Lead Case No. 21-7000
(Member Case Nos. 21-4033, 21-4088, 21-4097)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In Re: MCP No. 165;

OSHA Rule on COVID-19 Vaccination and Testing

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

RELIGIOUS PETITIONERS' JOINT RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISSOLVE STAY

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INTRODUCTION

The Southern Baptist Theological Seminary, Asbury Theological Seminary, Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools, The King's Academy, Cambridge Christian School, Home School Legal Defense Association, Inc. ("HSLDA"), and Christian Employers Alliance ("CEA") ("Religious Petitioners") request that the Court deny the government's motion to dissolve stay. Dkt. 69 ("Mot.").

The government provides no new reason for this Court to sanction immediate—and highly disruptive—enforcement of a sweeping mandate whose legality is strongly in doubt. It merely seeks to relitigate the Fifth Circuit's stay order. Yet nothing has changed. Allowing enforcement now would quickly place meaningful judicial review far out of reach as employers—including the Religious Petitioners—are forced to remove or terminate objecting employees to avoid crushing penalties.

And relief is warranted because the federal government has vastly overreached. OSHA's mandate inserts federal power into the employment decisions of religious institutions. If the stay is lifted, OSHA will immediately "commandeer[]" religious institutions to enforce federal mandates on their own ministers and employees and "compel" them to "receive a COVID-19 vaccine or bear the burden of weekly testing." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). Without the stay, OSHA will interfere with religious institutions' internal management and employment decisions. And it will force religious institutions to divert resources away from their mission of preaching the Gospel and living out their faith.

The Fifth Circuit ordered that OSHA's mandate be "stayed pending adequate judicial review" and for "OSHA [to] take no steps to implement or enforce the [m]andate until further court order." *Id.* at 619. The government offers nothing persuasive to alter the *status quo*. It asks this Court to scrap two orders of a sister circuit, the second of which fully addressed the same arguments now raised in the government's motion. *See BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021), *aff'd* 17 F.4th at 619. And the government fully briefed its position to the Fifth Circuit on two occasions. *See* 5th Cir. No. 21-60845. Without any persuasive reason, the government asks this Court to ignore "the interest of inter-circuit comity and the concomitant husbanding of scarce judicial resources." *L.A. Cnty. v. Marshall*, 631 F.2d 767, 768 (D.C. Cir. 1980).

Moreover, the stay should remain because OSHA's mandate violates Religious Petitioners' rights. As the government conceded, the "petitioner-specific" arguments could provide a basis for a stay for Religious Petitioners. Dkt. 177, at 33. OSHA has exceeded its statutory authority and violated the First Amendment and the Religious Freedom Restoration Act ("RFRA") by imposing the mandate on Religious Petitioners, impermissibly interfering with their employment decisions and missions, and substantially burdening their faith.

And despite claims of emergency, the government's recent actions confirm that there is no reason to lift the stay. It waited nearly a week after the multi-circuit lottery to move to dissolve the Fifth Circuit's stay.

And just days after filing the motion, the federal government delayed the enforcement of the federal-employee mandate until after the holidays, belying claims of a workplace emergency. The lack of emergency should be unsurprising also because nearly 84% of adults—and 99.9% of seniors—have received at least one dose of COVID-19 vaccines.[1] The stay should remain in place without any modifications.

BACKGROUND

I. The OSHA mandate.

On November 4, 2021, OSHA announced the Emergency Temporary Standard ("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). The ETS requires a covered employer to develop, implement, and enforce either a mandatory vaccination policy or an alternative testing and masking policy. *Id.* § 1910.501(d)(1). 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).

OSHA can impose severe penalties for non-compliance. OSHA's penalty guidelines imposes a penalty of up to $13,653 per violation, or $136,532 per willful violation.[2]

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[1] *COVID Data Tracker*, CDC (last visited Dec. 7, 2021), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr

[2] *See* DOL, *OSHA Penalties* (last visited Dec. 7, 2021), https://www.osha.gov/penalties.

II. Procedural history.

On November 6, 2021, citing "grave statutory and constitutional issues with the [m]andate," the Fifth Circuit issued a temporary administrative stay and ordered the government to file a response by November 8, 2021. *BST Holdings*, 2021 WL 5166656, at *1. The court invited the government to file an additional response by November 10, 2021, which it did. *See* 5th Cir. No. 21-60845. On November 12, 2021, the Fifth Circuit granted a stay pending judicial review and enjoined OSHA from taking "steps to implement or enforce the [m]andate until further court order." *BST Holdings*, 17 F.4th at 619.

