

# In the Supreme Court of the United States

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NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AMERICAN TRUCKING ASSOCIATIONS, INC.; NATIONAL RETAIL FEDERATION; FMI–THE FOOD INDUSTRY ASSOCIATION; NATIONAL ASSOCIATION OF CONVENIENCE STORES; NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; INTERNATIONAL WAREHOUSE AND LOGISTICS ASSOCIATION; INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION; NATIONAL PROPANE GAS ASSOCIATION; BRICK INDUSTRY ASSOCIATION; AMERICAN BAKERS ASSOCIATION; KENTUCKY PETROLEUM MARKETERS ASSOCIATION; KENTUCKY TRUCKING ASSOCIATION; LOUISIANA MOTOR TRANSPORT ASSOCIATION; MICHIGAN ASSOCIATION OF CONVENIENCE STORES; MICHIGAN PETROLEUM ASSOCIATION; MICHIGAN RETAILERS ASSOCIATION; MICHIGAN TRUCKING ASSOCIATION; MISSISSIPPI TRUCKING ASSOCIATION; OHIO GROCERS ASSOCIATION; OHIO TRUCKING ASSOCIATION; TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY; TENNESSEE GROCERS AND CONVENIENCE STORE ASSOCIATION; TENNESSEE MANUFACTURERS ASSOCIATION; TENNESSEE TRUCKING ASSOCIATION; AND TEXAS TRUCKING ASSOCIATION,

*Applicants,*

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR; MARTIN J. WALSH, IN HIS OFFICIAL CAPACITY AS SECRETARY, U.S. DEPARTMENT OF LABOR; DOUGLAS PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

*Respondents.*

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*On Applications for Stay of Agency Action Pending Disposition of Petition for Review*

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## **BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS**

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**STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>**

The separation of powers has long been known to be a defense against tyranny. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (T. Nugent transl. 1949). And so it “remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Loving v. United States*, 517 U.S. 748, 757 (1996). “The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.” *INS v. Chadha*, 462 U.S. 919, 946 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)). “To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring).

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<sup>1</sup> Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Those safeguards are just as relevant today. For example, if the President becomes impatient with how the citizenry is responding to his plan for dealing with a public health crisis, he may look to act (through an agency) to advance his agenda more quickly. The President may direct an agency to find some authority, somewhere, that could arguably be used in furtherance of the agenda and then use that claimed authority to enact a sweeping public health measure. But when an executive agency overreaches the boundaries of its authority in enacting the President's agenda, it undermines both the vertical and horizontal separation of powers that protect the people.

*Amici* are \_\_\_ United States Senators and \_\_\_ Members of the United States House of Representatives concerned with the executive overreach seen in the current administration's response to the COVID-19 pandemic. Congressional members have an interest in the powers they delegate to agencies not being abused—the legislative authority vested in the federal government belongs to Congress, not the Executive branch. In this case, the promulgation by the Occupational Health and Safety Administration (OSHA) of a sweeping, nationwide vaccine mandate on businesses intrudes into an area of legislative concern far

beyond the authority of the agency. And it does so with a Mandate enacted through OSHA’s seldom-used “emergency temporary standard” (ETS) provision that allows for bypass of notice and comment rulemaking under certain circumstances. That OSHA exceeded its authority in enacting the ETS Mandate is not a “particularly hard” question. *In re OSHA*, 2021 WL 5914024, at \*4 (Sutton, C.J., dissenting from the denial of initial hearing en banc).

Moreover, congressional members—as representatives of the people of their States and districts—have an interest in the citizens they represent being able to craft local solutions to problems facing their States and districts. Federalism concerns should be addressed before requiring federally-imposed solutions. And this is especially true when the question at issue involves an area typically reserved to the States (such as vaccine mandates). At the least, Congress should be forced to make clear any delegations of authority into areas of State control.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Time and again this Court has recognized that a clear statement of congressional intent must be present to find that Congress has ceded decisions of great economic and political significance. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). And this case involves an issue broader and more important than those of the past addressed by this principle. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–43 (2000). Even assuming Congress has the power to enact mandatory vaccination requirements across the country—a difficult question, see *NFIB v. Sebelius*, 567 U.S. 519, 549–61 (2012)—such power cannot be assumed to have been given away accidentally. To hold otherwise would infringe the separation of powers necessary both to avoid arbitrary or tyrannical rule and to make government effective and accountable. See *Loving*, 517 U.S. at 757.

