No. 21A248

IN THE

Supreme Court of the United States

BST HOLDINGS, LLC ET AL.,
APPLICANTS

V.

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

ON EMERGENCY APPLICATION FOR WRIT OF STAY
FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Brett M. Kavanaugh, Associate Justice
and Circuit Justice for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION

Daniel R. Suhr
Counsel of Record
M. E. Buck Dougherty III
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org
bdougherty@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Ste. 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for Applicants BST Holdings, LLC; RV Trosclair L.L.C.; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; Trosclair Williams LLC; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall

[additional counsel on next page]

Matthew R. Miller
Robert Henneke
Chance Weldon
Nate Curtisi
Texas Public Policy Foundation
901 Congress Ave.
Austin, TX 78701
Telephone: 512-472-2700
Attorneys for Applicants Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; and LeadingEdge Personnel, ltd.

Gene P. Hamilton
Vice President & General Counsel
America First Legal Foundation
300 Independence Ave. SE
Washington, DC 20003
Telephone: 202-964-3721
R. Shawn Gunnarson
Kirton McConkie
36 S. State St., Ste. 1900
Salt Lake City, UT 84111
Telephone: 801-328-3600
Additional Counsel for Applicant LeadingEdge Personnel Services, Ltd.

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INTRODUCTION

Claiming authority from a rarely used, fifty-year-old statute, OSHA is on the eve of enforcing an ETS of unprecedented breadth that will require 84 million workers either to submit to an irreversible medical procedure or submit to an uncomfortable, inconvenient,[1] and expensive medical test every week. As Chief Judge Sutton, joined by seven other judges, noted below, "When much is sought from a statute, much must be shown." App. 032. OSHA has failed to make such an extraordinary showing, and in our tripartite system of government, the Executive Branch cannot enforce laws without express authority from Congress or the Constitution. The standard for allowing the Executive Branch to evade standard procedure by issuing an ETS is particularly high. It has been used only ten times, challenged in court six times, and upheld only once. App. 003. In its Response Brief, OSHA failed to address the case law establishing this high bar for skipping normal notice-and-comment rulemaking.

It also failed to substantively address the five Court of Appeals opinions in favor of issuing a stay, which collectively represent 11 of the 13 judges to address the issue on the merits. *See* App. 002; App. 023; App. 032; App. 059; App. 108. OSHA also failed to answer Applicants' argument that the wisest course for this Court is to maintain the status quo prior to the issuance of the rule, knowing that millions of Americans could be fired, businesses could shutter, unwilling workers could bend to the pressure, and untold costs be incurred, only to find it was all illegal at the end of the merits phase. Finally, OSHA failed to provide any meaningful limiting principle at all to its

[1] Meredith Barack, *Surging Demand, Lab Backlogs Make For Long Wait times for COVID-19 Test Results*, CBS Chicago https://chicago.cbslocal.com/2021/12/31/covid-19-test-results-wait-times/ (December 31, 2021).

power under either statutory or constitutional law. Instead, it insists, in Judge Larsen's words, on a "capacious understanding" of the statute that gives OSHA "a combination of authority and discretion [that] is unprecedented." App. 124. Rather than exercise this enormous, claimed authority "delicate[ly]," as precedent requires, the ETS is a "one-size-fits-all sledgehammer." App. 009.

I. The ETS exceeds OSHA's statutory authority.

A. The ETS is not related to the workplace.

The starting point for this case is evident from the name of the respondent agency: the *Occupational* Safety and Health Administration. It is not the National Safety and Health Administration or the Pandemic Safety and Health Administration. Congress gave it authority to issue only "occupational safety and health standards." 29 U.S.C. § 651(b).

OSHA rejects as "lack[ing] merit" Applicants' suggestion that it "only has power to address hazards that are uniquely a workplace danger or, at a minimum, . . . more likely to occur [in the workplace] than in other places." Resp. 45. The Sixth Circuit panel which cancelled the stay rejected such an extreme position, correctly observing that when OSHA encounters "hazards that co-exist in the workplace and in society," it must justify its regulation based on "heightened risk in the workplace." App. 082. *Accord* App. 118 (Larsen, J., dissenting).

In this case, OSHA failed to establish that COVID-19 is at "heightened risk" in the workplace. It claims only that people are at "heightened risk" when they are indoors and within 6 feet of one another for 15 minutes, and then it jumps to the conclusion that this must occur "often" in workplaces. Resp. 30. It further presumes that "'[e]ven in the cases where workers can do most of their work from, for example, a private office within a workplace, they share common areas like

hallways, restrooms, lunch rooms and meeting rooms.'" *Id*. (quoting 86 Fed. Reg. 61,411). But it fails to point to any record evidence in support of its claim.

