No. 21-4033

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY and ASBURY THEOLOGICAL SEMINARY

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DOUGLAS L. PARKER, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health, U.S. DEPARTMENT OF LABOR, and MARTIN J. WALSH, in his official capacity as Secretary of Labor,

Respondents.

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

PETITIONERS' CORRECTED EMERGENCY MOTION FOR STAY

ACTION REQUESTED BY 5:00 P.M. FRIDAY, NOVEMBER 12, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, The Southern Baptist Theological Seminary and Asbury Theological Seminary make the following disclosure:

1. The Southern Baptist Theological Seminary is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

2. Asbury Theological Seminary is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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INTRODUCTION[1]

Petitioners The Southern Baptist Theological Seminary and Asbury Theological Seminary respectfully request the Court to stay the Occupational Safety and Health Administration ("OSHA")'s Emergency Temporary Standard ("ETS") published on November 5, 2021. *COVID-19 Vaccination and Testing: Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910 *et seq.*) (Ex. 1). Because the ETS is effective already and because Petitioners must immediately undertake efforts to comply with its aggressive enforcement deadlines, Petitioners request that the Court issue an immediate administrative stay while it considers this motion. Petitioners also respectfully request that the Court rule on this motion by 5:00 p.m. Friday, November 12, 2021.

This is a case of unprecedented federal overreach. Under threats of heavy penalties, the ETS forces private employers—including religious institutions—to ensure that their employees are either vaccinated or tested weekly and masked.

The ETS represents a breathtaking encroachment of federal power into the employment decisions of private religious institutions. It empowers OSHA to commandeer religious institutions to enforce federal mandates on their own ministers and employees—many of whom may have sincere religious and conscientious objections to the government's mandate. In doing so, the federal government will force religious

[1] This corrected motion withdraws and substitutes ECF No. 9.

institutions to divert resources away from their religious missions. And it will directly interfere with those institutions' internal management and employment decisions.

Yet it is doubtful whether the OSH Act even allows OSHA to exercise jurisdiction over religious institutions in the first instance. Moreover, the surveillance and compulsion of employees' healthcare required by the ETS is a serious intrusion on religious autonomy and free exercise that cannot withstand scrutiny under the First Amendment and the Religious Freedom Restoration Act ("RFRA").

Also, how OSHA promulgated the ETS was highly irregular. Rather than going through Congress, President Biden unilaterally announced a nationwide vaccine mandate for 80 million individuals. This came almost two years after the country's initial encounter with COVID-19, after the country has learned to adapt and mitigate the effects of the disease, and after 78.4% of U.S. population has already received at least one dose of COVID-19 vaccines.[2] Perhaps for those reasons, as late as July 23 of this year, the White House stated that mandating vaccines is "not the role of the federal government."[3]

Despite this, President Biden told OSHA to invoke its powers under the Occupational Safety and Health Act ("OSH Act") of setting *emergency*

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[2] CDC, *COVID Data Tracker* (last visited Nov. 5, 2021), https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

[3] White House Press Briefing (July 23, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/.

standards to address new *occupational* hazards with no public comment. OSHA dutifully complied.

That is an abuse of executive power. "A stay allows for a more deliberate determination whether this exercise of Executive power . . . is proper under the dictates of federal law." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on other grounds In re U.S. Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018). The Court should immediately stay the ETS pending judicial review.[4]

BACKGROUND

I. Standard-setting provisions under the OSH Act

Congress enacted the OSH Act to address "personal injuries and illnesses arising out of work situations." 29 U.S.C. § 651(a). Congress allowed OSHA to promulgate an "occupational safety or health standard" after public comment. *Id.* § 655(b).

Congress also allowed OSHA to promulgate an emergency temporary standard without public comment. *Id.* § 655(c)(1). An ETS becomes effective when published in the Federal Register. *Id.* § 655(c)(3). The bar to issue an ETS is high. OSHA must determine "(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

[4] Given the immediate effect of and short compliance deadlines in the ETS, seeking a stay from OSHA would be impracticable and futile. Fed. R. App. P. 8. Counsel notified OSHA of its intent to seek relief by email but have not received a response.

from such danger." *Id.* § 655(c)(1). An ETS is "the most drastic measure in [OSHA's] standard-setting arsenal." *Pub. Citizen Health Res. Grp. v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983).