On November 16, 2021, the Judicial Panel on Multidistrict Litigation consolidated all cases pending in 12 courts of appeals and designated this Court to hear all these cases. This Court subsequently vacated the briefing schedule for pending stay motions given the Fifth Circuit's stay order. *The S. Baptist Theological Seminary v. OSHA*, No. 21-4033 (6th Cir. Nov. 23, 2021) (Dkt. 24).

ARGUMENT

The Court should deny the government's motion. To start, the government cites to an incorrect standard. Mot. 9. By staying OSHA's mandate, the Fifth Circuit preserved the *status quo* for petitioners. Namely, absent OSHA's mandate, petitioners are free (as they have always been) to require or not require vaccination as a condition of employment based on their own needs, beliefs, and circumstances. As the party seeking to materially alter this *status quo*, the government—not petitioners—must show that it is likely to succeed on the merits, that it is being irreparably injured by the Fifth Circuit's stay, and that equity favors lifting the stay. *See Nken v. Holder*, 556 U.S. 418, 429, 434 (2009); U.S. Opp'n to Mot. Lift or Modify Stay 7, *DHS v. New York*, 19A785 (U.S. Apr. 20, 2020) (When "a motion asks this Court to vacate or lift a stay in a manner that would materially change the status quo, the correct legal standard should be similar to the one that the Court would apply if it were vacating or lifting a lower court's order."). The government fails to show why it is entitled to *this* relief. This alone requires a denial.

The government's substantive arguments fare no better. *First*, the government repeats the same arguments categorically rejected by the Fifth Circuit and offers nothing new or more persuasive. *Second*, the government is unlikely to succeed on the merits as to Religious Petitioners. *Third*, the government's recent actions confirm that the Fifth Circuit's stay is not irreparably injuring the government and equity favors extending the stay without any modifications.

I. The government repeats the same arguments that failed to persuade the Fifth Circuit.

The government is unlikely to succeed on the arguments that failed to persuade the Fifth Circuit. The vaccine-or-test mandate exceeds OSHA's statutory authority. And OSHA failed to properly justify the issuance of an ETS.

A. The mandate exceeds OSHA's statutory authority.

Text. The plain text of the Occupational Safety and Health Act ("OSH Act") does not allow OSHA to issue public health measures like the vaccine-or-test mandate. The OSH Act concerns "*occupational* safety or health standard[s]." 29 U.S.C. § 655(a) (emphasis added); *id.* § 651(a) (Congress focused on "injuries and illnesses arising out of *work situations*" (emphasis added)); *Forging Indus. Ass'n v. Sec'y of Lab.*, 773 F.2d 1436, 1442 (4th Cir. 1985) ("OSHA's authority is limited to ameliorating conditions that exist in the workplace.").

The ETS provision focuses on grave danger "from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1)(A). It is a "transparent stretch" for OSHA to "shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness*." *BST Holdings*, 17 F.4th at 613.

The government previously agreed that "[t]he OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis

without notice and comment." *Id.* at 612 n.14 (internal quotation marks omitted). "The law hasn't changed, only [the] agency's interpretation of it." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Statement of Gorsuch, J.).[3]

The government offers nothing new. *See* Mot. 12-22. Its main point is that COVID-19 constitutes a "physically harmful" "agent[]" under the Act. *Id.* at 13. This misapplies the statute. "[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). The words—"physically harmful" or "agent"—must be read in the context of the entire phrase: "from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1)(A). Interpreting "physically harmful" separately from "toxic" would "ascrib[e] to [it] a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality) (internal quotation marks omitted).

The government also asserts that "[s]tatutes 'often go beyond the principal evil [targeted by Congress],'" such that OSHA has the authority

[3] 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. Pub. L. No. 106-430 (2000).

to impose the vaccine-or-test mandate for nearly 80 million individuals. Mot. 14 (second alteration in original) (quoting *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 79 (1998)). This reading is unmoored from the OSH Act's text, and "[n]o law pursues its purposes at all costs." *Hernandez v. Mesa*, 140 S. Ct. 735, 741-42 (2020) (cleaned up).