Instead, OSHA relies on evidence of "workplace clusters and outbreaks." Resp. 2, 10, 30-31, 41, 47. But clusters and outbreaks are not endemic to all workplaces, and OSHA has failed to tailor its ETS to the workplaces where such clusters and outbreaks are at "heightened risk." Far from supporting the broad ETS, the example OSHA cites of prior authority to regulate rubella outbreaks at meatpacking plants is a counter example of the type of narrow tailoring that is "necessary" for an ETS. *See* Resp. 45. As OSHA acknowledges, some industries show higher spikes than others, s*ee id.* at 42, yet the ETS makes no effort to target those industries. OSHA acknowledges that it must "distinctly address" how COVID-19 spreads "inside the workplace," *id.* at 47, but its ETS does not distinctly target particular workplaces at all. (Indeed, doing so would have undermined the entire purpose of the President's proposal to pressure as many Americans as possible into vaccination.)

It is true that some OSHA regulations like those for fire and sanitation apply to all industries and address hazards that exist both inside and outside the workplace, *see id.* at 46-48, but even those regulations address hazards that cause "heightened risk" at the workplace. For example, sprinkler systems may be mandatory in industrial settings where machinery is employed but not in home settings where there is less risk of fire breaking out.

For the ETS to be upheld, OSHA's scientific findings must match its chosen application: to employers with 100 or more employees. App. 011. But OSHA failed to support this line-drawing. OSHA states generally that "'exposures to SARS-CoV-2 are occurring in a wide variety of

work settings across all industries.'" Resp. 36 (quoting 86 Fed. Reg. 61,412). But this finding undercuts its decision to limit the ETS to larger employers. In both the ETS and its Response Brief, OSHA has provided no evidence that workers face a "heightened risk" of exposure to COVID-19 while working for an employer with 100 or more employees. Whether a 20-person office is owned by a company with 1,000 employees or by a company with twenty employees makes no difference.

OSHA claims the ETS is not based on a pretext because it is consistent for the Executive Branch to want people to be safe everywhere in society, including at work. Resp. 63. But OSHA fails to address the core of the argument—that one cannot don and doff a vaccine like a pair of gloves or goggles. If the President had said that he wants all Americans to wear masks everywhere, and OSHA had proposed that all workers must wear masks in the workplace, that would belie the pretext argument because the masks could be taken off outside the workplace. But in this instance, the President has said he wants all Americans to be vaccinated everywhere, and OSHA has proposed that all workers be vaccinated while in the workplace, which has the effect of having them vaccinated everywhere. Therein lies the pretext.

This Court should apply *Department of Commerce v. New York* and not accept a "contrived reason[ ]" for the administrative decision. 139 S. Ct. 2551, 2575 (2019). OSHA failed to address the case because it has no answer for it.

This Court also should apply *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021) (per curiam). OSHA acknowledged that, in that case, the language of the CDC authorization statute limited the solutions it could propose to stop the

transmission of COVID-19. Resp. 58-59. OSHA attempts to distinguish *Alabama Realtors* by saying there is "no analogous statutory language" limiting its power. *Id*. at 59. The analogous statutory language is that an OSHA regulation must be limited to "employment and places of employment." 29 U.S.C. § 652(8). Because the proposed solution regulates the private health decisions of 84 million Americans far beyond "their places of employment," it falls outside the scope of congressional authority granted under the ETS statute. *Id*.

B. The ETS is not "necessary."

OSHA claims the ETS is "necessary," but it fails to cite any case law supporting its position. Resp. 26-27, 34-37. "Necessary" is a statutory requirement: an ETS must be "necessary to protect employees from [the grave] danger." 29 U.S.C. § 655(c)(1). Courts correctly see this term as a meaningful restriction on OSHA's ability to evade normal rulemaking. *See Asbestos Info. Ass'n/North Am. v. OSHA*, 727 F.2d 415, 426-27 (5th Cir. 1984) (staying an ETS purporting to limit workers' exposure to ambient asbestos fibers); *see also Florida Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 129-30 (5th Cir. 1974) (vacating an ETS purporting to limit farmworker exposure to organophosphorus pesticides). OSHA makes no effort to distinguish or address these cases. The only case OSHA cites to defend the necessity of its rule is not an ETS case at all; moreover, it is a case in which the court invalidated the OSHA rule. *See* Resp. 37 (citing *American Dental Ass'n v. Martin*, 984 F.2d 823 (7th Cir. 1993)).

