No. 21-4033

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE SOUTHERN BAPTIST THEOLOGICAL SEMINARY and ASBURY THEOLOGICAL SEMINARY,

Petitioners,

v.

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

Respondents.

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

PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

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INTRODUCTION

With the multi-circuit lottery out of the way, the Court should grant the Seminaries' emergency motion for a stay. Under 28 U.S.C. § 2112(a)(4), this Court has the authority to independently "stay the effective date" of an agency action. It could do so by granting the Seminaries' pending stay motion. The statute also gives this Court the authority to "extend[]" a stay that another court of appeals entered before the multi-circuit lottery. *Id.* The Fifth Circuit—through a cogent and forceful order—stayed the OSHA mandate. *See BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5279381, at *9 (5th Cir. Nov. 12, 2021). This Court's order granting the Seminaries' stay motion will effectively extend the Fifth Circuit's order.

The *status quo* now is for the OSHA mandate to 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.* The Court should definitively continue the *status quo* by granting the Seminaries' emergency stay motion. All petitioners—and nearly 80 million individuals who would be affected by the mandate—will welcome the certainty of *status quo* pending judicial review, especially given the mandate's fast-approaching compliance deadlines of December 6, 2021, and January 4, 2022. *See* 29 C.F.R. § 1910.501(m)(2).

The Court should grant the Seminaries' stay motion also because the government's untimely response is based on the same arguments already categorically rejected by another court. The Fifth Circuit held that the mandate rests on a faulty interpretation of OSHA's authority

under the Occupational Safety and Health Act ("OSH Act") and a "dubious" constitutional footing. *BST Holdings*, 2021 WL 527381, at *3. And the court also found OSHA's justification for the ETS lacking. *Id.* at *5-*8. The Seminaries raised these problems in their motion. Stay Mot. 14-18 (ECF No. 10-1). The government offers nothing new or persuasive to rebut the Seminaries' arguments or the Fifth Circuit's holding.

Moreover, the government implicitly concedes that the "petitioner-specific" arguments could provide a basis for a stay at least for the Seminaries. *See* Resp. 33. Critically, the government fails to show that OSHA has jurisdiction over religious non-profits under the OSH Act or to even address the First Amendment argument. The government's response to the Religious Freedom Restoration Act ("RFRA") argument also misses the mark. Contrary to the government's assertion, the mandate does *not* "accommodate[] [the Seminaries'] religious objections" at all. *Id.* And that the *employees* may be able to seek accommodations does nothing to remedy the mandate's substantial burden on the *Seminaries'* beliefs and religious exercise. The Court should grant the Seminaries' stay motion.

ARGUMENT

A. The government repeats the same arguments already rejected by the Fifth Circuit.

1. The vaccine-or-test mandate exceeds OSHA's statutory grant of authority. As the Seminaries argued, the plain text of the OSH Act does not allow OSHA to issue the vaccine-or-test mandate. Stay Mot. 14-15. OSHA is not the CDC, and the OSH Act addresses "*occupational* safety"

issues. 29 U.S.C. § 655(a) (emphasis added); Stay Mot. 14-15. The Seminaries also explained how various interpretative canons similarly "underscore[d] the implausibility of the [g]overnment's interpretation." *Van Buren v. United States*, 141 S. Ct 1648, 1661 (2021); *see also* Stay Mot. 16-17.

The Fifth Circuit rejected OSHA's expansive reading of the OSH Act on substantially similar grounds. The court held that "OSHA's attempt to shoehorn an airborne virus that is . . . widely present in society (and thus not particular to any *workplace*)" is a "transparent stretch" of the OSH Act. *BST Holdings*, 2021 WL 5279381, at *5 (emphasis added). It further observed that "health agencies do not make housing policy, and occupational safety administrations do not make health policy." *Id.* at *9 (citing *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2488-99 (2021)).

The government does not offer any new or persuasive arguments in its response. *See* Resp. 8-10. Its main thrust appears to be that "[s]tatutes 'often go beyond the principal evil [targeted by Congress],'" such that OSHA has the authority to impose the vaccine-or-test mandate for nearly 80 million individuals. *Id.* at 11 (second alteration in original) (quoting *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 76 (1998)). This reading is completely unmoored from the OSH Act's text. Public health issues "[are] markedly different from" the kind of problems that Congress sought to solve with an *occupational* safety agency. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

And such a broad reading is untenable under various interpretative canons, which the Fifth Circuit also examined and which the government fails to rebut. To start, "[a] person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity." *BST Holdings*, 2021 WL 5279381, at *7; *see also* Stay Mot. 17 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012)). The "serious" risk of violating the Commerce Clause *alone* "counsel[s] against adopting OSHA's broad reading." *BST Holdings*, 2021 WL 5279381, at *7. Or take the federalism clear-statement rule. Public health measures—which OSHA broadly preempts through the ETS—"falls squarely within the States' police power." *Id.* at *8. OSHA cannot point to an "exceedingly clear language" that allows it to alter (or further disturb) the state-federal balance. Stay Mot. 16 (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2485).

