No.: _____

In the Supreme Court of the United States

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ASSOCIATED BUILDERS AND CONTRACTORS OF ALABAMA, INC., INDEPENDENT ELECTRICAL CONTRACTORS, INC., and INDEPENDENT ELECTRICAL CONTRACTORS – FWCC, INC.

Applicants,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

EMERGENCY APPLICATION OF ABC AND IEC FOR IMMEDIATE STAY OF AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

J. Larry Stine
Counsel of Record
WIMBERLY, LAWSON, STECKEL, SCHNEIDER & STINE, P.C.
3400 Peachtree Road N.E.
Suite 400
Atlanta, Georgia 30326
(404) 365-0900
jls@wimlaw.com

IDENTITY OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Applicants ("ABC and IEC") state that no individual Applicant has any parent corporation and that no publicly held company owns any portion of any Applicant. Applicants further state as follows:

Associated Builders and Contractors, Inc. is a national association of construction companies primarily in the commercial and industrial sectors and represents over 21,000 companies nationwide.

Associated Builders and Contractors of Alabama, Inc. is a chapter of ABC representing the interests of hundreds of member construction contractors and related firms from all over Alabama, who perform work in that state and throughout the country. Its membership represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Industrial Electrical Contractor, Inc. is a national association of employers who provide electrical construction services.

Independent Electrical Contractor – FWCC, Inc. is the local chapter of IEC in Florida and is an association of employers who provide electrical contractors services found throughout the State of Florida.

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Applicants are trade associations ("ABC and IEC") representing tens of thousands of construction contractors throughout the United States representing most specialties within the construction industry. Many of Applicants' members are directly and irreparably harmed by the Occupational Safety and Health Administration's ("OSHA") "COVID-19 Vaccination and Testing; Emergency Temporary Standard." 86 Fed. Reg. 61,402 (Nov. 5, 2021) (the "ETS"). They respectfully request an immediate stay of the ETS.

At issue is whether OSHA has statutory authority under the ETS section of the OSH Act, 29 U.S.C. § 655(c) create a vaccine-and-testing regime for all businesses with 100 or more employees, without prior notice and public comment, thereby reaching over 25% of the entire population, 86 Fed. Reg. 61,475. Absent an emergency stay, the unlawful ETS will impose massive and irreparable burdens on the construction industry, effective immediately.

The Fifth Circuit in *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021) found that the Petitioners had met the requirements for a stay

and issued a stay. After consolidation in the Sixth Circuit, multiple petitioners in the Sixth Circuit filed motions for an initial *en banc* review, which were denied in an 8 to 8 vote. In the dissent, 8 judges found that the Petitioners had a substantial likelihood of success, and that OSHA had failed to demonstrate irreparable harm if the stay was lifted. Nevertheless, the Sixth Circuit on December 17, 2021, vacated the Fifth Circuit's stay of the OSHA ETS. A conflict in the circuits therefore exists on an issue of extraordinary importance, impacting 80 million workers and a substantial portion of the business community. All of this calls for immediate action by this Court to preserve the status quo by again staying the OSHA ETS pending further review on the merits.

The Sixth Circuit failed to acknowledge that there is no language in the OSH Act authorizing OSHA to require vaccinations. Instead, as further discussed below, the Act grants a limited immunization authority exclusively to HHS, an entirely different agency. Under such circumstances, the major-questions doctrine prohibits OSHA from "discover[ing] in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). In addition, OSHA has failed to

demonstrate that the ETS is necessary to address a "grave danger" to the many different industries, which the blunderbuss new standard purports to regulate in this unprecedented manner. The construction industry is entitled to separate consideration, as evidenced by OSHA's own longstanding regulations, particularly because most construction workers have been recognized by OSHA itself to be at much lower risk of infection in the workplace. At the same time, because construction industry employees are well known to be more transient than in other industries, construction businesses are at a very high risk of losing workers who have made abundantly clear that they will relocate to employers with below 100 employees who will not be covered by the standard. OSHA gave no consideration to the impact of its ETS on construction and a variety of other industries, already facing a severe labor shortage, who will suffer irreparable harm from enforcement of the ETS.

A likelihood of success and irreparable harm are all that 5 U.S.C. § 705 requires for a stay pending review, but the equities also favor a stay. Under the Court's Rule 23.2, this Court is the only remaining option for a stay, and unless this Court immediately stays the effective date

of the ETS, OSHA's unlawful action will begin to inflict significant and irreparable harm to the economy as the country struggles through the holiday season and beyond.