Further, an ETS is unlike statutes regarding discrimination, disabilities, and family and medical leave, which likewise apply only to larger employers. *See* Resp. 27-28. Those statutes lack a requirement that the solution be found "necessary." In those instances, it was Congress that made

the decision on limited application, so it had no need to limit agency discretion through a "necessity" finding. Only for an ETS must the proposed solution be a "necessary means to achieve" the stated goal. *Asbestos Info.*, 727 F.2d at 426. This ETS is no such "necessary" means.

C. In the face of a difficult decision, the safest action for the Court to take is to maintain the status quo pending review.[2]

OSHA fails to address Applicants' argument that this Court should maintain the status quo pending review of the ETS on the merits. The decision to vaccinate is one made for life. No American should be forced to make this personal, lifelong decision against his or her will on the flimsy legal authority of an OSHA ETS. *See* App. 032.

OSHA claims Applicants "mistake[ ] the temporal duration of [an ETS] with that of a vaccination." Resp. 55. Far from a mistake, that is exactly the point. The ETS will go away in six months, but the vaccination decision is for life. This temporal mismatch is what tips the balance of harms so heavily in favor of those who choose not to be vaccinated.

OSHA claims the vaccine mandate is not really a mandate because it gives the "option" to test weekly and wear a mask. *See* Resp. 3, 9, 33, 54-55. But the ETS itself belies this claim. Testing and mask-wearing is mere window-dressing on the stated goal of the ETS, which is to "increas[e] a workforce's vaccination rate." 86 Fed. Reg. 61,437; *see also* Resp. 51 (acknowledging that the

[2] OSHA seems to agree that the four-factor test from *Nken v. Holder*, 556 U.S. 418, 428-29 (2009), is the appropriate standard but then asks the Court to apply "the higher standard for an injunction." Resp. 16-17. But the Fifth and Sixth Circuits applied *Nken*, and the statute refers to the relief sought as a stay. 29 U.S.C. § 655(f). The Court should reject any higher standard for Applicants. Rather, the case for a pause is unusually strong here, where the OSH Act specifically provides for immediate appellate review of a regulation that takes effect immediately without any public input from a notice-and-comment period.

goal is to "encourage vaccination"). OSHA admits that forcing employees to pay for their own tests "will provide a financial incentive" to get vaccinated, which is the real goal of the ETS. *Id*. And OSHA acknowledges that COVID-19 can spread to the vaccinated, yet it exempts them from face coverings. *See* Resp. 11, 32, 41. OSHA is leveraging testing and masking to bully workers into vaccination and to put a more palpable face on a controversial policy.

For the same reason, this Court should deny OSHA's argument in the alternative that the testing and mask mandate alone should go forward for the unvaccinated. *See* Resp. 83-84. If the ETS were necessary to prevent COVID-19 spread to all workers, then this alternative proposal should apply to all workers. But OSHA is not proposing such a solution, and this omission further supports Applicants' claim that the stated reason for the ETS is pretextual.

OSHA further claims that the harm of the vaccine mandate on workers is not irreparable because of the testing option. Resp. 80. But OSHA ignores the irreparable harm of the invasion of privacy required by testing. *See* Application 9-10. Furthermore, OSHA claims that the harm to workers' constitutional freedoms is not always sufficient to establish irreparable harm because of lower court holdings "suggesting" this principle is limited to First Amendment harms. Resp. 80. This runs smack into *Alabama Realtors*, which suggests that a violation of the Takings Clause, found in the Fifth Amendment, is an irreparable harm. 141 S. Ct. at 2489.

II. The ETS exceeds OSHA's constitutional authority.

A. OSHA's understanding of the Commerce Clause gives the federal government unchecked police power.

As President Biden recently said in a call with the National Governors Association, "there

is no federal solution" to COVID-19.[3] The President's statement is a recognition that "the Constitution created a Federal Government of limited powers." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (quoting *New York v. United States*, 505 U.S. 144, 156-57 (1992)). In particular, this Court has "always rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *United States v. Lopez*, 514 U.S. 549, 584 (1992) (Thomas, J., concurring). But OSHA's argument regarding the Commerce Clause stands in stark contrast to such an understanding. Resp. 65-69.