An ETS is effective for six months after publication, at which time OSHA must complete a permanent standard-setting. 29 U.S.C. § 655(c)(3). Furthermore, OSHA's findings must be "supported by substantial evidence in the record considered as a whole." *Id.* § 655(f). Courts "take a 'harder look' at OSHA's action than [it] would if [it] were reviewing the action under the more deferential arbitrary and capricious standard." *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984).

An ETS carries "the force of law." *Id.* at 417. Under the OSH Act, employers have a general duty to provide a safe workplace free of "recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). In addition, employers have a specific duty to comply with OSHA standards. *Id.* § 654(a)(2). The OSH Act authorizes OSHA's inspectors to enter, inspect, and investigate a workplace during regular work hours and to issue citations for violations. *Id.* §§ 657(a), 658(a).

II. The OSHA mandate

On November 5, 2021, OSHA published the ETS on COVID-19 vaccination. It "covers all employers with a total of 100 or more

employees." 29 C.F.R. § 1910.501(b)(1).[5] It imposes several onerous requirements.

Mandatory vaccination policy requirement. The ETS requires a covered employer to develop, implement, and enforce either a written mandatory vaccination policy or an alternative testing and masking policy. *Id.* § 1910.501(d)(1). "[E]ach employee" must "be fully vaccinated," unless he qualifies for medical or religious exemptions and reasonable accommodations. *Id.* § 1910.501(c) ("*Mandatory Vaccination Policy*"). Employers must provide paid time off for employees to get vaccinated and for recovery from side effects. *Id.* § 1910.501(f).

Alternatively, the employer must oversee regular testing and mandatory masking for its unvaccinated employees. "The employer is exempted from [the mandatory vaccination policy requirement] . . . only if [it] establishes, implements, and enforces a written policy allowing any employee to . . . provide proof of regular testing for COVID-19 . . . and wear a face covering." *Id.* § 1910.501(d)(2).

Vaccination status determination requirement. Whether or not an employer chooses the mandatory vaccination or alternative program, it "must determine the vaccination status of each employee" and "whether the employee is fully vaccinated." *Id.* § 1910.501(e)(1). This requires the employer to comply with record-keeping requirements

[5] For simplicity, Petitioners refer to OSHA's proposed Code of Federal Register citations.

for sensitive medical records. *Id.* § 1910.501(e)(4). This determination must be made by December 4, 2021. *Id.* § 1910.501(m)(2).

Testing & Masking Requirements. Even if an employer does not mandate vaccination, it must still verify the vaccination status of its employees and subject its employees to mandatory testing and masking requirements. *Id.* § 1910.501(e), (d)(2).

"An [unvaccinated] employee who reports at least once every 7 days to a workplace" must be tested "at least once every 7 days" and "[m]ust provide documentation . . . no later than the 7th day following [the last test]." *Id.* 1910.501(g)(1). The employee cannot use a self test, unless proctored, so she must generally go to a testing center. *Id.* §1910.501(c) ("*COVID-19 test*"). "If an employee does not provide [test results], . . . the employer must keep that employee removed from the workplace until [she] provides a test result." *Id.* § 1910.501(g)(2).

The ETS requires the employer to either bear the cost of employees' testing or to pass it onto the employees. *Id.* § 1910.501(g) (note 1). The employer must keep the test results as sensitive medical records. *Id.* § 1910.501(g)(4).

Also, "[t]he employer must ensure that each [unvaccinated] employee . . . wears a face covering when indoors" at work and "fully cover [her] nose and mouth." *Id.* § 1910.501(i).

Compliance dates and penalties. "Employers must comply with all requirements," except the testing requirements, by December 4, 2021. *Id.* § 1910.501(m)(2). By then, an employer must develop a policy,

determine employees' vaccination status, and start enforcing the masking requirement. Employees will have until January 4, 2021 to get fully vaccinated, and the employer must test unvaccinated employees from then on. *Id.* § 1910.501(m)(2)(ii).

