

Nos. 21A244, 21A247

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Applicants ,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION , ET AL .,  
Respondents.

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OHIO , ET AL .,

Applicants,

v.

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION , ET AL .,  
Respondents.

\_\_\_\_\_

ON APPLICATIONS FOR STAY OF ADMINISTRATIVE ACTION AND PETITIONS FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN MEDICAL  
ASSOCIATION, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN  
ACADEMY OF FAMILY PHYSICIANS, AMERICAN ACADEMY OF  
PEDIATRICS, AMERICAN COLLEGE OF CHEST PHYSICIANS,  
AMERICAN COLLEGE OF CORRECTIONAL PHYSICIANS, AMERICAN  
COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN  
GERIATRICS SOCIETY, AMERICAN MEDICAL WOMEN'S ASSOCIATION,  
AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR  
CLINICAL PATHOLOGY, AMERICAN SOCIETY OF  
ECHOCARDIOGRAPHY, AMERICAN SOCIETY OF HEMATOLOGY,  
AMERICAN THORACIC SOCIETY, ASSOCIATION OF ACADEMIC  
PHYSIATRISTS, AND AMERICAN LUNG ASSOCIATION AS AMICI CURIAE  
IN OPPOSITION TO APPLICATIONS FOR STAY

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Dated: December 30, 2021

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## INTEREST OF AMICI CURIAE

Amici are associations representing medical professionals and patients and the public health across disciplines. They accordingly have a strong interest in promoting public health and reducing the spread of COVID -19.<sup>1</sup>

The American Medical Association is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy -making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The American College of Physicians is the largest medical specialty organization in the United States . Its membership includes 161,000 internal medicine physicians, related subspecialists, and medical students. Internists apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adu Its

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<sup>1</sup> This brief is filed with the written consent or non-opposition of Applicants ; Respondents took no position on the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for Amici authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than Amici and their counsel contributed mn andtn[(o)9TJ 0 TTJ /en



interested in providing evidence-based guidance on respiratory disease - related public health issues and advocating for best practices in patient care.

The American College of Correctional Physicians, formerly known as The Society of Correctional Physicians, was founded in 1993. Its purpose is to support the interests of the providers who care for those incarcerated in correctional facilities of all types. This includes jails, juvenile facilities, and state and federal prisons. They



The American Society for Clinical Pathology is a 501(c)(3) non-profit medical specialty society representing more than 100,000 members. ASCP is one of the nation's largest medical specialty societies and the world's largest organization representing the field of laboratory medicine and pathology. ASCP membership is



The American Society of Hematology is the world's largest professional society of hematologists, including approximately 18,000 clinicians and researchers, who are dedicated to furthering the understanding, diagnosis, treatment, and prevention of disorders affecting the blood. ASH believes that vaccinations offer the best protection against contracting COVID -19, prevent severe illness and hospitalization, and will help save lives .

The American Thoracic Society is an international, nonprofit, nonpartisan organization with more than 15,000 physicians, scientists, nurses, and respiratory therapists dedicated to improving the health and wellbeing of patients suffering from critical care illness, pulmonary disease and sleep disordered breathing. ATS's members are on the front lines of the COVID -19 response, treating patients with COVID -19 in hospital intensive care units and inpatient hospital wards , and caring for patients with long -COVID -19. Given ATS's close and daily interaction with COVID -19 patients, ATS's members are also at significant risk for occupational exposures to COVID -19. As such ATS has a compelling interest in seeing the federal government establish and enforce science -based vaccination and testing policy to protect the American public from further spread of COVID -19.