As *Morrison* explains, the relevant inquiry under the Commerce Clause is whether the ETS complies with the substantial effects test. 529 U.S. at 610-12. This requires, at a minimum, that courts consider: (1) the economic nature (or lack thereof) of the intrastate activity; (2) the presence of a jurisdictional element in the regulation, limiting its application to matters affecting interstate commerce; (3) findings concerning the effect that the activity has on interstate commerce; and (4) the degree of attenuation of the link between the regulated activity and its effect on interstate commerce. *Id.*

Despite eleven U.S. Court of Appeals judges expressing doubt that the Commerce Clause grants OSHA authority to publish such a sweeping regulation,[4] the agency does not even try to

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[3] Remarks by President Biden at COVID-19 Response Team's Regular Call With the National Governors Association, The White House, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/27/remarks-by-president-biden-at-covid-19-response-teams-regular-call-with-the-national-governors-association/ (December 27, 2021).

[4] Three Fifth Circuit judges wrote the ETS "likely exceeds the federal government's authority under the Commerce Clause," App. 017, while eight Sixth Circuit judges expressed skepticism that the Constitution's "vertical separation of powers" allows the ETS's sweeping regulation, App. 055 (explicitly mentioning the Commerce Clause). *Accord* App. 023 (Duncan, J., concurring) ("Whether Congress could enact such a sweeping mandate under its interstate commerce power

explain why the ETS meets any of the four criteria outlined in *Morrison* or the additional considerations discussed by this Court in *United States v. Comstock*, 560 U.S. 126 (2010), by the Chief Justice in *NFIB v. Sebelius*, 567 U.S. 519, 560–61 (2012), or by Justice Scalia in *Gonzalez v. Raich*, 545 U.S. 1, 36–39 (2005) (Scalia, J., concurring).

Rather than engaging any of these considerations from this Court's precedents, OSHA argues that the ETS is constitutional because it is limited to "employees engaged in economic activity." Resp. 67. But simply engaging in economic activity is not enough to bring someone's private medical decisions under the purview of the Commerce Clause. Such a staggering view of the commerce power would eradicate the distinction between that which is national and that which is local. *See Lopez*, 514 U.S. at 557; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Adults in this country that seek to eat, buy clothing, purchase a home—in short, to live—generally must work. By OSHA's reasoning, that decision to work means those individuals are engaged in interstate commerce and therefore subject to virtually unlimited federal power in their private lives. Taking this argument to its logical conclusion, virtually every person in this country has shopped at a grocery store, mailed a letter, or driven on a public road. In doing so, they were "engaged in interstate commerce." Under OSHA's rationale, this tenuous, inferential connection to interstate commerce means that the federal government could mandate that they be vaccinated, or immediately cease buying groceries, mailing letters, or driving on roads all in the name of "pro-

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would pose a hard question."); App. 059 (Bush, J., dissenting from denial of initial hearing en banc) ("Congress likely has no authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine mandate upon the American public.").

tecting" interstate commerce. Such a conclusion makes a mockery of the Commerce Clause's limited grant of federal authority. OSHA's reliance on *United States v. Darby*, 312 U.S. 100 (1941), Resp. 66, does not solve this problem. In OSHA's telling, *Darby* stands for the proposition that the federal government can regulate employment conditions, simpliciter. Resp. 67. But *Darby* did not make such a broad pronouncement, and even if it had, subsequent cases have made clear that OSHA regulations are still subject to the heightened multi-consideration approach articulated in *Morrison* and *Lopez*. *See, e.g., United States v. Kung-Shou Ho*, 311 F.3d 589, 599 (5th Cir. 2002) (applying the four *Morrison* considerations to an OSHA regulation). *See also Gen. Tobacco & Grocery v. Fleming*, 125 F.2d 596, 601 (6th Cir. 1942) (noting narrow scope of *Darby*).

Darby involved a challenge to a federal law that: (1) prohibited selling goods in interstate commerce that were manufactured in substandard conditions; (2) set the wage-and-hour requirements for employees producing goods for transport in interstate commerce; and (3) required that manufacturers selling goods in interstate commerce keep paperwork to determine compliance with these laws. 312 U.S. at 112, 117, 124. The Court upheld the first provision as a valid exercise of Congress's Commerce Power because it merely regulated the sale of certain goods across state lines. *Id*. at 113. The Court upheld the second and third provisions as an extension of the Commerce Power under the Necessary and Proper Clause, because the Court deemed those provisions as essential mechanisms for enforcing the ban on selling certain goods across state lines. *Id.* at 118. As the Court explained, because manufactured goods are often made without reference to their ultimate destination, it would be "practically impossible" to regulate only goods meant for interstate commerce. *Id.* Thus, the federal government may regulate the production of goods within a

shop producing goods for interstate commerce, even if some goods will never be shipped interstate.