Interpretative principles. Various interpretative principles "underscore[] the implausibility of the [g]overnment's interpretation." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).[4]

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) ("*UARG*")). With nearly 80 million employees affected and nearly $3 billion in compliance cost, *see BST Holdings*, 17 F.4th at 617, the government does not seriously dispute that the OSHA mandate carries a vast economic and political significance, *see* Mot. 20-21.

Contrary to the government's assertion, the Fifth Circuit did not "greet" the government's interpretation "with a measure of skepticism," *UARG*, 573 U.S. at 324, just because the OSHA mandate had "nationwide effect[s]," Mot. 21. The court did so because OSHA "claim[ed] to discover in a long-extant statute an unheralded power" to impose a nationwide

[4] Because the text is clear, *Chevron* deference is inappropriate. *See* Mot. 17. And interpretative canons come before *Chevron* deference. *See Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) ("Here, a canon makes the statute's meaning clear. Thus, we reject the agency's contrary interpretation.").

vaccine mandate. *UARG*, 573 U.S. at 324; *see also BST Holdings*, 17 F.4th at 617-18.

Interpreting the OSH Act to authorize a nationwide vaccine mandate also violates Article I and the Commerce Clause. Article I 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); *cf. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687-88 (1980) (Rehnquist, J., concurring in the judgment) (identifying a non-delegation problem in the OSH Act). By claiming authority to dictate national healthcare policy, OSHA has illegitimately seized an uncabined legislative power.

Furthermore, the Fifth Circuit correctly identified grave Commerce Clause issues. *BST Holdings*, 17 F.4th at 617. Accepting the government's view of the Commerce Clause, *see* Mot. 19-20, would "convert" it "to a general police power of the sort retained by the States" that the Supreme Court has rejected since *United States v. Lopez*, 514 U.S. 549, 567 (1995). These constitutional concerns "counsel against adopting OSHA's broad reading." *BST Holdings*, 17 F.4th at 616.

B. OSHA failed to justify the issuance of the mandate.

The government also fails to justify the mandate under the OSH Act. The arbitrary 100-employee threshold—based on "administrative capacity"—belies OSHA's assertion that the mandate was necessary to

protect employees from "grave danger from exposure to [toxic or physically harmful] substances or agents . . . or from new hazards." 29 U.S.C. § 655(c)(1). The Fifth Circuit agreed. It may be true that "companies of 100 or more employe[e]s will be better able to administer (and sustain) the [m]andate. . . . But this kind of thinking belies the premise that any of this is truly an *emergency*." *BST Holdings*, 17 F.4th at 616.

The government erroneously asserts that OSHA does not need to "address all aspects of a problem in one fell swoop." Mot. 27. Here, there is only *one* aspect to one purported problem—employees (regardless of who they work for) are either vaccinated or not. "Administrative capacity" is an arbitrary line to divide what OSHA claims to be an emergency. Although OSHA points to other federal programs (like Title VII which has a 25-employee threshold), *see* Mot. 27, the OSH Act does not *require* such a threshold. The mandate's arbitrary 100-employee threshold belies any emergency.

II. The government is also unlikely to succeed on the merits as to Religious Petitioners.

In addition to the Fifth Circuit's cogent analysis, the government is unlikely to succeed on the merits because it violates Religious Petitioners' rights for three reasons. *First*, OSHA lacks jurisdiction over religious non-profit organizations because they are not "employers" under the OSH Act. *Second*, OSHA's mandate violates the First Amendment. *Third*, the mandate falters under RFRA's strict scrutiny.

A. Religious non-profits are not "employers" under the OSH Act.

1. OSHA lacks jurisdiction to regulate religious non-profit institutions, because they are not "employers" under the OSH Act.

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). Congress did not define the term "business." When Congress does not define a term, courts "normally seek[] to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021).

The term "business"—when used in a commercial context—refers to *for-profit* businesses. *See, e.g.*, *Business*, Ballentine's Law Dictionary (3d ed. 1969) ("[A] commercial enterprise, conducted for monetary reward, as distinguished from a religious or charitable enterprise."); *Business*, Random House Dictionary (Unabridged ed. 1967) ("[T]he purchase and sale of goods in an attempt to make a profit" or "a person, partnership, or corporation engaged in a commerce, manufacturing, or a service; profit-seeking enterprise or concern."); *Business*, American Dictionary of English Language (1970) ("[T]hat which occupies the time, attention and labor of men, for the purpose of profit or improvement."); *see also Business*, Black's Law Dictionary (11th ed. 2019) ("A commercial enterprise carried on for profit."). Therefore, the phrase "a person engaged in a business affecting commerce," 29 U.S.C. § 652(5), refers to for-profit corporations, not churches and religious non-profits.