Nor can OSHA point to a clear statement by Congress to let OSHA make "decisions of vast economic and political significance." *BST Holdings*, 2021 WL 5279381, at *8 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see also* Stay Mot. 16. And Article I and the non-delegation doctrine similarly prohibit Congress from giving OSHA a blank check of authority. *BST Holdings*, 2021 WL 5279381, at *8; Stay Mot. 17.

2. The government also fails to justify the ETS. The Seminaries showed that the ETS was not supported by substantial evidence. Stay Mot. 17-18. Namely, the arbitrary 100-employee threshold—based on "administrative capacity"—severely undermined OSHA's assertion that

the vaccine mandate was necessary to protect employees from "grave danger from exposure to [toxic or harmful] substances or agents . . . or from new hazards." 29 U.S.C. § 655(c)(1); Stay Mot. 17-18. 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*, 2021 WL 5279381, at *7. Although OSHA points to other federal programs (like Title VII which has a 25-employee threshold), *see* Resp. 18, the OSH Act does not *require* such a threshold. The mandate's 100-employee threshold is arbitrary and belies any emergency.

B. The mandate's coverage of religious institutions exceeds OSHA's authority.

The government fails to engage with the fact that the mandate's coverage of religious non-profits is in excess of OSHA's statutory grant of authority.[1] *See* Resp. 35 n.11. Its sole response is that the Seminaries must wait until OSHA begins an enforcement action against the Seminaries for them to raise this argument. *Id.* Not so.

The OSH Act plainly permits "[a]ny person who may be adversely affected by a standard" to "file a petition challenging the validity of such standard." 29 U.S.C. § 655(f). The OSH Act's definition of an "employer," 29 U.S.C. § 652(5), does not include religious institutions. *See* Stay Mot.

[1] Critically, the government implicitly concedes that the "petitioner-specific" arguments—based on religious non-profit coverage, the First Amendment, and RFRA—could provide a basis to stay the mandate for the Seminaries. *See* Resp. 33.

8-14. However, OSHA's vaccine-or-test mandate covers religious non-profits with 100 or more employees. *See* 29 C.F.R. § 1910.501(b)(1) (covering "all employers with a total of 100 or more employees"). The mandate, therefore, exceeds OSHA's grant of statutory authority. And as "adversely affected" parties, the Seminaries properly challenged the mandate's coverage of religious institutions. *See* Stay Mot. 8 ("OSHA lacks jurisdiction to regulate religious non-profit institutions.")

The conflict between the mandate's coverage provision, 29 C.F.R. § 1910.501(b)(1), and the OSH Act, 29 U.S.C. § 652(5), is sufficient to invalidate the coverage of religious non-profits. However, separate and apart from the *mandate*'s conflict with the OSH Act, the Court can *also* properly rely on OSHA's application of its invalid "jurisdictional regulation," 29 C.F.R. § 1975.4(c), to set aside the mandate's coverage of religious non-profits. The jurisdictional regulation also exceeds the OSH Act, 29 U.S.C. § 652(5), by codifying the flawed assertion of jurisdiction over "[c]hurches" and "religious organizations," 29 C.F.R. § 1975.4(c)(1). Even if OSHA does not pin-cite to this regulation in the mandate, *see* Resp. 35 n.11, the regulation *is* OSHA's interpretation of the OSH Act's reach, *see also* 29 C.F.R. § 1975.1(a) (noting the purpose is to "indicate which persons are covered by the [OSH] Act").

It is black-letter law that, at any time, a party "may challenge [the] *application* [of a rule] on the grounds that it conflicts with the statute from which its authority derives." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 971 F.3d 340, 348 (D.C. Cir. 2020) (emphasis added)

(quoting *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014)).

An agency's "application" of an invalid rule "is not limited to agency enforcement actions." *Id.* A subsequent rulemaking based on a prior invalid rule is unavoidably an *application* of the invalid rule. *See id.* And the Court may vacate the subsequent agency action (*i.e.*, the mandate) while declaring unlawful—but without vacating—the prior invalid rule (*i.e.* the jurisdictional regulation). *See Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir 2017) (vacating a 2014 agency action that applied an "unlawful" 2006 rule while leaving the 2006 rule in place). In any event, OSHA lacks jurisdiction over religious institutions.

