop O'Gorman's administrative and school staff will need to devote precious time, personnel, and resources to collect, verify, and record vaccination and/or testing information. Because such information will contain our employees' sensitive health information, such an endeavor will involve an implementation of careful policies and training. We estimate this record-keeping requirement will entail significant additional resources, time and expense for Bishop O'Gorman.

37. If the ETS's weekly testing and masking requirements apply to Bishop O'Gorman, we also anticipate that our employees will be forced to devote a significant amount of time and effort to comply with the weekly testing requirement.

38. Even the slight loss of employee time and Bishop O'Gorman's expenditure of these additional compliance costs detract from Bishop O'Gorman's core mission to provide Catholic education to the students within the Sioux Falls area.

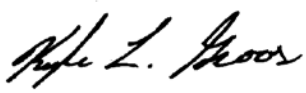
39. Furthermore, OSHA's threat of punitive fines may force Bishop O'Gorman to terminate employees who do not submit to the mandates of the ETS. Again, Bishop O'Gorman hires its teachers and staff to support its mission to provide Catholic education to our students. And we vet and hire teachers with this mission in mind. The ETS could force Bishop O'Gorman to have to terminate excellent, mission-driven employees.

40. The ETS will interfere with—and irreparably injure—our ability to select teachers of Catholic faith and staff within our Catholic education system. Without good teachers and staff who are faithful to the Catholic faith, Bishop O'Gorman cannot carry out its mission to provide Catholic education within the Diocese of Sioux Falls. Nevertheless, the ETS will place a significant burden on our ability to hire good Catholic teachers just because they have chosen to remain unvaccinated for a variety of reasons. Forced to vaccinate or undergo unjust accommodation procedures, Bishop O'Gorman would very probably lose highly-qualified staff members who are essential to Bishop O'Gorman's teaching faculty as those individuals would choose to honor their well formed consciences rather than to submit to the burdensome requirements. In other words, the ETS will hamper Bishop O'Gorman's religious mission.

41. As a religious organization, Bishop O'Gorman strongly believes that it—working with the Diocesan leadership—should have autonomy in hiring faculty and staff.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Executed on November 5, 2021



Kyle L. Groos

DECLARATION OF J. MICHAEL SMITH

I, J. Michael Smith, swear or affirm as follows:

1. I am over the age of 21 years and competent to testify to the matters attested herein.

2. I am the President of Home School Legal Defense Association ("HSLDA") and have held this position since 2000.

3. HSLDA is a 501(c)(3) nonprofit corporation incorporated in the District of Columbia.

4. HSLDA is a non-profit, public interest law firm that exists to advance and protect the freedom to homeschool, serving any parent who has the legal right to homeschool.

5. HSLDA provides legal protection for the right to homeschool, as well as educational support and community for homeschooling families. HSLDA advocates for homeschool freedom in courts around the country, state legislatures, and in the public arena.

6. HSLDA is a Christian organization guided by a Statement of Faith that all Board Members and employees must assent to.

HSLDA's Membership

7. HSLDA has almost 108,000 member families who reside in all 50 states.

8. HSLDA has approximately 750 member families in Arkansas; 1,200 member families in Iowa; 2,300 member families in Minnesota; 3,900 member families in Missouri, 1,000 member families in Nebraska; 470 member families in North Dakota; and 500 member families in South Dakota.

9. All of these member families can call on HSLDA for free assistance surrounding homeschool related legal issues as part of their membership.

The Impact of OSHA's Unlawful Vaccine Mandate

10. HSLDA employs over 200 full- and part-time employees.

11. Our employees currently consist of 95 full-time employees and 109 part-time employees. Over 100 of these employees come into the office at least once a week.

12. Because HSLDA employs more than 100 in-person staff members, it is covered by Occupational Safety and Health Administration ("OSHA")'s recently issued Emergency Temporary Standard ("ETS").

13. Forcing HSLDA to administer the vaccination, testing, and masking mandates in the ETS will cause significant and irreparable injuries to HSLDA.

14. HSLDA believes it is not our place to second-guess the medical decisions of our employees, nor force employees to make or change certain medical decisions.

15. It is my understanding that there are both vaccinated and unvaccinated employees who work at HSLDA.

16. While HSLDA has implemented various measures to mitigate and monitor the presence of COVID-19 at the workplace, it has not mandated vaccination on its staff.

17. We would not mandate vaccination and dictate our employees' private health choices that implicate their conscience and religious beliefs.

18. Following the well-established position within the Christian tradition, HSLDA regards liberty of conscience as a core dimension of theological and personal integrity.

19. If the ETS mandates us to administer the weekly testing requirements, we expect that the cost would be significant.

20. We would either have to bear the testing costs ourselves or pass them onto our employees. Both options substantially burden our mission and guiding faith. If we bear the testing costs, the costs will be significant and diverted from our resources that would otherwise go toward

legal or support services for our members. If we pass the costs to our employees, this will interfere with our ability to attract qualified staff who are needed to carry out our mission. This cost burden will certainly burden some of the employees' religious and conscientious decisions to remain unvaccinated. That would be contrary to our own Christian belief regarding conscience. And we may need to reimburse those employees for testing costs.

21. Regardless of who bears the cost of testing, our religious mission and beliefs will be substantially and significantly burdened.

22. If OSHA's regulatory requirements mandate us to keep records to demonstrate compliance with the ETS, this could result in a significant cost to achieve compliance. This would mean that HSLDA's administrative staff will need to devote precious time, personnel, and resources to collect, verify, and record vaccination and/or testing information. Because such information will contain our employees' sensitive health information, such an endeavor will involve an implementation of careful policies and training. We estimate this record-keeping requirement will entail significant additional resources, time, and expense for HSLDA.

23. Even the slight loss of employee time and resources—to enforce the vaccination, testing, and/or masking mandates—will detract from HSLDA's mission of tirelessly advocating for the right to homeschool and encouraging our member families who do so.

24. Furthermore, OSHA's threat of punitive fines may force HSLDA to terminate employees who do not submit to, or comply with, the mandates of the ETS.

25. The ETS will interfere with—and irreparably injure—HSLDA's ability to select and retain employees who share our mission. If HSLDA is required to enforce a mandate that all employees vaccinate, test, and/or mask, it is my understanding that a number of our employees

will quit. These employees have religious objections to vaccination and do not want to wear a scarlet letter. Without good staff members, HSLDA will not be able to carry out its mission.

26. As a religious employer, HSLDA strongly believes that it should have autonomy in hiring and staff.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Executed on 11/5, 2021

J. Michael Smith