The ETS goes well beyond *Darby*'s "outer limits." *Lopez*, 514 U.S. at 556-57 (referencing *Darby* and *Wickard v. Filburn*, 317 U.S. 111 (1942), as the cases at the "outer limits" of federal power). First, unlike the regulations in *Darby*, the ETS is not limited to companies that sell fungible commodities across state lines. *See Gen. Tobacco*, 125 F.2d at 601 (holding *Darby* did not apply to a business not engaged in interstate commerce). Second, unlike *Darby*, the ETS does not regulate the workplace directly but instead regulates private, non-economic, out-of-work conduct because of its incidental effects on workplace safety. Finally, unlike *Darby*, OSHA provides no argument or findings that its regulation of local activity is essential to a prohibition on shipping certain goods across state lines. *See Gonzalez*, 545 U.S. at 12 n.20, 21 (laying out congressional findings and noting the record evidence in *Wickard*). Indeed, the ETS is not tied to the shipment of goods at all. To the contrary, the ETS explicitly *excludes* employees most connected with the interstate shipment of goods—truckers. *See* 86 Fed. Reg. 61402, 61551. OSHA's conclusory reliance on *Darby* is therefore misplaced.

In *Lopez* and *Morrison*, the Court recognized that without limitations, the substantial effects test would almost inevitably lead to unlimited federal power. As the Court noted, "in a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Morrison*, 529 U.S. at 611. To avoid the federal government's total collapsing of the vertical separation of powers, this Court listed several considerations that courts must consider when the government invokes the substantial effects test. The fact that OSHA has repeatedly refused to engage in this analysis at all

is telling. Allowing OSHA to pile inference upon inference to touch any "existing commercial activity" for employers with over 100 employees, Resp. 68, results in a *de facto* police power for the federal government—a result that this Court has repeatedly rejected and should do so again.

B. OSHA fails to explain how the ETS statute meaningfully constrains discretion under the nondelegation doctrine.

OSHA has similarly failed to engage Applicants' arguments regarding the nondelegation doctrine. In order to comply with the nondelegation doctrine, a statute must have an "intelligible principle." *United States v. Gundy*, 139 S. Ct. 2116, 2123 (2019). An intelligible principle requires a statute to "clearly delineate[ ] a general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989); *accord Gundy*, 139 S. Ct. at 2129. Despite this clear test, OSHA failed both to articulate the general policy of the ETS statute, 29 U.S.C. § 655(c), or to point to the boundaries of the statute's delegated authority.

OSHA points instead to instances where courts have vacated or partially vacated previous ETSs as evidence that the statute gives "sufficiently clear guidelines for regulations." Resp. 72. But if the history of ETSs teaches us anything, it is that § 655(c) is so unclear that OSHA has failed to publish ETSs that pass judicial muster more often than it has published ones that do. OSHA "has issued only ten previous emergency standards in the half-century that it has held that power. Six of those were challenged in court; five were struck down." App. 112. It is hardly a ringing endorsement of a statute's clarity that an agency has repeatedly failed to follow it when enacting regulations. Instead, this history shows that the statute has not properly delineated the boundaries of OSHA's authority, and the agency has frequently interpreted its discretion in publishing ETSs

as practically unlimited. In short, it is a "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

As Applicants previously explained, OSHA's repeated abuse of this statute is understandable given the statute's failure to define key terms and boundaries. *See Schechter Poultry Corp.*, 295 U.S. 495; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) (Congress "must provide substantial guidance on setting air standards that affect the entire national economy."). Nevertheless, the agency contends that the delegation is limited by the statutory requirement that the ETS be "necessary" to protect employees from a "grave danger." Resp. 71 (quoting Section 655(c)). Here, a comparison is helpful. In *Touby v. United States*, 500 U.S. 160, 166 (1991), Congress gave the Attorney General authority to temporarily schedule a drug if doing so was "necessary." To make that determination, he was required to consider six factors such as the drug's history and current pattern of abuse, the scope of its abuse, and its risk the public health. *Touby*, 500 U.S. at 166. The Attorney General was also required to comply with the section identifying the criteria for each of the five schedules of drugs, and the statute required a 30-day notice. *Id.* Comparatively, Section 655(c)'s guidance is not only paltry; it is nonexistent.