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SARS-CoV-2 is highly transmissible. The original strain was more contagious than the flu, and the Delta variant of SARS-CoV-2, the leading strain until recent days, is more than twice as contagious as previous variants.<sup>8</sup> The surging Omicron variant—which now accounts for more than half of new cases in the United States—appears to be more contagious still.<sup>9</sup> Crucially, more than 50% of the spread of the virus may be from individuals who have no symptoms at the time of transmission.<sup>10</sup>

Workplace transmission has been a major factor in the spread of COVID-19. COVID-19 outbreaks have occurred among workers in numerous industries, including service and sales, education, hospitality, construction, domestic work, meat-processing, transportation, prison, and, of course, healthcare.<sup>11</sup> For example, as of December 22, 2021, the State of Oregon reports more than fifty active workplace outbreaks, including at retail distribution facilities, correctional facilities, and food production facilities, with several outbreaks resulting in

programs, correctional facilities, food industry , and retail. <sup>13</sup> And in New Mexico, as of December 29, 2021, the State has 159 workplaces (including retail, food industry, hospitality, manufacturing, and healthcare facilities) on its “rapid response COVID -19 watchlist,” <sup>14</sup> a designation indicating that at least two employees have tested positive for COVID -19 in a fourteen -day period. <sup>15</sup> Studies have also found widespread COVID -19 outbreaks in meat- and poultry -processing facilities and “ identified high proportions of asymptomatic or presymptomatic infections. ”<sup>16</sup> Another study found that frontline health care workers had a three -fold risk of contracting SARS -CoV-2 compared to the general population. <sup>17</sup>

Forty-five percent more people reported missing work for medical reasons during 2020 than the previous twenty -year average. <sup>18</sup> Another study found that adults who tested positive for SARS -CoV-2 were significantly more likely to report going to an office or school setting than adults who tested negative. <sup>19</sup> Protecting workers from COVID -19 is especially important given that “a large proportion of the United States

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<sup>13</sup> Statewide COVID -19 Outbreak Report , Washington State Department of Health, at 3–4 (Dec. 15, 2021), <https://bit.ly/3FAV11u> .

<sup>14</sup> Rapid Response COVID -19 Watchlist , New Mexico Environment Department (last updated Dec. 29, 2021), <https://bit.ly/3FwIWu5> .

<sup>15</sup> Rapid Response COVID -19 Watchlist: Frequently Asked Questions, at 1, New Mexico Environment Department ( last visited Dec. 30, 2021) , <https://bit.ly/3Js3gPK>.

<sup>16</sup> Michelle A. Waltenburg et al., Coronavirus Disease among Workers in Food Processing, Food Manufacturing, and Agriculture Workplaces, 27 Emerging Infectious Diseases 243 ( Jan. 2021), <https://bit.ly/3kp3Lip>.

<sup>17</sup> Long H. Nguyen et al., Risk of COVID -19 among front -line health -care workers and the general community: a prospective cohort study , 5 Lancet e475 (July 31, 2020) , <https://bit.ly/31ABwY2> .

<sup>18</sup> Charisse Jones & Matt Wynn, Coronavirus and the Workplace: The Virus Causes Record Numbers of Job Absences in 2020, USA Today (Jan. 21, 2021), <https://bit.ly/3C39lgx>.

<sup>19</sup> Kiva A. Fisher et al., 7 H O H Z R U N % H I R U H , O O Q H V V 2 Q V H W \$ P R Q J 6 \ P S W R P I Years With and Without COVID -19 in 11 Outpatient Health Care Facilities — United States, July 2020 , 69 Morbidity & Mortality Weekly R ep. 1648 (Nov. 6, 2020), <https://bit.ly/3F5Ybt8>.

workforce, across a variety of occupational sectors, are exposed to disease or infection at work more than once a month.”<sup>20</sup>

## II. Vaccines Provide A Safe And Effective Way To Help Reduce Transmission Of COVID-19 In The Workplace

COVID -19 vaccines are safe. Before FDA authorized/approved and the Centers for Disease Control and Prevention recommended use of the COVID -19 vaccines in the population, scientists conducted extensive clinical trials. FDA, CDC, and their advisory committees then conducted rigorous reviews of the data, and continue to monitor the vaccines’ safety.<sup>21</sup> A study of more than six million people who received the Pfizer or Moderna vaccines found that serious side effects are very rare.<sup>22</sup> Another study concluded that there is no increased risk for mortality among recipients of any of the COVID -19 vaccines, and that vaccine recipients had lower non -COVID -19 mortality risks than did unvaccinated people.<sup>23</sup>

COVID -19 vaccines are also effective. First, each of the three vaccines greatly reduces the likelihood of contracting SARS -CoV-2. The Pfizer, Moderna, and J&J/Janssen vaccines are 91.3%, 90%, and 72% effective against infection,

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<sup>20</sup> Marissa G. Baker et al., Estimating the burden of United States workers exposed to infection or disease: A key factor in containing risk of COVID -19 infection , PLoS ONE (Apr. 28, 2020), <https://bit.ly/3BWDQq8>.