The ETS will enable OSHA to impose severe penalties for non-compliance. OSHA's latest penalty guidelines imposes a penalty of up to $13,653 per violation, or $136,532 per willful violation.[6] Under the ETS, each non-compliant employee may constitute a violation.

ARGUMENT

The Court should immediately stay the ETS. To issue a stay, the Court considers (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm absent a stay, (3) the prospect of harm to others if the Court grants the stay, and (4) the public interest in granting the stay. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These "are not perquisites" but "interrelated considerations that must be balanced together." *Griepentrog*, 945 F.2d at 153.

I. Petitioners are likely to succeed on the merits.

Petitioners are likely to succeed for three reasons. *First*, OSHA lacks jurisdiction over religious non-profit institutions. *Second*, the ETS was unlawfully promulgated. *Third*, the ETS violates the First Amendment and RFRA.

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[6] *See* DOL, *OSHA Penalties* (last visited Nov. 5, 2021), https://www.osha.gov/penalties.

A. OSHA lacks jurisdiction over religious institutions.

As a threshold matter, OSHA lacks jurisdiction to regulate religious non-profit institutions. The ETS purportedly applies to all employers with 100 or more employees without a distinction between religious institutions and other private employers. OSHA generally claims jurisdiction over all religious institutions so long as they engage in "secular activities" and unless they only perform "religious services." 29 C.F.R. § 1975.4(c)(1).

OSHA's assertion of jurisdiction is impermissible for two reasons. *First*, jurisdictional line-drawing based on a secular-religious distinction entangles OSHA to decide inherently religious matters. *Second*, the OSH Act does not clearly authorize OSHA to exercise jurisdiction over religious institutions.

1. OSHA cannot assert jurisdiction based on a secular-religious distinction.

The ETS is premised on OSHA's assertion of jurisdiction over "[c]hurches and religious organizations . . . where they employ one or more persons in *secular activities*." 29 C.F.R. § 1975.4(c)(1) (emphasis added). OSHA does not treat "[a]ny person" who "perform[s] *religious services* or participat[es] in them in any degree . . . as an employer or an employee." *Id.* (emphasis added). But OSHA does not define what constitutes "secular activities" or "religious services." *See id.* And OSHA provides as an example of a covered entity "a private school . . . owned or operated by a religious organization." *Id.* § 1975.4(c)(2)

Courts have repeatedly rejected this kind of line-drawing. "These determinations threaten to embroil the government in line-drawing and second-guessing regarding [religious] matters about which it has neither competence nor legitimacy." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008).

There is an obvious "difficulty of judicially deciding which activities of a religious organization [are] religious and which [are] secular" because "a judge would not understand [an institution's] religious tenets and sense of mission." *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 830 (D.C. Cir. 2020) (quoting *University of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002)). "The 'very process' of such an inquiry . . . would 'impinge on rights guaranteed by the Religion Clauses.'" *Id.* at 835 (quoting *Great Falls*, 278 F.3d at 1341); *see also Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring in the judgment) (religious-secular inquiry disrupts a religious group's activities and "self-definition").

Cases rejecting the secular-religious line-drawing by the National Labor Relations Board ("NLRB") are instructive. To avoid the risk of interfering with Catholic schools' religious autonomy, the Supreme Court held in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 504 (1979), that NLRB cannot exercise jurisdiction over church-run schools. In doing so, the Supreme Court rejected NLRB's distinction between "completely religious" and "merely religiously associated" schools as it "provide[d] no workable guide to the exercise of discretion." *Id.* at 495. Courts similarly

rejected NLRB's subsequent and renewed attempts to assert jurisdiction. *See Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 398 (1st Cir. 1985) (evenly divided en banc) (Breyer, J.) (rejecting the inquiry whether religious schools "seek[] primarily to provide . . . a secular education"); *Great Falls*, 278 F.3d at 1337 (rejecting the inquiry whether the schools are of "substantial religious character"); *Duquesne*, 947 F.3d at 833-34 (rejecting the inquiry whether schools provide "religious educational environment").