While OSHA misinterprets its textual authority to take the action it attempts here, the lack of a clear statement from Congress that it could do so presents an insurmountable hurdle to the agency’s expansion of the ETS provision. Vaccine mandates—a prototypical state police power—are not within the purview of the Occupational Safety and Health Act

(OSH Act), let alone something on which Congress intended OSHA to take unilateral action under its “emergency” powers. The ETS Mandate proposed by OSHA cannot stand.

## ARGUMENT

### **I. Congress Did Not Provide OSHA With The Authority It Claims Here.**

The ETS provision of the OSH Act allows OSHA to address only “grave danger” in the workplace, which includes any “toxic or physically harmful” agent, without going through notice and comment when such an emergency standard is “necessary.” 29 U.S.C. § 655(c)(1). And in the statutory scheme established by Congress, these conditions are a meaningful restraint on the agency. OSHA, however, aggressively reads the restrictions as an opportunity for the agency to branch out into public healthcare policy. Not only does this reading violate the text of the OSH Act, it would also create a nondelegation problem. That is because Congress provided no authority—let alone an intelligible principle—for OSHA to become a roving public health agency. The problem is avoided, though, because the ETS Mandate does not meet the conditions for issuing such a nationwide requirement on businesses.

**A. The Text of the OSH Act Does Not Support Implementation of the ETS Mandate for COVID-19 Vaccines.**

With its ETS Mandate, OSHA imposes COVID-19 vaccine mandate for all large employers (those having more than 100 employees). This exceeds the scope of OSHA’s congressionally-defined role, though. As a matter of statutory interpretation, the OSH Act “covers only *workplace-specific* hazards and permits only *workplace-specific* safety measures.” *In re OSHA*, 2021 WL 5914024, at \*7 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). After all, OSHA rules apply to “employment and places of employment.” 29 USC § 652(8). But OSHA now wants to dictate virus protection measures outside the workplace to stop a virus outbreak that is also taking place outside the workplace. The ETS Mandate was thus flawed from its inception.<sup>2</sup>

The ETS Mandate also elides the specific statutory provisions set forth by Congress to constrain use of OSHA’s emergency powers. *First*,

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<sup>2</sup> While the ETS Mandate also offers a testing option, OSHA is likely aware that the increased cost to employers for testing will probably cause them to simply mandate vaccines for their employees. Alternatively, if testing costs are imposed on employees, they would likely take the vaccine unwillingly or quit their jobs. Either way, the testing option in the Mandate will largely be illusory in practice as both employers and employees would be reticent to pay for it. Moreover, the testing option is rightly viewed as a punitive measure for those unwilling to get the vaccine since individuals with a vaccine can contract and spread COVID-19.

under OSHA’s own analysis, there is no “grave danger” as defined by the OSH Act. *BST Holdings*, 17 F.4th at 613. OSHA itself has conceded that the “effects of COVID-19” range from *mild* to critical. 86 Fed. Reg. 61402-03. Moreover, despite OSHA’s excuse that smaller employers might not be able to administratively handle its new rule, the exemptions from the Mandate for those small employers shows that there is no grave danger. After all, “[i]f [OSHA] suddenly realized that exposure to a new chemical created a ‘grave’ danger of cancer, it is difficult to imagine that anyone would permit an emergency rule targeting the problem to apply only to companies with over 100 employees in order to save the other companies money.” *In re OSHA*, 2021 WL 5914024, at \*13 (Sutton, C.J., dissenting from the denial of initial hearing en banc); see also *BST Holdings*, 17 F.4th at 616 (“[It may be true that] companies of 100 or more employees will be better able to administer (and sustain) the mandate \* \* \* \* But this kind of thinking belies the premise that any of this is truly an emergency.”).