Restoring the pre-ETS status quo does not require this Court to question the efficacy of COVID-19 vaccines. But the reality is that tens of millions of Americans remain unpersuaded.. The goal of getting more Americans vaccinated does not allow the Executive Branch to use regulatory fiat compelling regulated businesses to achieve a drastic social, economic, and political change via the limited "emergency" power that Congress authorized. *Ala. Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. This Court should therefore immediately stay OSHA's unlawful action, pending disposition of ABC's petition for review, along with those of other similarly affected organizations.

OPINION BELOW

OSHA published its ETS at 86 Fed. Reg. 61,402 on Nov. 5, 2021 (Appendix 1). The Fifth Circuit's November 6 order granting a stay pending further review is unpublished but can be found at 2021 WL 5166656. The Fifth Circuit's November 12, 2021, opinion and order

granting a stay of the effective date of the ETS can be found at 17 F.4th 604 and is attached as Appendix 2.

The Sixth Circuit's 8-8 decision on Dec. 15 denying initial hearing *en banc* is attached as Appendix 3. The Sixth Circuit's December 17, 2021, opinion and order dissolving the Fifth Circuit's stay is attached as Appendix 4.

This Court is the only remaining option for a stay, pursuant to Rule 23.2, in light of the Sixth Circuit's panel decision and that court's *en banc* refusal to keep the Fifth Circuit's stay in place.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The Court has authority to grant the Applicants relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS

All relevant statutory provisions are attached to this Application as Appendix 5.

STATEMENT OF REASONS FOR GRANTING THE EMERGENCY STAY

The OSH Act, 29 U.S.C. § 655(c)(1), allows OSHA to establish an emergency temporary standard if, and only if, "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "such emergency standard is necessary to protect employees from such danger."

In January 2020, the President directed OSHA to review COVID-19 and issue an ETS. On June 21, 2021, OSHA issued an ETS limited to the healthcare industry and healthcare employees and no other industries, and it did not deem it necessary to require vaccines or testing. 86 Fed. Reg. 32,376. On September 9, 2021, in what the President's chief of staff declared to be a "workaround" of the lack of statutory authority[1] the President directed OSHA to issue an emergency temporary standard requiring all employers with "100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain

[1] *BST Holding, L.L.C. v. OSHA,* 17 F.4th 604, 612 n.13 (5th Cir. Nov. 12, 2021) ("On September 9, 2021, White House Chief of Staff Ron Klain retweeted MSNBC anchor Stephanie Ruhle's tweet that stated, "OSHA doing this vaxx mandate as an emergency workplace safety rule *is the ultimate work-around for the Federal govt to require vaccinations*.").

unvaccinated to produce a negative test result on at least a weekly basis before coming to work." The White House, *Vaccinating the Unvaccinated*, https://www.whitehouse.gov/covidplan/ (last visited December 14, 2021).

On November 5, 2021, OSHA published the emergency temporary standard at issue. 86 Fed. Reg. at 61,402. Among many requirements, this ETS requires most employers with 100 or more employees to determine the vaccination status of their employees thirty days from the issuance date and sixty days from that date to require unvaccinated employees to either get fully vaccinated or submit to weekly COVID-19 testing. *Id.* Many workers in the construction industry, a significant percentage of whom are unvaccinated, have indicated to their employers in no uncertain terms that they will quit or be terminated rather than be vaccinated or constantly tested at considerable expense. Because of the uniquely transient, project-by-project nature of the construction workforce, employees of companies covered by the OSHA ETS 100-worker threshold can easily relocate to smaller companies, thereby exacerbating the labor shortage and dislocations occurring throughout the industry.

On November 12, 2021, the Fifth Circuit stayed the effective date of the ETS, granting relief to all petitioners with pending stay motions. *BST Holdings, LLC*, 17 F.4th at 619 & n.23.

Following briefing and without oral argument, on December 17, 2021, the Sixth Circuit vacated the Fifth Circuit's stay of the ETS and denied all other consolidated petitioners' pending motions to stay. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, (6th Cir., Dec. 17, 2021) (hereinafter *In re: MCP No. 165*, Slip Op.).