This interpretation is confirmed by the fact that Congress knows how to broadly define covered entities under the Commerce Clause but has not done so here. For example, the Sherman Act states that "[e]very *person*"—not just an "employer" or "a person engaged in a business affecting commerce"—who conspires to restrain trade or commerce shall be guilty of a felony. 15 U.S.C. § 1. The Sherman Act's broad definition covers non-profit organizations. *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021). And under Title VII, which covers non-profits, Congress broadly defined an "employer" as "a person engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b). "The term 'industry affecting commerce' means any *activity*, business, or industry in commerce." *Id.* § 2000e(h) (emphasis added); *but see* 42 U.S.C. § 2000e-1(a) (exemptions for religious employers).

OSHA has relied on the OSH Act's "purpose" and legislative history to include non-profits under its jurisdiction, *see* 29 C.F.R. §§ 1975.3(d), 1975.4(b)(4), and the vaccine mandate applies this understanding, 29 C.F.R. § 29 C.F.R. § 1910.501(b)(1). However, "the best evidence of a statute's purpose is the statutory text." *Walton v. Hammons*, 192 F.3d 590, 593 (6th Cir. 1999) (cleaned up). The vaccine-or-test mandate exceeds the scope of OSHA's jurisdiction because it covers not only for-profit businesses, but also religious non-profits.[5]

[5] Even without OSHA's intrusive regulations, including the unlawful vaccine mandate, religious institutions deeply care about their workers' safety, may freely institute voluntary safety measures, and/or could be subject to state and local laws. *See* Doug Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1398 (1992)

2. The constitutional-avoidance canon also supports Religious Petitioners' interpretation. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 504 (1979) (narrowly construing the National Labor Relations Act ("NLRA") to avoid the "consequent serious First Amendment questions that would follow" from allowing NLRB to exercise jurisdiction over Catholic schools). As more fully described below, pp. 14-16, interpreting the OSH Act to cover religious non-profits—and to allow OSHA to impose employment conditions—would invite interference with Religious Petitioners' religious mission, internal management, and employment decisions. *See, e.g.*, *Cath. Bishop*, 440 U.S. at 504; *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

OSHA concedes the serious First Amendment issues stemming from OSHA's jurisdictional grab. OSHA's coverage regulation states that, "[a]s a matter of enforcement policy," OSHA disclaims jurisdiction over "[a]ny person" who "perform[] religious services or participate[] in them in any degree." 29 C.F.R. § 1975.4(c)(1). OSHA's attempt to exempt certain religious institutions confirms there are "consequent serious First

("Churches may object to regulation on church autonomy grounds even when their official doctrine seems to support the regulation.").

Amendment questions that would follow."[6] *Cath. Bishop*, 440 U.S. at 504.

B. The OSHA mandate violates the First Amendment.

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*, 344 U.S. at 116, and "autonomy with respect to internal management decisions that are essential to the institution's central mission," *Our Lady*, 140 S. Ct. at 2060. 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).

Religious Petitioners include two evangelical Christian seminaries (The Southern and Asbury Seminaries), a consolidated Catholic school

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[6] This coverage provision is nevertheless unlawful because OSHA usurps the authority to define what constitutes "secular activities" or "religious activities" for a religious institution. 29 C.F.R. § 1975.4(c)(1). "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). "The very process of such an inquiry" violates the First Amendment. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (cleaned up).

system (Bishop O'Gorman), two prominent private Christian schools (The King's Academy and Cambridge Christian School), a faith-based non-profit organization (HSLDA), and a membership organization that represents the interests of religious non-profit organizations (CEA). These organizations exercise their faith by providing seminary training, providing Christian and Catholic education, and operating non-profit ministries. Austin ¶ 6 (Ex. 1); Blankenship ¶ 7 (Ex. 2); Groos ¶ 10 (Ex. 3); Martin ¶ 7 (Ex. 4); Minks ¶ 6 (Ex. 5); Smith ¶ 6 (Ex. 6); Royce ¶ 29 (Ex. 7).[7]

OSHA "commandeers" religious institutions "to compel [their] employees" to comply with the mandate. *BST Holdings*, 17 F.4th at 617. To ensure compliance, religious institutions must probe their ministers' and employees' intimate and personal medical decisions that likely implicate their religious beliefs. This is precisely the "secular control or manipulation" that the First Amendment prohibits. *Kedroff*, 344 U.S.at 116.