<sup>21</sup> Benefits of Getting a COVID -19 Vaccine, CDC (last updated Nov. 29, 2021), <https://bit.ly/3H6BsiF>; Nicola P. Klein et al., Surveillance for Adverse Events After COVID -19 mRNA Vaccination , 326 JAMA 1390 ( Sept. 3, 2021), <https://bit.ly/3F1XQYM>; COVID -19 vaccine safety surveillance, FDA (Dec. 7, 2021), <https://bit.ly/3y1dDET>.

<sup>22</sup> Klein et al., *supra* note 21.

<sup>23</sup> Stanley Xu et al., COVID -19 Vaccination and Non -COVID-19 Mortality Risk — Seven Integrated Health Care Organizations, United States, December 14, 2020 –July 31, 2021, 70 Morbidity & Mortality Weekly Rep. 1520 ( Oct. 29, 2021), <https://bit.ly/3D1ZRn4>. Although the CDC recently recommended the Pfizer or Moderna vaccines over the J&J/Janssen vaccine, the CDC’s advisory committee made clear that “receiving any vaccine is better than being unvaccinated.” Press Release, CDC, CDC Endorses ACIP’s Updated COVID -19 Vaccine Recommendations (Dec. 16, 2021), <https://bit.ly/3yzUTfJ>.

respectively.<sup>24</sup> A study of vaccine effectiveness between December 14, 2020 and August 14, 2021 found that vaccines were 80% effective at preventing SARS-CoV-2 infection among frontline workers.<sup>25</sup> Although the vaccines' efficacy wanes over time, initial data on Pfizer booster shots, during a time when Delta was the prevalent variant,







incidence rates of measles less than half those of states that did not.<sup>41</sup> More recently, Ohioans exposed to measles abroad resulted in “the largest outbreak documented in the United States in more than two decades.”<sup>42</sup> Approximately 89% of those who contracted measles were unvaccinated, but “high baseline vaccination coverage in the general community was probably effective against further spread of measles.”<sup>43</sup> COVID-19 spreads in communities with fewer vaccinated individuals, even if they are within or adjacent to communities with a higher proportion of vaccinated individuals. The more people who share a workspace who are vaccinated, the better protected all workers —vaccinated and unvaccinated alike —will be.

Applicants suggest that OSHA cannot establish the necessity of the ETS simply because OSHA did not require vaccines sooner. See Business Association Applicants’ Mot. at 15. The timing of the ETS, however, does not undermine its necessity. OSHA’s decision to issue the ETS within three months of FDA’s full approval of a COVID-19 vaccine was consistent with the American Medical Association’s policy recommendation that vaccine requirements are appropriate only after a vaccine has received full authorization, the vaccine is widely publicly available, and there has been a reasonable amount of time allotted for voluntary uptake of the authorized vaccine.<sup>44</sup> Far from undermining the ETS’s necessity, the timing shows that OSHA

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<sup>41</sup> Kevin M. Malone & Alan R. Hinman, Vaccination Mandates: The Public Health Imperative and Individual Rights, in *Law in Public Health Practice* 262, 269 (1st ed., 2003), <https://bit.ly/3BUviyg>.

<sup>42</sup> Paul A. Gastañaduy et al., A Measles Outbreak in an Underimmunized Amish Community in Ohio



transmission of SARS-CoV-2, many people choose not to wear masks, even when encouraged or legally required to do so. Noncontinuous mask-wearing has been shown to result in the spread of COVID-19 in the workplace.<sup>47</sup>

Even for those who work remotely or outdoors at times, vaccination provides the best protection against COVID-19. The virus spreads through respiratory droplets or aerosols when an infected individual talks, breathes heavily, sings, coughs, or sneezes.