Further, OSHA has done nothing to address *Whitman*'s rule that delegation of enormous authority requires substantially more detail from Congress. Congress "must provide substantial guidance" when giving the Executive power to set "standards that affect the entire national economy." *Whitman*, 531 U.S. at 475. Respondents' conclusory argument completely ignores the concerns of judges below that the broad terms in § 655(c) meaningfully constrains agency discretion. App. 007; App. 039, 050, 052; App. 123-24. Here, OSHA purports to issue a rule that will force

employers either to require their employees to obtain an irreversible medical procedure (vaccination) or to submit to an uncomfortable, inconvenient, and expensive diagnostic test every week. The ETS is expected to affect 84 million employees nationwide. 86 Fed. Reg. at 61,424. "This is precisely the kind of broad assertion of administrative power that should be accompanied by clear, direct, and channeled delegations by Congress." App. 052.[5] To paraphrase Justice Gorsuch's dissent in *Gundy*, if the nondelegation doctrine means anything, it must mean that Congress cannot give the Executive the power to regulate 84 million employees by using two undefined and ambiguous terms. *See Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

CONCLUSION

As a district court recently stated while enjoining a different federal vaccine mandate, "This is not a case about whether vaccines are effective. . . . Nor is this a case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. . . . The question presented here is narrow." *Kentucky v. Biden*, 2021 U.S. Dist. LEXIS 228316, at *1 (E.D. Ky. Nov. 30, 2021).

The first question is whether the Executive Branch has the authority to issue a COVID-19 vaccine mandate on 84 million Americans under the rightly restrictive OSHA Emergency Temporary Standard statute. The answer is, "No." If Congress had wanted to give such authority, as OSHA suggests it did in the American Rescue Plan, *see* Resp. 46, 56, it would have done so explicitly. Congress did not. This Court should not either. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct.

[5] Skepticism about whether the OSH Act meaningfully restrains the federal government's discretion is not limited to the judiciary. *See* Cass R. Sunstein, *Essay: Is OSHA Unconstitutional*, 94 Va. L. Rev. 1407 (2008).

2320, 2321 (2021) (Kavanaugh, J., concurring).

To reach any other conclusion would open the door wide to OSHA's regulation of any aspect of public health that people bring with them to work, whether lawful concealed firearms, sugary soft drinks in vending machines, or a mandate to serve broccoli in workplace cafeteria. And it would also fatally undermine the horizontal separation of powers which is the bedrock of our constitutional order.

The second question is whether the Constitution gives Congress the power to issue a national vaccine mandate under the Commerce Clause, and if Congress may pass that power off to OSHA in a single, vague sentence. Again, the answer is, "No," or nothing would be left of our system of vertical separated powers, equally essential to our national character and constitution.

The "sheer scope" of OSHA's claimed authority counsels in favor of a stay. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The federal government, seeking a workaround to its limited statutory and constitutional authority, has claimed expansive authority under § 655(c) and "has identified no limit" beyond that OSHA "deem a measure 'necessary.'" *Id.* (quoting 42 U.S.C. § 264(a)). When the federal government claims an unprecedented and "breathtaking amount of authority" that upsets our constitutional structure, a stay is appropriate. *Id.* This Court should grant the application for emergency relief and reinstate the stay of the ETS pending review on the merits.

January 3, 2022

Respectfully submitted,

s/ Daniel R. Suhr

Daniel R. Suhr
M. E. Buck Dougherty III
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604

Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org
bdougherty@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for BST Applicants

Matthew R. Miller
Robert Henneke
Chance Weldon
Nate Curtisi
Texas Public Policy Foundation
901 Congress Ave.
Austin, TX 78701
Telephone: 512-472-2700
Attorneys for Applicants Burnett Specialists; Choice Staffing, LLC; Staff Force Inc.; and LeadingEdge Personnel, ltd.

Gene P. Hamilton
Vice President & General Counsel
America First Legal Foundation
300 Independence Ave. SE
Washington, DC 20003
Telephone: 202-964-3721
R. Shawn Gunnarson
Kirton McConkie
36 S. State St., Ste. 1900
Salt Lake City, UT 84111
Telephone: 801-328-3600
Additional Counsel for Applicant LeadingEdge Personnel Services, Ltd.