In addition, the mandate violates the First Amendment by setting the "terms and conditions of employment" to work for religious institutions, *Cath. Bishop*, 440 U.S. at 502-03, and interfering with their ability to "select[] . . . the individuals who play certain key roles," *Our Lady*, 140 S. Ct. at 2060. The faculty of the seminaries and the Catholic

[7] CEA also represents for-profit members who have free-exercise and RFRA claims. Reference to Religious Petitioners include references to CEA for-profit or non-profit members.

and Christian schools are clearly "ministers" under *Our Lady*, 140 S. Ct. at 2055.

And in those seminaries and schools as well as in other religious non-profit organizations, there are other staff members who "play certain key roles" and fall under the ministerial exception. *Id.* at 2060; *see also* Austin ¶ 30; Blankenship ¶ 22; Groos ¶ 40; Martin ¶ 38; Minks ¶ 33; Smith ¶ 25; Royce ¶ 30. 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 religious organizations' ability to hire *any* employee to "conduct" "activities . . . in furtherance of" their religious missions violates religious autonomy and the co-religionist doctrine. *Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment); *Hall v. Baptist Mem'l Health Care Corp.*, 215F.3d 618, 622-23 (6th Cir. 2000) (acknowledging a "constitutionally-protected interest . . . in making religious-motivated employment decisions); *Little v. Wuerl*, 929 F.2d 944, 945-46 (3d Cir. 1991) (similar).

C. The ETS 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). Those protections cover for-profit and non-profit entities and go "far beyond what [the Supreme] Court ha[d] held [was] constitutionally required." *Id.* at 706. The mandate substantially burdens Religious Petitioners' exercise of religion, and OSHA cannot clear the high threshold to justify that burden.

Substantial burden. 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. 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.").

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

Although Religious Petitioners do not categorically oppose vaccines, their Christian faith requires them to respect their employees' conscience and religious decisions to remain unvaccinated and to not burden those beliefs. Austin ¶ 23; Blankenship ¶ 17; Groos ¶¶ 24, 28; Martin ¶¶ 14, 22; Minks ¶¶ 16, 23; Smith ¶¶ 18, 20; Royce ¶¶ 24, 30-31, 35. And

Religious Petitioners' faith precludes them from burdening their unvaccinated employees' religious beliefs for remaining unvaccinated. *Cf. Hobby Lobby*, 573 U.S. at 691 (employers' desire not to be complicit in providing contraception constituted sincerely held belief); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (explaining that "the contraceptive mandate violated RFRA as applied to entities with complicity-based objections"); Austin ¶ 23; Blankenship ¶ 17; Groos ¶ 34; Martin ¶ 30; Minks ¶ 27; Smith ¶ 20; Royce ¶¶ 28, 47.

If Religious Petitioners pass the testing costs to their employees, Religious Petitioners will burden their ministers' and employees' conscience and religious beliefs and, as a result, "violate [Religious Petitioners'] beliefs" regarding conscience. *Thomas*, 450 U.S. at 717-18; *see also Little Sisters*, 140 S. Ct. at 2383.

If Religious Petitioners decide to incur the employees' testing costs, the cumulative cost of testing the unvaccinated employees for *perpetuity* will be substantial. In *Hobby Lobby*, the Supreme Court found a substantial burden where "the contraceptive mandate force[d] [religious businesses] to pay an enormous sum of money . . . if they insist[ed] on providing insurance coverage in accordance with their religious beliefs." 573 U.S. at 726. Here, under the OSHA mandate, Religious Petitioners will similarly have to pay a large sum in testing costs to insist on maintaining their Christian beliefs on conscience—*i.e.*, not imposing a mandatory vaccination requirement and not burdening unvaccinated employees' beliefs by making them pay for testing.