C. The government fails to rebut the Seminaries' First Amendment and RFRA arguments.

By downplaying the Seminaries' religious arguments as "limited," Resp. 33, the government forgets that the First Amendment gives "special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). And it further vitiates Congress's desire to effectuate "very broad protection for religious liberty" through RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). The substance of the government's response fares no better.

1. The government does not dispute the Seminaries' First Amendment argument that the mandate "violates the religious autonomy doctrine and free-exercise rights by interfering with [the Seminaries'] religious mission, internal management, and employment

decisions." Stay Mot. 19; *see also 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).

Nor does it dispute that the mandate "effectively imposes employment conditions" for the Seminaries' employees based on vaccination status. Stay Mot. 12. Such a blanket interference with the Seminaries' hiring practices and religious missions contravenes the broader religious autonomy doctrine, *Kedroff*, 344 U.S. at 116, and the more specific ministerial exception, *Our Lady*, 140 S. Ct. at 2061, and co-religionist doctrines, *Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

2. The government's RFRA analysis also misses the mark. Contrary to the government's assertion, the mandate does not "accommodate[] [the Seminaries'] religious objections." Resp. 33. And the fact that the *employees* may be able to seek religious accommodations does not remedy the harm to the *Seminaries*' beliefs and exercise of its religion. There is no question that religious non-profits like the Seminaries can invoke RFRA to protect their own religious beliefs. *Hobby Lobby*, 573 U.S. at 708. And it is the *Seminaries* whom OSHA commandeers to enforce the vaccine-or-test mandate on their employees. And it is the *Seminaries* on whom OSHA will impose significant compliance costs and non-compliance penalties.

Yet, the Seminaries' faith precludes them from imposing a mandatory vaccination policy. Stay Mot. 20; *see also* Austin Decl. ¶¶ 8,

10-11 (ECF No. 10-3); Blankenship Decl. ¶¶ 14-15 (ECF No. 10-4). Similarly, the Seminaries' faith precludes them from burdening their unvaccinated employees' religious beliefs for remaining unvaccinated, including by passing the testing costs onto them. *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 *Hobby Lobby* held "the contraceptive mandate violated RFRA as applied to entities with complicity-based objections"). And much of the mission and ministry of the Seminaries is carried out by its employees. Their absence and possible firing severely impair the Seminaries' propagation and teaching of the Gospel. Interfering with the Seminaries' religious mission is a tremendous burden.

In addition to imposing crippling fines for any noncompliance, this leaves the Seminaries with the option to bear the 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, the Seminaries 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. *See* Austin Decl. ¶¶ 8, 10-11; Blankenship Decl. ¶¶ 14-15.

Although the government makes it look as though the mandate offers neutral choices, *see* Resp. 34, OSHA admits that the "ETS is designed to strongly encourage vaccination," 86 Fed. Reg. 61,532. There is no question that the mandate is designed to pressure employers to disfavor and/or further pressure unvaccinated employees. This compliance structure—with heavy costs and threat of penalties—"put[s] substantial pressure on [the Seminaries] to modify [their] behavior and to violate [their] beliefs." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981).

And despite having the burden of proof, the government does not attempt to state a compelling interest or explain narrow tailoring. The Fifth Circuit noted that the mandate is "both overinclusive . . . *and* underinclusive." *BST Holdings*, 2021 WL 5279381, at *3. There is absolutely no semblance of a tailoring—much less a *narrow* tailoring.

D. The government fails to rebut the Seminaries' irreparable harm and the equities favoring a stay.

The government cannot seriously dispute irreparable harms that the Seminaries will suffer. The vaccine-or-test mandate "places an immediate and irreversible imprint on all covered employers in America" and nearly 80 million individuals. *Id.* at *8. And it especially does so by interfering with and limiting the religious ministry carried out by the Seminaries.

Given such a scale, public interest is served by "maintaining our constitutional structure and maintaining the liberty of individuals." *Id.* Although COVID-19 has inflicted great harm to our society, *see* Resp. 37, "stemming the spread of COVID-19" "cannot qualify as [a compelling interest] forever" lest it give way to proclamations of "indefinite states of emergency." *Does 1-3 v. Mills*, No. 21A90, 2021 WL 5027177, at *3 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting) (cleaned up).

CONCLUSION

The Court now has full and exclusive control over the OSHA mandate cases. And it should definitively maintain the *status quo* pending judicial review. Granting the Seminaries' motion will do just that. The Court should grant a stay.

Respectfully submitted,

/s/ *Ryan L. Bangert*

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Dated: November 19, 2021

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 2,582 words according to the word count function of Microsoft Word 365.

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/s/ Ryan L. Bangert

Date: November 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Ryan L. Bangert

Date: November 19, 2021