ARGUMENT

Under 5 U.S.C. § 705, this Court "may issue all necessary and appropriate process to postpone the effective date of an agency action." *See* 28 U.S.C. §§ 1254, 2101; *Chamber of Com. v. EPA*, 577 U.S. 1127 (2016) (granting pre-judgment application to stay federal agency action in order to forestall immediate, burdensome compliance causing irreparable harm if not enjoined). The Applicants are trade associations who have standing to represent the interests of thousands of their construction industry members around the country, pursuant to *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The following stay factors are all present here: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [by enjoining OSHA's ETS]; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *See also Nken v. Holder*, 556 U.S. 418, 426 (2009) ("[B]alanc[ing] the equities and weigh[ing] the relative harms to the applicant and to the respondent.").

I. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WOULD VOTE TO GRANT REVIEW, AND A FAIR PROSPECT THAT A MAJORITY WOULD DECLARE THE ETS UNLAWFUL.

A. There is a Reasonable Probability that Four Justices Would Vote to Grant Review in Order to Resolve the Evident Conflict in the Circuits on an Issue of Extraordinary Importance.

As discussed above, the Fifth and Sixth Circuits reached opposite conclusions on staying the OSHA ETS, and specifically the following issues: the scope of OSHA's authority, the major questions doctrine, OSHA's statutory basis for the ETS (including whether the factors of emergency, grave danger, and necessity existed), the Commerce Clause (including the police powers reserved to the States), the nondelegation

doctrine, irreparable harm, and the balancing of the equities. The importance of this conflict is extraordinary in that immediate enforcement of the OSHA ETS will have a huge impact on the entire nation's economy and the rule of law.

An additional conflict is presented by the Eleventh Circuit's recent order in *State of Georgia v. President*, No. 21-14269-F (11th Cir. Dec. 17, 2021), which found with respect to the federal contractor mandate, that the federal government cannot establish that it will suffer irreparable injury absent a stay.

B. There is a fair prospect that a majority of this Court would declare the ETS unlawful.

1. The Scope of OSHA's Authority.

a. 29 U.S.C. § 669(a)(5) of the OSH Act does not Grant Authority to OSHA to Require Vaccination.

The Sixth Circuit majority misunderstood Section 669(a)(5). The Sixth Circuit concluded that, because 669(a)(5) referenced "immunization," OSHA must have authority to require immunization somewhere in the OSH Act. Yet, the Sixth Circuit failed to properly identify where such authority exists. *In re: MCP No. 165*, Slip Op.at 11). Section 669, however, assigns the responsibilities at issue here, i.e.,

vaccinations, solely to the Secretary of Health, Education, and Welfare (now Secretary of Health and Human Services), not to OSHA. Specifically, Section 669(a)(5) states:

> The Secretary of Health, Education, and Welfare, in order to comply with his responsibilities under paragraph (2), and in order to develop needed information regarding potentially toxic substances or harmful physical agents, may prescribe regulations requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents which the Secretary of Health, Education, and Welfare reasonably believes may endanger the health or safety of employees. The Secretary of Health, Education, and Welfare also is authorized to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses. ***Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others***. Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the Secretary of Health, Education, and Welfare shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

29 U.S.C. § 669(a)(5) (emphasis added). Section 669(a)(5) is not a grant of authority to OSHA but is a limitation on any authority granted by the OSH Act to the Secretary of Health and Human Services and/or OSHA.

Neither the Sixth Circuit nor OSHA has cited any other provision of the OSH Act that grants OSHA authority to require vaccinations or any other medical treatment.

OSHA cannot justify the ETS by relying on bloodborne pathogen legislation. OSHA asserts that legislation adopting OSHA's bloodborne pathogen standard "illustrates Congress's understanding that OSHA has authority to issue standards addressing workplace exposure to viruses." Doc. 69, pp 16-17. The legislation, however, merely adopted OSHA's proposed bloodborne pathogen standard if OSHA did not act by a date certain. Pub. L. No. 102-170, tit. I, § 100(b), 105 Stat. 1107, 1113-1114 (1991). Notably, the bloodborne pathogen standard, as adopted by Congress, did not mandate vaccinations; instead, the standard required employers to bear the cost of any vaccine, to make the vaccine available, and to provide information to the employees about the benefits of the vaccine.[2] The standard as adopted by OSHA did not change these

[2] "OSHA believes a hepatitis B vaccination program where employers bear the cost of the vaccine, make the vaccine available to employees at a reasonable time and place, and provide information about the benefits of the vaccine is the most appropriate way to assure that a large percentage of eligible employees are vaccinated. The Agency seeks comment on whether this voluntary approach is the correct approach." 54 Fed. Reg. at 23,045.

requirements. *See* 29 C.F.R. § 1910.1030(f)(1), (g)(2)(vii)(I). Neither the Sixth Circuit nor OSHA can cite any legislation that authorizes OSHA to mandate, as opposed to make available, vaccinations.