Although the government makes it seem as though the mandate offers neutral choices, *see* Mot. 48, OSHA admits that the "[mandate] is designed to strongly encourage vaccination," 86 Fed. Reg. 61,532. This design pressures employers to disfavor and/or further pressure unvaccinated employees—and to "to modify [their] behavior and to violate [their] beliefs." *Thomas*, 450 U.S. at 717-18.

Furthermore, Religious Petitioners exercise their faith by providing seminary training, providing Catholic and Christian education, engaging in non-profit ministries, and operating for-profit businesses according to Christian values. The mandate will force Religious Petitioners to take faculty out of classrooms, and staff out of operating these organizations and businesses—for testing on a weekly basis or for non-compliance—which will significantly disrupt Religious Petitioners' mission. Austin ¶ 30; Blankenship ¶ 22; Groos ¶ 40; Martin ¶ 38; Minks ¶ 33; Smith ¶ 25; Royce ¶ 48. This burden is substantial—and not "mere inconvenience"—because Religious Petitioners' faculty and staff are not fungible. *New Doe Child #1 v. United States*, 891 F.3d 578, 590 (6th Cir. 2018).

Lack of compelling interest/narrow tailoring. OSHA cannot show a compelling interest or narrow tailoring. 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). The Fifth Circuit noted that the mandate is "both overinclusive . . . and underinclusive." *BST Holdings*, 17 F.4th at 611. There is no semblance of a tailoring—much less a narrow tailoring. Indeed, OSHA's mandate is

underinclusive and fails to cover those engaged in "comparable activities": thousands of students who attend Religious Petitioners' seminaries and schools; other employers with fewer than 100 employees; and public school employees in South Dakota and Florida.

To the extent that OSHA insists on violating Religious Petitioners' religious beliefs by claiming that there is a "grave danger" in the workplace, it cannot show a compelling interest or narrow tailoring because it exempts a similar religious employer if it has 99 (or fewer) employees. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (requiring the City to show a "properly narrowed" "interest in denying an exception" to a Catholic adoption agency).

III. The government's recent actions confirm that the stay should be extended.

A. The government fails to show that it is suffering an irreparable injury or that the public interest lies in lifting the stay. To the contrary, its recent actions confirm that there is no reason to lift the stay. To start, OSHA took nearly two months after the President's order to issue an *emergency* standard, which included yet another two-month implementation period. This failure to act is "evidence that [this] situation is not a true emergency" under the OSH Act. *Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 423 (5th Cir. 1984).

What's more, the government waited nearly a week after the multi-circuit lottery to ask this Court to dissolve the Fifth Circuit's stay. And just days after the government filed its motion, the federal government suspended the enforcement of the federal-employee mandate until after

the holidays. Joe Walsh, *Federal Government Will Hold Off on Firing Unvaccinated Workers Until Next Year*, Forbes (Nov. 29, 2021), https://tinyurl.com/3vzhdfma. And nearly 84% of adults—and 99.9% of seniors—have already received at least one dose of COVID-19 vaccines. These facts belie the government's claim of a workplace emergency.

However, religious institutions will be irreparably harmed without the stay. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And contrary to the government's assertion, Mot. 44, significant and non-recoverable compliance cost inflicted by a federal agency is an irreparable injury. *Texas v. U.S. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance cost." (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment)).

Even while acknowledging "a strong interest in combating the spread of the COVID-19 [virus], . . . 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.

B. Finally, there is no reason to modify the stay. As noted above, the onerous burdens of various administrative requirements and the masking-and-testing requirements were "designed" to pressure employers to force their employees toward vaccination. 86 Fed. Reg.

61,532. By asking the Court to only stay the vaccination mandate and not other requirements (as though they can be separated from the regulatory apparatus), Mot. 46-47, OSHA seeks a backdoor way to implement its unlawful mandate and circumvent judicial review. States' Stay App. 1-2, *West Virginia v. EPA*, 15A773 (U.S. Jan. 26, 2016) (because there was no stay in place, the EPA "used [the] unlawfully-mandated compliance" to render judicial review in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), a nullity), *stay granted* 577 U.S. 1126 (2016) (staying the Clean Power Plan). Because "[a]ny interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate," there is no need to modify the stay. *BST Holdings*, 17 F.4th at 618.

CONCLUSION

The Court should deny the government's motion.

Respectfully submitted,

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Dated: December 7, 2021

CERTIFICATE OF COMPLIANCE

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/s/ Ryan L. Bangert

Date: December 7, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 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: December 7, 2021