No. 21A246

IN THE SUPREME COURT OF THE UNITED STATES

The Southern Baptist Theological Seminary, Asbury Theological Seminary, Sioux Falls Catholic Schools d/b/a Bishop O'Gorman Catholic Schools, The King's Academy, Cambridge Christian School, Home School Legal Defense Association, Inc., and Christian Employers Alliance,

Applicants,

v.

Occupational Safety & Health Administration, et al.,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING JUDICIAL REVIEW, OR, ALTERNATIVELY, PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT AND STAY PENDING RESOLUTION

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

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The government recycles the same tired arguments that failed to persuade the Fifth Circuit and half of the active Judges of the Sixth Circuit. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021); *BST Holdings*, 17 F.4th at 619 (Duncan, J., concurring); *In re MCP No. 165, Occupational Safety & Health Administration, Interim Final Rule: COVID-19 Vaccination & Testing, Emergency Temporary Standard* ("*In re OSHA*"), No. 21-7000, 2021 WL 5914024, at *15 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc); *In re OSHA*, 2021 WL 5914024, at *21 (Bush, J., dissenting from the denial of initial hearing en banc); App.039 (Larsen, J., dissenting). This Court should similarly reject those arguments and hold that the Mandate is facially unlawful.

The government also fails to rebut Religious Institutions' arguments under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and the First Amendment. Those grounds therefore provide a basis for as-applied relief.

A. The government concedes the viability of as-applied relief.

As a threshold matter, the government concedes that RFRA and the First Amendment can provide as-applied relief for Religious Institutions. *See* Opp'n 73. It does not try to defend the Sixth Circuit motions panel's erroneous observation that religious ***employers***' RFRA and First Amendment claims are somehow obviated because the Mandate acknowledges religious accommodations for ***employees***. App.031 n.10 (relegating RFRA and First Amendment arguments to a footnote). The Mandate imposes crushing burdens on the ***employers***, makes no accommodations for religious ***employers***, and violates their RFRA and First Amendment rights—

independent of any employees' rights. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (RFRA and free exercise claims can be raised by employers).

The government also distances itself from the motions panel majority's categorical failure to address Religious Institutions' RFRA and First Amendment arguments. Indeed, the government acknowledges the viability of "as-applied" relief by discussing the merits of the RFRA and First Amendment arguments. *See* Opp'n 73–77. Moreover, the government noted below that the "petitioner-specific arguments" ***could*** provide a "basis to stay the rule" even if not "for any party other than the [religious] petitioners in this case." Resp. 33, *The S. Baptist Theological Seminary v. OSHA*, No. 21-4033 (6th Cir. Nov. 16, 2021); Resp. 19, *Florida v. OSHA*, No. 21-13866 (11th Cir. Nov. 12, 2021) (same).

In view of these concessions, the Court should reject the government's unfounded assertion that Religious Institutions should first "present [these] claims to the agency before seeking judicial intervention." Opp. 76–77. Such a requirement would vitiate the principle that affected entities can seek a stay during the pendency of judicial review. *See* 5 U.S.C. § 705 (allowing reviewing courts to "issue all necessary and appropriate process"); 28 U.S.C. § 2112(a)(4) (allowing the issuance of a stay). And as Chief Judge Sutton observed below, before dissolving the Fifth Circuit's stay, the motions panel should have addressed whether "compelling faith-sensitive employers to administer [the] mandate violate[s] the Free Exercise Clause or [RFRA] by interfering with their employment decisions or religious mission." *In re OSHA*,

2021 WL 5914024, at *11 (Sutton, C.J., dissenting from the denial of initial hearing en banc). The Court should provide as-applied relief for Religious Institutions.

B. The government offers a flawed and erroneous RFRA analysis.

The government's RFRA analysis is erroneous for at least three reasons. First, it mischaracterizes the Mandate as presenting innocuous options to employers. The government asserts that "applicants have not identified any religious exercise that the Standard substantially burdens," because, according to the government, "any requirement to vaccinate rather than mask and test is attributable to the choice of the employer, not a dictate from OSHA." Opp'n 74. But this ignores that OSHA specifically designed the Mandate to pressure employers into adopting mandatory vaccination policies by imposing heavy administrative costs and penalties associated with the test-and-mask "option." The Mandate's preamble boasts in several places that the Mandate was designed to do just that. *See* 86 Fed. Reg. 61402, 61434 (Nov. 5, 2021) (noting the Mandate "is designed to strongly encourage vaccination"); *id.* at 61437 (the Mandate "will provide a financial incentive . . . to be fully vaccinated").

And numerous Judges have correctly seen through this shell game. *In re OSHA*, 2021 WL 5914024, at *10 (Sutton, C.J., dissenting from the denial of initial hearing en banc) (observing that vaccination is "strongly encouraged" and the alternative is "discouraged"); *id.*, at *15 (Bush, J., dissenting from the denial of initial hearing en banc) (describing the Mandate as "a *de facto* national vaccine mandate"); App.040 (Larsen, J., dissenting) ("OSHA consciously designed this [alternative] to be less palatable to employers and employees."); *BST Holdings*, 17 F.4th at 609 (describing the Mandate a "vaccine mandate"); *see also id.* at 619 (Duncan, J.,

concurring) (describing the Mandate as a move "to mandate vaccines"). Contrary to the government's assertions, the pressure to require vaccination directly comes from the Mandate.