OSHA certainly cannot use the very limited authority set forth in Section 669(a)(5) as the basis for the broad authority to mandate vaccines as set forth in the ETS. As the Supreme Court held in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020). "Because we must interpret the statutes "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute."

In determining what authority Congress statutorily delegated to an agency, the courts look "not only [to] the ultimate purposes Congress has selected, but [to] the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Tiger Lily, LLC v. United States HUD*, 5 F.4th 666 at 670-71 (6th Cir. 2021), *citing MCI Telecomms. Corp. v. AT&T Co., 512* U.S. 218, 231 n.4, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). Thus, this Court must hold OSHA to the text of Section § 669(a)(5), which, at best, vests HHS only when it is engaged in

measuring and recording with limited authority regarding immunizations. Nowhere in the text of that statute, or anywhere else in the OSH Act, is there any authority for what OSHA purports to do in the ETS.

b. The ETS has no Force or Effect and Cannot be Ratified Because the Person who Issued the ETS had no Authority to do so.

The ETS was issued on November 5, 2021, by James Frederick, who purported to be the "Acting Assistant Secretary of Labor." 86 Fed. Reg. at 61,551. In reality, there was no "Acting Assistant Secretary of Labor" on November 5, 2021, because two days before the ETS's issuance the confirmed Assistant Secretary of Labor, Douglas L. Parker, was sworn in.[3] Accordingly, Frederick had no authority to issue this rule. *See SW Gen. Inc.*, 796 F.3d at 81–83; 5 U.S.C. § 3348(d) and 3345(a). Because Frederick had no authority to issue the ETS, the ETS has no force or effect and cannot be ratified. *Id.*.

2. Major Questions Doctrine.

For the reasons fully explained in the Fifth Circuit's *BST* decision imposing the stay, and in the dissenting opinion in the Sixth Circuit's

[3] OSHA, *Special Edition Meet OSHA's New Leader* (Nov. 3, 2021) https://www.osha.gov/quicktakes/11032021.

decision lifting the stay, this Court has repeatedly declared that federal agencies such as OSHA cannot claim the right to exercise "unprecedented power over American industry" in the absence of "a clear mandate" expressed by Congress in a statute. . . *See, e.g.*, U*til. Air Regul. Grp.*, 573 U.S. at 324*; Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021). Specifically with regard to OSHA, this Court has held that Congress has "narrowly circumscribed [OSHA's] power to issue temporary emergency standards" and has "repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 651 (1980). Congress has enacted no clear mandate for OSHA to take the currently challenged action, which is unprecedented in its scope and the burdens it is imposing on the business community. The Sixth Circuit improperly glossed over the foregoing holdings of this Court in lifting the stay which the Fifth Circuit had correctly imposed. For this reason alone, this emergency appeal to reinstate the stay should be granted.

3. OSHA's Basis for the ETS.

a. The Authority Claimed by OSHA to Mandate Vaccinations Exceeds the Authority Granted to OSHA by 29 U.S.C. § 655(c)(3).

Aside from the authority erroneously claimed to have under Section 669(a)(5) to mandate vaccines, OSHA claims to have inherent standard setting authority under Section 655(b) to mandate vaccinations, which is a medical procedure, but again Congress did not grant OSHA such authority.

Section 655(b) does not grant OSHA authority to compel vaccinations or any other medical treatments. Instead, Section 655(b)(7) limits OSHA's rulemaking authority as follows in pertinent part:

> **(7)** In addition, where appropriate, any such standard ***shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure***.

29 U.S.C. § 655(b)(7) (emphasis added). Section 655(b)(7) allows OSHA to require that certain information about the hazard be given to employees and that certain medical examinations and other tests be made available to employees, but Section 655(b)(7) does not grant OSHA authority to mandate vaccinations or any other medical treatments.

