No. 21A250

# In the Supreme Court of the United States

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IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD, 86 FED. REG. 61402.

WORD OF GOD FELLOWSHIP, INC. D/B/A DAYSTAR TELEVISION NETWORK; AMERICAN FAMILY ASSOCIATION, INC., AND ANSWERS IN GENESIS, INC.
*Applicants*,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, SECRETARY OF LABOR; AND DOUGLAS L. PARKER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,
*Respondents.*

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

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# REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF AGENCY STANDARD PENDING DISPOSITION OF PETITION FOR REVIEW AND, IN THE ALTERNATIVE, PETITION FOR CERTIORARI BEFORE JUDGMENT AND STAY PENDING REVIEW

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants Word of God Fellowship, Inc. d/b/a Daystar Television Network, Inc.; American Family Association, Inc.; and Answers in Genesis, Inc. have no parent corporations and issue no stock.

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## ARGUMENT

OSHA spends about four pages responding to the Ministries' emergency application for a stay. While this treatment is more than the mere footnote in the Sixth Circuit's opinion dissolving the stay, it exemplifies OSHA's utter disregard for the Ministries' religious liberty claims against the emergency temporary standard ("ETS"). OSHA ignores that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 ("RFRA"), is a "super statute"[1] that "secures Congress' view of the right to free exercise under the First Amendment."[2] As such, OSHA must meet RFRA's demands any time it would substantially burden a person's exercise of religion. 42 U.S.C. § 2000bb-1. And OSHA's response fails to meet RFRA's exacting demands in this case.

Much of OSHA's response focuses on whether the ETS substantially burdens the Ministries' religious practices. But OSHA provides no factual basis for questioning the Ministries' beliefs that compliance with the ETS will force them to disobey God's commands. Instead, OSHA offers suggestions on how the Ministries may follow God's commands and still comply with the ETS. Resp. at 73–77. For

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[1] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."); *see also* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253–54 (1995) ("RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. RFRA qualifies Congress' regulations of commerce, of defense, of the post office, of immigration, of bankruptcy, of federal lands, and so on. Whenever federal law, or the implementation of federal law, substantially burdens religious exercise, the federal government must show that such burden is justified by a compelling governmental interest and is the least restrictive means of accomplishing that interest. RFRA supersedes all prior federal law inconsistent with its requirements. RFRA also trumps all subsequently enacted federal law, unless such laws explicitly exclude application of RFRA."); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 213 (1995) ("Congress can restrain the federal agencies if it wants, and that is what it has done" in RFRA).
[2] *Tanzin v. Tanvir,* 141 S. Ct. 486, 489 (2020).

example, OSHA offers that the Ministries could abandon their mask-optional policies and instead require all employees, including those who are vaccinated, to wear a mask so as to obfuscate who is vaccinated in order to comply with 1 Corinthians 12:24–25. But, as explained in the emergency application, and ignored by OSHA in its response, forcing all employees to mask because some employees choose not to get vaccinated still causes religious division that the Ministries cannot faithfully permit. Emerg. App. at 6. Respectfully, OSHA's interpretation of the Ministries' religious duties does not offer a spiritual safe-harbor. *See* Matthew 10:28 ("Do not be afraid of those who kill the body but cannot kill the soul. Rather, be afraid of the One who can destroy both soul and body in hell.").

OSHA's response also shows that the government did not consider the many ways the ETS interferes with religious practices of large religious employers. The "tell" is in OSHA's failure to make the particularized and fact-intensive showings that RFRA requires to support the government's purported compelling interest. In fact, OSHA devotes but one conclusory sentence in its response to establishing a compelling interest. Resp. at 76. This is insufficient for RFRA.

Finally, OSHA never explains why applying the mandate to only organizations with 100 or more employees is anything other than arbitrary; and, therefore, the government has not shown that setting such a line is the least restrictive means of furthering its interests in reducing the spread of COVID-19.

RFRA protects the Ministries from OSHA's interference with their practies. The Court should stay the ETS while the Sixth Circuit considers these weighty issues.

## I. The Mandate Substantially Burdens the Ministries' Free Exercise of Religion.

In its response, OSHA does not challenge the sincerity of the Ministries' religious beliefs. Nor does OSHA ever challenge that the vaccine mandate is a substantial burden on the Ministries' religious exercise. Instead, OSHA asserts that the Ministries can obey their religious convictions by requiring all of their employees to wear a mask, regardless of vaccination status (Resp. at 74), and then require masking and testing. But OSHA misses how the ETS substantially burdens the Ministries' religious practices. As the Ministries *already* explained: "Forcing all employees to mask because some employees choose not to get vaccinated would also cause division," Emerg. App. at 6, because God calls the Ministries to promote peace in accordance with 1 Corinthians 12:24–25 ("But God has put the body together, giving greater honor to the parts that lacked it, so that there should be no division in the body, but that its parts should have equal concern for each other."). OSHA cannot excuse the Ministries from their duty to God, which requires them to have a mask optional policy. *See* Emerg. App. at 6–7; see also Emerg. App. App'x F. Thus, OSHA has no response to the Ministries' substantial burden argument, other than to argue that they misunderstand God. This does not suffice under RFRA.