*Second*, a virus is not a “toxic or physically harmful” “agent” as defined in the OSH Act. In context, an agent is a substance that is used for a particular purpose in the workplace—e.g., a chemical being used by

an employee is the employee's agent to do a particular job. COVID-19 does not fall into this category, irrespective of whether OSHA can find one potential dictionary definition of "agent" that matches the agency's preferred outcome. Moreover, to avoid overreading statutes, this Court will "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). Here, the phrases "substances or agents" and "toxic or physically harmful" denote something far different than a virus. Thus "OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness* is yet another transparent stretch." *BTS Holdings*, 17 F.4th at 613.

*Third*, the ETS Mandate is not "necessary" as required by the statute. That term in the OSH Act's emergency standard goes far beyond mere advisability. Indeed it means that the action must be *indispensable*, not "just appropriate." *In re OSHA*, 2021 WL 5914024, at \*9 (Sutton, C.J., dissenting from the denial of initial hearing en banc). But OSHA cannot argue that the mandate is indispensable for many

categories of workers under “any standard of review.” *Id.* at \*11. It is thus unsurprising that OSHA itself previously preferred “less intrusive, more tailored protective measures” for this exact problem. *Id.* at \*10.

Moreover, mandatory vaccinations do not stop individuals from contracting and transmitting COVID-19. Vaccinated workers can still contract and transmit COVID-19, including the new Omicron variant. Given that fact, imposing masking and testing restrictions *only* on unvaccinated workers makes no sense because *all* workers regardless of vaccination status remain potential carriers and transmitters of the virus. If the Rule does not cure the supposed grave danger in the workplace, it cannot be necessary under the statute. Thus the ETS Mandate cannot rise to the level of “necessary” required by the text of the OSH Act.

**B. Reading the OSH Act to Allow the Agency’s Interpretation Here Would Create a Nondelegation Problem.**

“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.” *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). While the legislative branch “may confer substantial discretion on executive agencies to implement and enforce the laws,” *id.* at 2123 (citing *Mistretta v. United*

*States*, 488 U.S. 361, 372 (1989)), Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *Ibid.* No such intelligible principle exists if OSHA’s reading of the statute is correct.

OSHA seeks to trade on the broad delegations of authority to executive agencies previously approved by this Court. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–74 (2001). And to be sure, were OSHA strictly relying on an ETS that was “necessary” to stop a “grave danger” from a workplace “agent,” the agency could arguably find support for that delegated authority. But the ETS Mandate here opens the door for a power that would lack an intelligible principle—it would allow OSHA to become a roving committee for general health policy. As this Court has recognized, a failure to limit a word such as “necessary” vests an agency with a breathtaking amount of authority that will have no functional limitation. *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

The challengers to the Mandate have not argued against OSHA’s finding that individual employees might have better outcomes with COVID-19 if they are vaccinated. This fact is irrelevant to OSHA’s

claimed power. Employees might also have better outcomes with the disease if they exercised at night, took vitamins at home in the morning, and avoided large gatherings on weekends. Yet no one would argue that OSHA's jurisdiction extends beyond the workplace to these activities. A vaccine requirement is functionally an outside-the-workplace requirement that individuals take action to provide themselves with better individual outcomes when they do contract the virus. But that's not OSHA's job. It was never meant to be the health police, "protect[ing] unvaccinated working people from themselves based on highly personal medical decisions." *In re OSHA*, 2021 WL 5914024, at \*11 (Sutton, C.J., dissenting from the denial of initial hearing en banc).

The administration's stated goal for the ETS Mandate is to "reduce the number of unvaccinated Americans by using regulatory powers." Path Out of the Pandemic, The White House, <https://www.whitehouse.gov/covidplan/>. This is neither a purpose of the OSH Act generally or the emergency rule process specifically. Private healthcare decisions are far afield from federal workplace-safety regimes. To allow OSHA the authority to control such decisions would remove any semblance of an intelligible principle in the delegated authority that

Congress has given the agency. As this Court has recognized, a delegation of power that broad would need even more circumscribed discretion. See, e.g., *Loving*, 517 U.S. at 772–73. Such boundaries are clearly not present here and thus it may be inferred that OSHA was not given power on that scale.