Section 655(b)(7) allows OSHA only to prescribe the medical examinations and other tests that employers should make available to employees. Thus, although OSHA can prescribe the medical examinations and tests which shall be made available to employees by employers, OSHA does not have statutory authority to compel employees, or to require employers to compel employees, to submit to such medical examinations and other tests.

b. Emergency and Grave Danger: The ETS Does not Show an Emergency or Address a "Grave Danger" for a Lower Risk Industry Like Construction.

The ETS also exceeds OSHA's authority because the Secretary cannot adequately show that "employees are exposed to 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) nor that an emergency exists. This is particularly true in the construction industry, where most employees perform their work outside or in socially distant situations while wearing personal protective equipment already specified by extensive OSHA regulations tailored to the industry. *See* 29 U.S.C. § 1926; 86 Fed Reg 61412-13 (11/5/2021): "There is no comprehensive source of nationwide workplace infection data…." So,

OSHA relied on anecdotal, unverified state and local reports of workplace exposures to COVID. A remarkable number of these unvetted "studies" showed no correlation between COVID and construction work.

In deciding whether to exercise the "extraordinary power" to issue an ETS, OSHA must determine whether "employees are exposed to grave danger" *in the workplace*, and whether an emergency standard including mandatory vaccination or weekly testing is "necessary" to protect them from such workplace danger. 29 U.S.C. § 655(c); *In re Int'l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987). Such a determination is necessarily based upon "'considerations of policy as well as empirically verifiable facts.'" *Pub. Citizen Health Rsch. Grp.*, 702 F.2d at 1156 (quoting *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 655 n.62, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980)).

Here, OSHA is really attempting to use the ETS as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS. "[T]he ETS statute is not to be used merely as an interim relief measure but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Id.* (citing *Public Citizen Health Research Group v. Auchter*,

702 F.2d 1150, 1155 (D.C. Cir. 1983)); *See also Taylor Diving & Salvage Co., 537* F.2d at 820-21; *Fla. Peach Growers Ass'n*, 489 F.2d at 129; *Dry Color Mfrs' Ass'n*, 486 F.2d at 104 n.9. "[T]he plain wording of the statute limits [the court] to assessing the . . . grave danger that the ETS may alleviate, during the six-month period that is the life of the standard." *Asbestos Info. Association/N. Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). "The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos*, 727 F.2d 415, 422 (5th Cir. 1984). Of course, OSHA did issue an ETS related to COVID 19 on June 21, 2021, and the six-month period of that ETS expires on December 21, 2021. OSHA is attempting to extend the six-month period on COVID-19 by issuing a new ETS, which is not authorized by the Act.

Furthermore, COVID-19 cannot be said to be a "grave danger" at every industry or in every job site in the nation with more than 100 employees. The consequences of COVID-19 depend significantly on the

age and the health of the person infected by the virus.[4] Older people and those with weakened immune systems tend to be the most susceptible and at risk of death if they contract COVID-19.[5] Younger adults who perform most construction work, and those who are not immune-compromised are less likely to die or be hospitalized from COVID-19. *Id.* Therefore, it is the condition of the individual and their working conditions that determine whether COVID-19 is a "grave danger"—not the number of workers at the individual's company.

c. Necessity: OSHA Failed to Sufficiently Explain its Dramatic Change of Position.

When an agency changes its existing position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, L.L.C. v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2124-25 (2016) (quoting *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800 (2009)). "In such cases it is not that further justification is demanded by the mere fact of policy

[4] CDC, COVID-19 Risks and Vaccine Information for Older Adults (Aug. 2, 2021), https://www.cdc.gov/aging/covid19/covid19-older-adults.html.

[5] *Id.*

change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516, 129 S. Ct. 1800. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars*, 579 U.S. 211, 136 S. Ct. at 2125-26. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. *Id*.

The government has indulged in just such arbitrary and capricious policy flip-flops here. President Biden was opposed to mandatory vaccinations until he was for them. On January 21, 2021, President Biden instructed OSHA to prepare an Emergency Temporary Standard (ETS) to protect worker health and safety from COVID 19. On June 21, 2021, six months later, OSHA issued an ETS to protect healthcare workers with certain safety measures; however, OSHA did not find a grave danger to the employees in other industries. Furthermore, OSHA did not mandate vaccines or weekly testing even for healthcare workers that had the greatest exposure to COVID-19. On September 9, 2021, President Biden announced that his "patience was wearing thin" and

directed all federal agencies to require vaccines. On November 5, 2021, OSHA issued a second ETS, 86 Fed. Reg. 61,402, directed to all industries for employers of 100 or more employees to require COVID vaccines or mandatory weekly testing.