## II. The Government Does Not Proffer and Therefore Waived Any Compelling Interest Argument.

RFRA states that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest . . . ." 42 U.S.C. § 2000bb-1(b). "Demonstrates" is defined as "meets the burdens of going forward with

the evidence and of persuasion." *Id*. at § 2000bb-2(3). OSHA does not meet these twin burdens with its one sentence response: "Protecting employees from the risk of contracting COVID-19 in the workplace surely is a compelling governmental interest."[3] Resp. at 76. OSHA offers no citations to the record, no citations to any studies, and no citations to any journals to support its purported interest in mandatory vaccination, masking, and testing. And even if it had provided even that barest of evidence, RFRA demands that OSHA demonstrate a compelling interest *as to the particular religious claimant.* As this Court said in *Burwell v. Hobby Lobby Stores, Inc.*:

> HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" . . . . RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." [*Gonzales v.*] *O Centro* [*Espírita Beneficente Uniao do Vegetal*], 546 U.S. [418, 430–31 (2006)] (quoting [42 U.S.C.] § 2000bb-1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro, supra,* at 431, 126 S.Ct. 1211.

573 U.S. 682, 726–27 (2014). Just as RFRA demanded more than "public health" as an interest in *Hobby Lobby* and more than "stopping illegal drugs" in *O Centro,* so, too, RFRA demands more here. OSHA does not present any reason for requiring *these*

[3] The Ministries also note that OSHA's interest in protecting people from contracting COVID-19 is not served by a vaccine mandate, as countless fully vaccinated Americans are now experiencing with the Omicron variant.

Ministries in particular to adhere to its general rule when it exempts every religious and nonreligious employer with fewer than 100 employees. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (internal cites and quotation marks omitted, ellipses in original)). OSHA's one sentence justification does not suffice for RFRA, and, thus, it has waived the compelling interest argument.

## III. OSHA Has Not Shown that Arbitrarily Applying the ETS Only to Employers with 100 or More Employees Is the Least-Restrictive Means of Furthering Any Interest in the Mandate.

RFRA also requires OSHA to "demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest." *Hobby Lobby,* 573 U.S. at 728 (quoting 42 U.S.C. § 2000bb-1(a) and (b)) (emphasis and brackets in original). This test is "exceptionally demanding." *Id.* OSHA, however, has made no such showing that applying the ETS to the Ministries is the least-restrictive means of furthering any supposed interest. Indeed, employers with fewer than 100 employees are placed in a different category and are not subject to the mandate at all. In its response, OSHA fails to provide any explanation of why its interest changes when employers have 99 or fewer employers versus 100 or more. Furthermore, OSHA provides no evidence that treating the Ministries as though they were in the exempt category would inhibit any compelling interest, assuming the government had one, which it does not. When the government arbitrarily places religious organizations into a group and imposes a burden on that

group but not on another group, the government must explain why its goals are not met by arbitrarily placing the religious organizations into the non-burdened group. It does not matter that the arbitrariness comes from picking a number for political expediency or from some other method of selection that is arbitrary to the government's goals. Here, OSHA does not make the showing required by the least-restrictive means test.

## IV. RFRA Demands More Respect than OSHA Provides in its Response.

With bipartisan support nearly unimaginable today, RFRA passed unanimously in the House[4] and 97–3 in the Senate.[5] The Coalition for the Free Exercise of Religion was a conglomeration of 66 organizations that lobbied in support of RFRA and included groups from across the spectrum of the religious liberty public interest organizations—from the Christian Legal Society to the American Civil Liberties Union to the National Association of Evangelicals and the American Humanist Association.[6] President Clinton even joked that the broad political and cultural unity behind the passage of RFRA "shows . . . that the power of God is such that, even in the legislative process, miracles can happen."[7]

At the signing ceremony, President Clinton referred to religious freedom as "the first freedom,"[8] and characterized RFRA as "basically say[ing] that the

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[4] 139 Cong. Rec. 27239–41 (1993).
[5] 139 Cong. Rec. 26416 (1993).
[6] *See* Baptist Joint Committee for Religious Liberty, The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom 6, http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf[http://perma.cc/J9QY-K98F] (reproducing a Letter from Oliver S. Thomas, Coalition Chair, to a Senator, October 20, 1993) (listing organizations).
[7] Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 Pub. Papers 2377 (Nov. 16, 1993).
[8] *Id.*

Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[9] President Clinton called on the nation to "respect one another's faiths, fight to the death to preserve the right of every American to practice whatever convictions he or she has, [and] bring out values back to the table of American discourse to heal our troubled land."[10] The Court should not accept OSHA's invitation to ignore RFRA, even in a pandemic. Religious liberty is too important and deserves a full, individualized analysis in this case. Both the OSHA and the Sixth Circuit failed to provide that assessment. This Court should grant the temporary relief to maintain the status quo of protecting religious liberty while this case plays out in the court of appeals.

[9] *Id.*
[10] *Id.*

## CONCLUSION

The Court should issue a stay of the ETS pending review by the United States Court of Appeals for the Sixth Circuit. In the alternative, the Court should grant the petition for writ of certiorari and issue a stay pending review.

Respectfully submitted.

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*Respondents.*

## CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 22, 29.3, 29.5(b), I certify that a copy of the foregoing Reply Brief in support of Emergency Application for Stay of Agency Standard Pending Disposition of Petition for Review and, in the alternative, a Petition for Writ of Certiorari Before Judgment and Stay Pending Review was served on all parties in the court of appeals and by email and U.S. mail to the counsel listed below:

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