OSHA's line-drawing is similarly problematic. "What counts as a 'religious . . . service'?" *Colo. Christian*, 534 F.3d at 1265. The only guidance that OSHA provides are a handful of circular examples. According to OSHA, religious organizations outside OSHA's reach include "[c]lergymen while performing or participating in religious services." *Id.* § 1975.4(c)(2). This "provides no workable guide to the exercise of discretion." *Cath. Bishop*, 440 U.S. at 495. Congress could not have delegated an unfettered discretion to OSHA to decide what constitutes "religious services" and what it means to "participate" in them. *Cf. Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2382 (2020) (noting a possible delegation issue with the "breadth" of the agency's discretion to decide exemptions for the contraceptive mandate).

2. The OSH Act does not clearly authorize OSHA's exercise of jurisdiction over religious institutions.

OSHA's jurisdictional grab is especially problematic because the OSH Act does not clearly authorize OSHA to exercise jurisdiction over religious institutions in the first place. And there are "consequent serious

First Amendment questions that would follow" from OSHA's interference with the religious institutions' missions and management decisions. *Cath. Bishop*, 440 U.S. at 504 (denying NLRB's jurisdiction).

The First Amendment recognizes religious autonomy and "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). The religious autonomy doctrine broadly guarantees religious institutions' "independence from secular control or manipulation," *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), and "autonomy with respect to 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). Only "a component of this autonomy is the selection of the individuals who play certain key roles." *Id.* Properly understood, religious autonomy broadly ensures that "a religious community defines itself"—including by determining what "activities are in furtherance of" its mission and who gets to "conduct them." *Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment).

When an agency's organic statute contains "broad terms" that raise "serious First Amendment questions," courts narrowly construe the statute if "[t]here is no clear expression of an affirmative intention of Congress" for the agency to exercise jurisdiction over religious institutions. *Cath. Bishop*, 440 U.S. at 504.

For example, the Supreme Court concluded that the National Labor Relations Act ("NLRA") did not clearly authorize NLRB's exercise of

jurisdiction over Catholic schools. *Id.* The Court observed that NLRB would entangle itself with the "terms and conditions of employment" of teachers and "nearly everything that goes on" at the schools. *Id.* at 502-03. To avoid the "significant risk" of violating the First Amendment, the Court narrowly construed the NLRA to bar NLRB's jurisdiction. *Id.* at 502, 504.

Here, broadly construing the OSH Act—and thus enabling OSHA to impose the ETS's requirements on religious institutions—would violate the First Amendment. *See id.*

If applied to Petitioners, the ETS violates the religious autonomy doctrine by effectively setting the "terms and conditions of employment" to work for Petitioners, *id.* at 502, and interfering with their ability to "select[] . . . the individuals who play certain key roles," *Our Lady*, 140 S. Ct. at 2060. Petitioners are seminaries that exercise their Christian faith by educating and training pastors. Jonathan Austin Decl. ¶ 6 (Ex. 2); Bryan Blankenship Decl. ¶ 7 (Ex. 3).

Petitioners' faculty are clearly "ministers," and there are other staff who play key roles and would fall under the ministerial exception. Austin ¶¶ 4, 30; Blankenship ¶¶ 4, 22. The mandate requiring them to get vaccinated or subjected to weekly testing effectively imposes employment conditions akin to the "various Acts of Uniformity . . . which dictated" that the ministers subscribe to certain beliefs (*e.g.*, no moral qualms regarding vaccination) and obtain licenses (*e.g.*, proof of vaccination or weekly tests). *See Our Lady*, 140 S. Ct. at 2061. And the interference

with Petitioners' ability to hire *any* employee to "conduct" "activities . . . in furtherance of" their religious missions violates religious autonomy. *See Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment).

OSHA effectively commandeers Petitioners—religious seminaries—as deputies to carry out the vaccination, testing, and/or masking mandates. Under a threat of heavy fines, the ETS coerces Petitioners to turn on their own employees. To ensure compliance, Petitioners must probe their employees' intimate and personal medical decisions that likely implicate their religious beliefs. Austin ¶ 15; Blankenship ¶¶ 14-15, 19. And OSHA inspectors will be authorized to inspect these seminaries' books, opening the door for OSHA to entangle itself with "nearly everything that goes on" at the seminaries. *Cath. Bishop*, 440 U.S. at 503. This is precisely the "secular control or manipulation" that the First Amendment prohibits. *Kedroff*, 344 U.S.at 116.