When the government undertakes a dramatic change of course, from opposition to vaccine mandates to their imposition, *Encino* suggests that some sort of explanation is in order. Yet no reasoned explanation has been offered. *See BST Holdings*, 2021 U.S. App. LEXIS 33698, at *14 & n.11. In its Motion, OSHA merely asserts that the Delta variant created a new danger after June 21, 2021, (Doc. 69, p. 14). That explanation fails because WHO designated the Delta variant as a variant of concern on May 10, 2021, and the Delta variant already accounted for a significant percentage of sequenced virus samples in the U.S. as of June 21, 2021.[6] In addition, we are now dealing with the Omicron variant of COVID, which the "CDC expects that anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms."[7] This certainly impacts the effectiveness of the vaccines.

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[6] https://edition.cnn.com/2021/06/10/health/delta-variant-india-explained-coronavirus-intl-cmd/index.html

[7] *Omicron Variant: What You Need to Know*;

4. Constitutional Challenges.

a. Commerce Clause: The Tenth Amendment, which Encompasses the Police Powers Reserved to the States, Limits OSHA's Authority to Mandate Vaccinations.

Nowhere in the CONSTITUTION is the federal government given authority to dictate that people must be vaccinated or must submit to any other medical treatment.[8] It has long been the States' power to legislate health—including vaccination. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting "health laws of every description" belong to the states); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 2021 WL 5279381, at *7 (5th Cir. 2021) (citing *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24 (1922) (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination.

Sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for an agency's action. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549, 132 S. Ct. 2566

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www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html)last visited December 19, 2021)

[8] Although OSHA relies on the Commerce and Supremacy clauses, those clauses neither explicitly nor implicitly grant the federal government any authority over the medical treatment decisions made by the people.

(2012). With such a history of exclusive State power, this Court should be certain that Congress intended for OSHA to require vaccinations for millions of Americans. *See Bond*, 572 U.S. at 858, 134 S. Ct. 2077 (noting "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers" (internal quotations omitted)).

Despite the plain language of the Tenth Amendment and the Supreme Court's continued recognition of the States' power in matters of public health, including COVID-19, the ETS claims "to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees." 86 Fed. Reg. at 61,551, § 1910.501(a) (Nov. 5, 2021). Yet, how can federal preemption apply to matters of public health that are within the police powers reserved to the States? It cannot.

b. Non-Delegation Doctrine: The Authority Claimed by OSHA in this Case Represents an Unlawful Delegation of Legislative Power.

As discussed above, The Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast

economic and political significance." *Alabama Ass'n of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021). "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* at 2490, citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 582, 585-586, 72 S. Ct. 863 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization). If the major-policy doctrine is violated, then in effect Congress has unlawfully delegated legislative authority. If the OSH Act allows the Secretary to impose a COVID-19 vaccine mandate on tens of millions of Americans – through the "workaround" of forcing the entire business community to act as the chief enforcers of such a policy, then the Act allows almost anything. This Court has held the Act must not be interpreted so broadly, and the CONSTITUTION is violated if that principle is not sustained here.

II. ABSENT A STAY, THE OSHA ETS WILL CAUSE IRREPARABLE HARM IN THE CONSTRUCTION INDUSTRY.

A stay of the OSHA ETS is necessary because in the absence of a stay, the ETS will have immediate adverse and irreparable impacts on

the construction industry. The ETS forces construction businesses to come into compliance with massively burdensome obligations even as they confront workplace shortages, supply chain disruptions, and year-end customer demands. Among these obligations are developing a mandatory vaccination policy or testing and face-covering policy, determining the vaccination status of their employees, and informing employees about the ETS,[9] vaccine efficacy and the criminal penalties associated with providing false information and documentation. 86 Fed. Reg. at 61,552, 61,554. The ETS will directly cause ABC's members to suffer myriad irreparable injuries: enormous nonrecoverable compliance costs, loss of employees, lost profits, lost sales to competitors who are not subject to the ETS, and loss of goodwill and reputation control.

A. Enforcement of the OSHA ETS will Cause Construction Companies to Lose Irreplaceable Employees to Businesses that do not Require COVID Vaccinations or Testing.