Second, the government misstates the nature of Religious Institutions' religious beliefs and objections to the Mandate. RFRA defines an "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). And RFRA is to "be construed in favor of a broad protection of religious exercise." *Id.* § 2000cc-3(g). As this Court has observed, RFRA protects "sincere religious belief[s]" from government mandates that "demand[] that [religious objectors] engage[] in conduct that seriously violates their religious beliefs." *Hobby Lobby*, 573 U.S. at 720.

As previously explained, consistent with the well-established Christian tradition, Religious Institutions' sincere religious belief requires them to respect and avoid burdening other individuals' religious beliefs and conscience. Stay App. 29–30. In practical terms, it would violate Religious Institutions' sincere religious belief to mandate vaccinations on—or pass the cost of weekly testing to—their unvaccinated employees, because doing so would burden their employees' conscience. *Id.* at 30. Yet this is precisely what the Mandate is designed to do, and it intrudes on Religious Institution's sincere religious belief. The government is incorrect in saying that the vaccine mandate (or the testing "option") "is not a burden on *religion*," Opp'n 75, and it is not the government's place to second-guess a religious organization's determination of what is and is not a burden on religion in the first instance.

Moreover, the testing requirement substantially burdens Religious Institutions' religious belief whether they choose to incur the heavy cost of weekly testing or pass it onto their employees. This is what Religious Institutions would face to "insist on" respecting their unvaccinated employees' conscience "in accordance with their religious beliefs." *Hobby Lobby*, 573 U.S. at 726. Furthermore, regardless of who bears the cost of testing, the testing requirement forces Religious Institutions to take their ministers, teachers, and other employees away from their religious mission to be tested weekly (or be removed from their religious mission if they do not comply with the Mandate). *See* Stay App. 31. The Mandate makes it substantially more burdensome to hire or retain unvaccinated ministers, teachers, and employees. *See id.* Such an interference imposes a substantial burden on Religious Institutions' religious exercise and mission.

Third, the government fails to satisfy its heavy burden under RFRA. "Government shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). "The least-restrictive-means standard is exceptionally demanding," and the government must show that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in [the] case[]." *Hobby Lobby*, 573 U.S. at 728. As this Court recently explained, "so long as the

government can achieve its interests in a manner that does not burden religion, it ***must*** do so." *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (emphasis added).

The government fails to address why Religious Institutions' proposed alternative that the government bear the cost of testing will not work. *See* Opp'n 76–77; *see also* Stay App. 32–33; *cf. Hobby Lobby*, 573 U.S. at 728 (observing that the "most straightforward way" of satisfying least-restrictive-means requirement was "for the Government to assume the cost of providing the four contraceptives"). "It is the government's burden to show that an alternative won't work," not religious challengers' burden to show that it will. *See Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring in the decision to grant, vacate, and remand). The government fails to carry this burden here. In addition, the government makes no attempt to explain how requiring Religious Institutions to take their ministers, teachers, and employees away from their ministries (and making it substantially more burdensome to hire unvaccinated ministers and employees) is narrowly tailored to further a compelling governmental interest. Given the vast over- and under-inclusiveness of the Mandate, the government cannot satisfy narrow tailoring even if it tried. *See* Stay App.32–33.

C. The government fails to comprehend the breadth of the First Amendment protections for religious institutions.

The government's First Amendment analysis also lacks merit. To start, that analysis focuses solely on the ministerial exception but fails to address Religious Institutions' arguments grounded in the broader religious autonomy doctrine and the separate co-religionist doctrine. *See* Opp'n 77; *but see* Stay App. 27–28 (also relying

on religious autonomy and co-religionist doctrines). As this Court explained in *Our Lady of Guadalupe School v. Morrissey-Berru*, the religious autonomy doctrine broadly protects a religious organization's "internal management decisions that are essential to the institution's central mission." 140 S. Ct. 2049, 2060 (2020). Only one "component of this autonomy" pertains to the "ministerial exception" regarding ministers, teachers, and/or other "individuals who play certain key roles." *Id.* And as courts have broadly recognized, the First Amendment also protects religious organizations' autonomy in their decisions to associate with or hire "co-religionists." *See* Stay App. 28 (collecting cases); *see also Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

Here, Religious Institutions rely on the ministerial exception doctrine to the extent that the Mandate interferes with their "authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. But Religious Institutions also rely on the co-religionist doctrine to the extent the Mandate interferes with their ability to select, hire, and retain "non-ministerial" employees. Stay App. 28; *see also* Pet. for Writ of Certiorari 22–29, *Seattle Union Gospel Mission v. Woods*, No. 21-144 (U.S. Aug. 2, 2021). And they rely on broader religious autonomy doctrine to object to OSHA's "control or manipulation" by commandeering them to carry out federal mandates on their unvaccinated employees. *Id.*; *see also Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

By focusing solely on the ministerial exception, the government fails to grasp the breadth of the "special solicitude to the rights of religious organizations" under

the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2021). Moreover, the government incorrectly asserts that the Mandate does not interfere with "the selection and supervision" of ministerial employees. Opp'n 77. To the contrary, the Mandate—under threat of heavy fines—***requires*** Religious Institutions to remove their unvaccinated employees who fail to comply with the Mandate away from their religious mission. 29 C.F.R. § 1910.501(g)(2). And the substantial cost associated with hiring unvaccinated employees discourages and interferes with Religious Institutions' ability to hire and retain an otherwise-qualified ministerial (and non-ministerial) employees of the same faith. *See* Stay App. 28; *see also* Pet. for Writ of Certiorari 20–29, *Gordon Coll. v. DeWeese-Boyd*, No. 21-145 (U.S. Aug. 2, 2021).

CONCLUSION

The Court should stay the government's vaccine and test-or-mask Mandate.

Respectfully submitted.

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