In short, there is no mousehole in which Congress could have even tried to hide the elephant of the ETS Mandate here. See *Whitman*, 531 U.S. at 468. It is thus unsurprising that the ETS itself acknowledges that OSHA has never used its authority before to mandate vaccination. 86 Fed. Reg. 61,439. There was no authority for it to begin doing so now, either.

## **II. Assuming OSHA Has The Authority It Now Claims Would Violate The Major Questions Doctrine.**

Under the major questions doctrine, a congressional authorization to mandate vaccines would have to be clear. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (noting that Congress must “speak clearly if it wishes to assign to an agency decisions of vast economic and political significance”). The major questions doctrine thus avoids the nondelegation problems discussed above by ensuring that Congress does not confer authority on an agency by accident. This is doubly true when

intruding into an area typically reserved for the States. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. An intrusion into state prerogatives on vaccines—if legitimately tried by Congress—would need to be accompanied by intelligible principles to guide the agency’s discretion. *U.S. Forest Serv. v. Cowpasture River Preservation Ass’n*, 140 S. Ct. 1837, 1850 (2020) (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”).

Vaccine mandates are traditionally the province of the States. *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). And courts must operate under the “assumption that the historic police powers of the States [a]re not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress.” *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). While the panel majority in the Sixth Circuit protested that there may be both federal and state regulatory powers over an area, *In re: MCP No. 165*, (6th Cir. Dec. 17, 2021), at \*34, that argument is irrelevant for three reasons. First, it is unclear if even

Congress could pass a nationwide vaccine mandate. *See in re OSHA*, 2021 WL 5914024, at \*18 (Sutton, C.J., dissenting from the denial of initial hearing en banc) (“For while Congress has long sought to *facilitate* safe and effective vaccines, it has never invoked the commerce power to *mandate* their administration upon the public at large.”). Second, it confuses congressional action with agency action—when authority does exist for such actions, it is Congress that must act in the first instance to initiate its use. Third, and most importantly, the panel’s argument

misses the point that the inquiry is not *if* Congress *could* legislate in an area but *whether* Congress *has* legislated in an area.

When Congress intends to act in a field known to fall within the purview of the States, it must pass an act clearly authorizing such an intrusion. *Cowpasture River*, 140 S. Ct. at 1850 (requiring “exceedingly clear language”). Because that has not been done here, it is even more plain that Congress did not give that power to an agency bureaucrat. The very purpose of the major questions doctrine is to prevent courts from assuming congressional intent to delegate authority—it is not to assess whether Congress could have done it. The Sixth Circuit panel’s rejection of the doctrine only shows that it was answering the wrong question.

Even if the statutory text appeared to leave open the possibility of a vaccine mandate ETS, the “sheer scope” of the agency’s claimed authority would counsel against the government’s interpretation. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. Here the sheer scope isn’t just the enormous sums of money and the numerosity of the people affected, either—it is the intrusion into States’ rights. *Ibid.* (“And the issues at stake are not merely financial. The [agency action] intrudes into an area that is the particular domain of state law: the landlord-tenant

relationship.”). Without clear congressional authority in the regulatory scheme for such an expansion of agency authority into the realm of state police powers, it may not be assumed to exist.

Moreover, the sudden “discovery” of authority under the OSH Act confirms that it was never intended to displace state authority in this area. *Utility Air Reg. Group*, 573 U.S. at 324 (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” (quoting *Brown & Williamson*, 529 U.S. at 159)). As the Fifth Circuit put it, OSHA is attempting to use “an old statute \* \* \* in a novel manner” to impose billions of dollars in compliance costs to “resolve one of today’s most hotly debated political issues” in an area “outside of OSHA’s core competencies.” *BTS Holdings*, 17 F.4th at 617. Thus, under this Court’s major questions doctrine, rejection of OSHA’s claimed authority here is certain.

## CONCLUSION

A stay pending review should be granted.

December 30, 2021

Respectfully submitted,

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