Although OSHA claims that employers with more than 100 employees "will have sufficient administrative systems in place to comply

[9] Emergency Temporary Standard – COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1918, 1926, and 1928) (hereafter "ETS").

quickly with the ETS[,]" 86 Fed. Reg. at 61,403, the agency's confidence is unsupported by any data in the construction industry. Even if employers and their employees can comply with the paperwork and testing acquisition requirements of the reinstated ETS, ABC's and IEC's member employers are reporting that significant percentages of their skilled employees will quit or accept termination if the ETS is enforced. Indeed, studies show that between 38-50% of unvaccinated employees say they would rather quit than submit to vaccination mandates. 86 Fed. Reg. at 61,475. These employees are irreplaceable. The construction industry workforce is inherently transient and mobile, and employees can and will easily take their services to smaller contractors who are not as yet covered by the ETS.

This is not mere speculation: ABC's and IEC's members, many of whom are small businesses under SBA guidelines even if they employ 100 or more employees, have been told in no uncertain terms that significant numbers of their unvaccinated employees will leave if the mandate is enforced. As one of many examples, the Executive Vice President of Cajun Industries Holding, LLC, a member of ABC, stated in a sworn declaration made part of the record in another federal court

proceeding that "many of its unvaccinated workers (over half its total workforce) will quit if they are required to be vaccinated." *State of Georgia v. Biden*, 21-cv-163, slip op. at 14 (S.D. GA. Dec. 7. 2021). And once this skilled employee exodus starts, it will be difficult, if not impossible, for ABC's members to replace them. *See Nat'l Ass'n of Mfrs. v. U.S. Dept. of Homeland Security*, 2020 U.S. Dist. LEXIS 182267, 2020 WL 5847503 (N.D. Cal. 2020) (ruling that skilled and unskilled workers are not "fungible.")

Moreover, the employers likely to be adversely affected employ highly skilled trade- and crafts-persons, such as licensed plumbers, electricians, ironworkers, and welders, for whom replacements simply are not readily available; indeed, it is projected that the construction industry already confronts a shortage of 430,000 craft workers in 2021.[10]

[10] The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021, March 23, 2021, ABC News Release. See also https://www.housingwire.com/articles/construction-worker-shortage-has-reached-crisis-levels/. (The construction industry needs more than 61,000 new hires every month, if we are to keep up with both industry growth and the loss of workers either through retirement or simply leaving the sector for good," said Home Builders Institute CEO Ed Brady. "From 2022 through 2024, this total represents a need for an additional 2.2 million new hires for construction. That's a staggering number.").

OSHA has acknowledged the risk that workers will quit rather than accept a vaccination or testing requirement but claims that the "data suggests that the number of employees who actually leave . . . is much lower." 86 Fed. Reg. at 61,475. OSHA speculates that only 1-3% of total employees will quit because of the mandate. *Id.* But OSHA's 1-3% estimate relies on a single article that summarizes data from *health care workers*—in Vermont. *Id.* at n.42. In short, OSHA's estimate is not based in reality.

B. The ETS Imposes Nonrecoverable Compliance Costs on Businesses.

ABC and IEC's members that have 100 or more employees immediately face the "irreparable harm" of significant nonrecoverable compliance costs if they are required to comply with the OSHA ETS. *Ala. Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *see, e.g.*, *Chamber of Com. v. EPA*, 577 U.S. at 1127 (granting stay to prevent nonrecoverable compliance costs).

The direct costs of ETS compliance are significant. OSHA itself predicts that compliance will cost employers nearly $3 billion. 86 Fed. Reg. at 61,493. Indirect costs, such as "testing-related costs [that] are not included in the [ETS's] main [cost] analysis," are equally substantial. 86

Fed. Reg. at 61,484. Most states require employers "to pay the cost of a medical examination" that is necessary "as a condition of employment." Ky. Rev. Stat. § 336.220; *see* Cal. Lab. Code § 222.5 (similar); 820 Ill. Comp. Stat. 235/1 (similar); Va. Code § 40.1-28 (similar). Although employers in some other states could theoretically require employees to pay for their own testing, that prospect is unlikely in this historically tight labor market. And no matter who pays for the test itself, employers in every state must pay for "[t]ime spent by an employee in waiting for and receiving medical attention on the premises *or* at the direction of the employer during the employee's normal working hours." 29 C.F.R. § 785.43 (emphasis added); *See Sehie v. City of Aurora*, 432 F.3d 749, 751 (7th Cir. 2005) (affirming district court's ruling that "time . . . spent attending and traveling to and from [employer-mandated] counseling sessions" was compensable under federal wage-and-hour laws, even though travel and sessions occurred outside of employee's "normal forty-hour work week").