Petitioners also consider their religious education work to be an exercise of their Christian faith. Austin ¶ 6; Blankenship ¶ 7. The ETS thus interferes with Petitioners' free exercise.

To avoid these First Amendment violations, the Court should narrowly construe the OSH Act. Like the NLRA, the OSH Act does not clearly authorize OSHA's exercise of jurisdiction over religious institutions. The OSH Act defines an "employer" as "a person engaged in a *business* affecting commerce who has employees." 29 U.S.C. § 652(5) (emphasis added). Although this definition is "[a]dmittedly" "broad"—

like the similar NLRA provisions[7]—it does not clearly cover religious institutions. *Cath. Bishop*, 440 U.S. at 504. Congress knows how to speak clearly and directly address religious institutions if it wishes, within the bounds of the First Amendment. *See, e.g.*, 26 U.S.C. §§ 1402(g) (certification of religious sects for tax purposes); 5000A(d)(2) (religious exemption under the Affordable Care Act). It has not done so here.

B. The ETS was unlawfully promulgated.

Even if OSHA could exercise jurisdiction over religious institutions, the ETS was unlawfully promulgated for two reasons. *First*, it exceeded OSHA's statutory authority. *Second*, OSHA failed to satisfy the requirements under the OSH Act.

1. The ETS exceeds OSHA's statutory authority.

The OSH Act does not authorize OSHA to promulgate a nationwide "vaccinate-or-test/mask" mandate.

Plain text. The plain text of the OSH Act does not allow such powers. Congress created OSHA and the Department of Labor to regulate the *workplace*, not to impose sweeping *public health* measures. *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442 (4th Cir. 1985). OSHA is not the CDC, nor is the Department of Labor, HHS. *Cf. Yates v. United States*, 574 U.S. 528, 551 (2015) (Alito, J., concurring in the judgment) (relying on titles as textual clues).

[7] The NLRA defines an "employer" to include "any person acting as an agent of an employer" and "employee" to "include any employee." 29 U.S.C. §§ 152(2), (3).

The OSH Act concerns "*occupational* safety or health standard[s]," 29 U.S.C. § 655(a) (emphasis added); *see also* 29 U.S.C. § 651(a) (Congress focused on "personal injuries and illnesses *arising out of* work situations" (emphasis added)). And the ETS-provision is specifically concerned with "substances or agents determined to be toxic or physically harmful or . . . new hazards." 29 U.S.C. § 655(c)(1)(A).

The text cannot be naturally read to authorize mandatory vaccination or alternative mandates to curtail a disease outbreak happening *outside* the workplace by mandating that employees undergo medical procedures *outside* the workplace. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012) (preferring a "far more natural" reading of statutory terms).[8]

The government recently confirmed Petitioners' reading of the OSH Act. In a May 29, 2020 letter from Principal Deputy Assistant Secretary of Labor Loren Sweatt, which denied AFL-CIO's request for the issuance of a COVID-19-related ETS, OSHA observed that "SARS-CoV-2 is not uniquely a workplace hazard." Ex. 4, at 69. The Department of Labor agreed that "[t]he OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown

[8] Although OSHA's "bloodborne-pathogen rule," requiring employers to make Hepatitis B vaccines *available*, was upheld, *see Am. Dental Ass'n v. Martin*, 984 F.2d 823, 830–31 (7th Cir. 1993), this rule did not *mandate* vaccination. *See id.* at 826. Moreover, OSHA used the notice-and-comment procedure, not the emergency procedure. *Id.* at 824. Lastly, Congress retroactively approved the rule, resolving doubt concerning OSHA's authority for this rule. *See* Pub. L. No. 106-430 (2000).

infectious diseases on an emergency basis without notice and comment." Ex. 4, at 33-34. "The law hasn't changed, only an agency's interpretation of it." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Statement of Gorsuch, J.).

Interpretative canons. Even if the statutory text were ambiguous, OSHA's position still falters. Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

At least 80 million Americans are expected to be subject to OSHA's mandate. And OSHA itself estimates that compliance will cost almost *$3 billion*. 86 Fed. Reg. 61495. And the issue of mandatory vaccination has obviously been a topic of critical social and political debate, and it implicates matters of sincere religious and conscientious beliefs of many. Austin ¶ 21; Blankenship ¶ 14. "This is exactly the kind of power" that requires a clear Congressional authorization. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Yet, there is none.

And the ETS invokes preemption and "intrudes into an area that is the particular domain of state law": health regulations. *Id.* at 2489; *see also Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern"). 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*, 141 S. Ct. at 2485 (emphasis added) (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020)). There is no such "exceedingly clear language" in the OSH Act.

Interpreting the OSH Act to authorize a nationwide vaccine mandate also violates Article I and the Commerce Clause. Article I, Section 1 of the Constitution states that "[a]ll legislative Powers . . . shall be vested in a Congress." U.S. Const. art. I, § 1. It does not "permit Congress to delegate them to another branch of the Government." *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring in the judgment). Furthermore, interpreting the OSH Act in such a way violates the Commerce Clause by regulating "inaction" and "bring[ing] countless decisions an individual could *potentially* make within the scope of federal regulation." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

2. OSHA failed to justify the ETS under the OSH Act.

To issue an ETS, OSHA must determine that an ETS is necessary to protect employees from the grave danger of exposure to toxic substances and agents or new hazards. 29 U.S.C. § 655(c)(1). OSHA failed to do so.

First, OSHA has severely undermined the finding of "gravity" by exempting employers with fewer than 100 employees. If COVID-19 is a dangerous "new hazard" that warrants an emergency action, why leave

these employees unprotected? Such a contradiction is not "reasonable . . . under the state of the record." *See Fla. Peach Growers*, 489 F.2d at 129. OSHA concedes that this was because it was "less confident that smaller employers can [implement the ETS] without undue disruption." 86 Fed. Reg. 61403. "[A]dministrative capacity" concerns have nothing to do with emergency and grave danger. *Id.*

Second, there is no substantial evidence to support the conclusion that the vaccine mandate is "necessary." Again, OSHA has exempted employers with fewer than 100 employees and requested comments regarding expanding the ETS to them. This shows that an ETS is not necessary. Moreover, OSHA recently noted that the "[e]nforcement of existing [general duty] requirements, paired with OSHA's publication of extensive COVID-19 guidance, can substantially reduce the hazard of COVID-19, and provides a superior method. . . than the issuance of an ETS." Ex. 4 at 66-67. This previous position "indicate[s] the strength of the evidence contrary to [OSHA's current] determination." *Fla. Peach Growers*, 489 F.2d at 129. If OSHA is changing its position after having had time to think, this still shows "no emergency existed and that there was no justification for use of an [ETS]." *Id.*

In sum, OSHA "cannot use its ETS powers as a stop-gap measure." *Asbestos Info. Ass'n*, 727 F.2d at 422. But this is exactly what OSHA has done here. The ETS should be stayed and set aside.

C. The ETS violates the First Amendment and RFRA.

The also ETS violates the First Amendment and RFRA. First, the ETS violates the religious autonomy doctrine and free-exercise rights by interfering with Petitioners' religious mission, internal management, and employment decisions. *Supra* pp. 10-14; *see also Our Lady*, 140 S. Ct. at 2061; *Kedroff*, 344 U.S. at 116.

The ETS also violates RFRA. RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion" without showing that the action furthers a compelling governmental interest by the least restrictive means. 42 U.S.C. § 2000bb-1(a)-(b). "Congress enacted RFRA . . . to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA's protections cover religious institutions and go "far beyond what [the Supreme] Court ha[d] held [was] constitutionally required." *Id.* at 706, 709. The ETS substantially burdens Petitioners' exercise of religion, and OSHA cannot clear the high threshold to justify that burden.

Substantial burden. The ETS substantially burdens Petitioners' exercise of religion. The government substantially burdens a person's exercise of religion if it "demands that [he] engage in conduct that seriously violates [his] religious beliefs" with the threat of "economic consequences." *Id.* at 720; *see also Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("[A] burden upon religion exists" if the state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.").