If the ETS is ultimately invalidated (and ABC and IEC believe that it will be invalidated), ABC and IEC's members will never be able to recover their compliance costs. Because federal agencies generally

possess sovereign immunity from monetary damages claims, "a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co.*, 510 U.S. at 220-21 (Scalia, J., concurring). Sovereign immunity and other *de facto* barriers to monetary recovery against the government have long been sufficient to convert monetary costs into irreparable harm. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers) (paying an unconstitutional state tax is irreparable harm because "there is a substantial risk [that the Applicants] will not be able to obtain a refund if the tax ultimately is declared unconstitutional"); *Ledbetter v. Baldwin*, 479 U.S. 1309 (1986) (Powell, J., in chambers) (nonrecoverable administrative costs of complying with an unlawful court order to restructure state regulations is irreparable harm). Consequently, this lack of a "guarantee of eventual recovery" makes compliance costs here irreparable. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Accordingly, preserving the status quo by reinstating the stay of the OSHA ETS pending review on the merits is vital to allowing the construction industry to continue its fragile recovery from the pandemic.

III. THE BALANCE OF THE EQUITIES FAVORS A STAY.

Staying the enforcement of the OSHA ETS is in the public interest. "From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months." *BST Holdings*, 2021 WL 5279381, at *8. "The public interest is also served by maintaining our constitutional structure and . . . the liberty of individuals to make intensely personal decisions according to their own convictions." *Id*.

The government would suffer little, if any, harm from maintaining the "status quo" through the litigation of this case. *Georgia v. Biden*, No. 21-14269-F (11th Cir. Dec. 17, 2021).

Enforcing an unlawful rule is not in the public interest, even in the context of a public health emergency. "Because OSHA's authority extends only to regulating the workplace, the equities embedded in the stay factors do not extend to the costs to society of having unvaccinated Americans. They extend only to the risks to workers and companies." *In re: MCP No. 165*, En Banc Order at 30 (Sutton, C.J., dissenting). In any event, there is no public interest in the perpetuation of unlawful agency action. As the Supreme Court said in *Ala. Ass'n of Realtors*, "[i]t is

indisputable that the public has a strong interest in combating the spread of the COVID–19[;]" however, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." 141 S. Ct. at 2490.

CONCLUSION

For the foregoing reasons, ABC and IEC respectfully request an immediate stay of the effective date of OSHA's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021).

In the alternative, this Court may treat this application as both a motion to stay and a petition for writ of certiorari before judgment; stay the ETS pending resolution of Applicants' petition for review; and set the case for expedited plenary review.

Respectfully Submitted this 20th day of December 2021.

/s/ J. Larry Stine
J. Larry Stine
Counsel of Record
WIMBERLY LAWSON STECKEL
SCHNEIDER & STINE, PC
3400 Peachtree Road, N.E.
Suite 400 – Lenox Road
Atlanta, GA 30326-1107
404-365-0900 – Phone
404-261-3707 – Fax
jls@wimlaw.com

No.: _____

In the Supreme Court of the United States

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL.,
Applicants,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, AND UNITED STATES DEPARTMENT OF LABOR,

Respondents.

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5(b), I hereby certify that a copy of the "Emergency Application of ABC and IEC for Immediate Stay of Agency Action Pending Disposition of Petition for Review" of the Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency Temporary Standard," 86 Fed. Reg. 61,402 (Nov. 5, 2021), was served via electronic service on all parties required and was served on the following via electronic service and overnight mail:

Elizabeth Prelogar
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave. NW

Washington, DC 20530-0001
Edmund C. Baird
Associate Solicitor for Occupational Safety and Health
U.S. Department of Labor
Office of the Solicitor,
Suite S4004
200 Constitution Ave., NW
Washington, DC 20210

Seema Nanda
Solicitor of Labor
U.S. Department of Labor
Office of the Solicitor,
Suite S4004
200 Constitution Ave., NW
Washington, DC 20210

DATED: December 20, 2021

/s/ J. Larry Stine
J. Larry Stine
Counsel of Record

Appendix 1