OSHA's mandate "demands" Petitioners to comply or face "substantial economic consequences." *Hobby Lobby*, 573 U.S. at 720 ($2,000 in penalty per employee constituted a substantial burden). The ETS carries up to nearly $14,000 in penalty per violation.

Although Petitioners do not oppose the vaccines, their Christian faith requires them to respect their employees' religious decisions to remain unvaccinated and to not burden those beliefs. Austin ¶¶ 15, 21; Blankenship ¶¶ 14-15. If Petitioners decide to incur the employees' testing costs, the cumulative amount will be crushing. If Petitioners pass the testing costs to their employees, Petitioners will burden their employees' religious beliefs and "violate [Petitioners'] beliefs" regarding conscience. *Thomas*, 450 U.S. at 717-18. And while many employees have good-faith religious objections to receiving the vaccine, most (if not all) of those employees likely will not have such objections to testing or masking. Thus, Petitioners necessarily will be forced to penalize those employees for their religious beliefs. In short, the ETS will impermissibly place substantial pressure on Petitioners to "modify [their] behavior" to prefer vaccinated employees. *Id.*

Furthermore, Petitioners exercise their religion by providing seminary training. Austin ¶ 6; Blankenship ¶ 7. The ETS will force Petitioners to take faculty out of classrooms, and staff out of operating the seminaries, for testing on a weekly basis, which will significantly disrupt Petitioners' mission of providing seminary education. Austin ¶¶ 25, 30; Blankenship ¶ 19-20, 22. This burden is substantial—and not

"mere inconvenience"—because Petitioners' faculty and staff are not fungible, and there are no other "feasible alternative[s]" to train pastors and church leaders. *New Doe Child #1 v. United States*, 891 F.3d 578, 590 (6th Cir. 2018). And regardless of who bears the cost of testing, hiring otherwise qualified employees will become more difficult and costly simply based on their vaccination status.

Lack of compelling interest/narrow tailoring. OSHA cannot show a compelling interest or narrow tailoring. The ETS "contains myriad exceptions and accommodations for comparable activities"—thousands of students who attend Petitioners' seminaries and other employers with fewer than 100 employees. *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021).

When the "vast majority" of individuals engaging in similar conduct are exempt, narrow tailoring "falters," *Dahl v. W. Mich. Univ.*, 15 F.4th 728, 735 (6th Cir. 2021). OSHA cannot show a "properly narrowed" "interest in denying an exception" in rulemaking for seminaries like Petitioners. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

II. Petitioners will suffer irreparable harm without immediate relief.

Petitioners will suffer irreparable injuries. The ETS will interfere with Petitioners' religious autonomy and free exercise guaranteed by the First Amendment. *See supra* pp. 10-14. "The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Furthermore, an injury is irreparable "if it is not fully compensable by money damages." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *cf. Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 425 (6th Cir. 2016) ("the waiver of sovereign immunity does not apply to actions seeking money damages." (cleaned up)). "[C]omplying with a regulation later held invalid"—as this ETS most likely will—"almost always produces the irreparable harm of nonrecoverable compliance cost." *Texas v. U.S. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment)). Unless the ETS is immediately stayed, Petitioners will need to incur significant costs to comply with the ETS by implementing the vaccination/testing verification program and possibly paying for weekly testing for its employees. Austin ¶¶ 25-29; Blankenship ¶¶ 19-22. These injuries will not be reparable.

III. The balance of harms and the public interest favor a stay.

The public would greatly benefit from a stay of the ETS. The public has not had the benefit of providing comments before OSHA issued the ETS. Nevertheless, the ETS will affect 80 million Americans and implicate intimate and personal decisions concerning vaccination. "[T]he sheer breadth of the ripple effects . . . counsels strongly in favor of maintaining the status quo for the time being." *In re EPA*, 803 F.3d at 808. OSHA will not be harmed by the stay. OSHA failed to act since

March 2020 and delayed for nearly two months before publishing the ETS. A slight delight will be inconsequential.

CONCLUSION

The Court should stay the ETS.

Respectfully submitted,

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Dated: November 5, 2021

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 5,197 words according to the word count function of Microsoft Word 365.

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/s/ Ryan L. Bangert

Date: November 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Ryan L. Bangert

Date: November 5, 2021