No. 21-7000 (lead), 21-4149
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

On Petition for Review

PETITIONER THE HERITAGE FOUNDATION'S RESPONSE IN OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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INTRODUCTION

On September 9, 2021, and ahead of the release of the emergency temporary standard (ETS) by the Occupational Safety and Health Administration (OSHA) entitled "COVID-19 Vaccination and Testing; Emergency Temporary Standard" *see* Federal Register at 86 Fed. Reg. 61402 (hereinafter "Mandate"), President Biden declared that his patience was "wearing thin" with unvaccinated Americans. President Biden, *Remarks at the White House* (Sept. 9, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ (hereinafter "Biden Remarks"). Pitting Americans against one another, Biden suggested that "anger at those who haven't gotten vaccinated" is warranted because they have not done "the right thing," and, thus, it is no longer about "freedom or personal choice" for unvaccinated Americans. *Id*. The solution, the President announced, is to take action to "combat those [the government perceives] are blocking public health" and compel Americans to comply. *Id.* Recognizing, however, that the other federal agencies tasked with regulating vaccines lacked the power to mandate vaccination, President Biden announced his plan to commandeer employers to do the government's work and compel Americans to act as the government wishes them to act.

Immediately upon issuance of the ETS, employers and employees alike filed lawsuits raising a host of valid concerns and legal challenges. As the Supreme Court explained last summer, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends" including to combat the spread of COVID-19 or its variants. *Alabama Assn. of Realtors v. Dept. of Health and Human Servs*., 141 S. Ct. 2485, 2490 (2021) (Per Curiam) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585-586 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization)).

Disregarding sound legal precedent, the government seeks to dissolve the stay and argues without proper legal or factual support that this Court should overrule the Fifth Circuit's decision. In addition to many of the reasons raised by other petitioners, this Court should refrain from entertaining the relief requested by respondents for the reasons outlined below.

ARGUMENT

I. The Fifth Circuit Properly Concluded that Petitioners Are Likely to Succeed on the Merits.

A. OSHA Lacks Statutory Authority To Issue A Vaccine Mandate.

29 U.S.C. § 655(c)(1) governing OSHA's implementation of an ETS provides as follows:

> The Secretary shall provide . . . for an emergency temporary standard to take immediate effect . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

For the reasons provided below, OSHA lacks authority to issue the Mandate.

1. OSHA's reliance upon sources outside the OSH Act to support its unprecedented exercise of power is unpersuasive.

Congress has already tasked several other agencies with power related to determining the safety, efficacy, and proper methods for distribution of the vaccine, yet none of these agencies are authorized to mandate a vaccine. OSHA – which has no such express power regarding vaccines – certainly lacks that authority too.[1]

OSHA's reliance upon sources *outside the language of the statute – i.e.* select definitions from the Merriam Webster dictionary defining "agent"[2] or "new hazard"

[1] Badger, Doug and Larkin, Paul Congress Didn't Give OSHA Authority to Impose Vaccine Mandates, THE HERITAGE FOUNDATION (Nov. 12, 2021), https://www.heritage.org/public-health/commentary/congress-didn't-give-osha-authority-impose-vaccine-mandates.

[2] OSHA's reliance upon the definition of "agent," which is defined as "a chemically, physically, or biologically active principle," alone, is insufficient to suggest that OSHA has authority to regulate a virus, thus it purports that the definition of "virus" coupled with the definition of "agent" grants it the asserted authority. *See* Gov't Mot., at 10 (noting that the Merriam-Webster dictionary defines "virus" as an infections agent[]"). The full definition of "virus" is as follows: "any of a large group of submicroscopic infectious agents that are usually regarded as nonliving extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, animals, and plants." MERRIAM-WEBSTER,

merely serves to confirm its lack of authority. The "standards addressed by Subsection 6(b)(5) [of the OSH Act] must be read together with Subsection 6(c)(1) which permits the ETS to take effect immediately.[3] Subsection 6(c)(1) contains no mention of "new hazards" or of "virus" – only "substances or agents determined to be toxic or physically harmful." *Id*. As this Court has noted, "[a]gencies cannot discover in a broadly worded statute authority to supersede state" law or powers. *Tiger Lily, LLC v. United States*, 5 F.4th 666, 671 (6th Cir. July 23, 2021) (rejecting the CDC's attempt amid COVID-19 to impose a broad eviction moratorium through the general phrase, "other measures" contained within § 264(a)). "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *id*., and courts "cannot read [§ 655] to grant [OSHA] the power to insert itself into [the personal health decisions]" of citizens. *Id.* at 671. Importantly, and as discussed in more detail below, this "principle has yet greater force when 'the administrative interpretation alters the federal-state framework by

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https://www.merriam-webster.com/dictionary/virus (last visited December 5, 2021). The Merriam-Webster dictionary defines "toxin" as a "poisonous substance." MERRIAM-WEBSTER, https://merriamwebster.com/dictionary/toxin.

[3] Paul Larkin and Doug Badger The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for Covid-19 Vaccinations, Admin. L. Rev. Accord, 2021 (Nov. 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3935420, at 14 ("The former speaks to *what* certain standards must contain and *why* that is obligatory, while the latter addresses *when* those standards can become law and *how long* they can remain law.").

permitting federal encroachment upon a traditional state power.'" *Id.* (citing *Solid Waste Agency*, 531 U.S. at 173).

Finally, OSHA's reliance on a "decade old regulation," 29 C.F.R. § 1910.1020,[4] to suggest that the definition of toxic substances or harmful physical agents includes viruses and the like only serves to further confirm the limits of OSHA's authority. This same regulation specifically clarifies that "'[e]xposure' . . . does *not* include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace *in any manner different from typical non-occupational situations*." 29 C.F.R. 1910.1020(c)(8) (emphasis added).

2. OSHA has failed to demonstrate grave danger and necessity.

Even if OSHA's argument above was a convincing one, which it is not, OSHA must still demonstrate a "grave danger," *and* "necessity." It fails to do so on both fronts.

OSHA expressly admits that COVID–19 is not exclusively an occupational disease, Fed. Reg. 61411, and that only "unvaccinated employees face a 'grave danger.'" Gov't. Motion, at 5. Unvaccinated workers make up less than 22% of the population. *See BST Holdings, L.L.C v. OSHA*, No. 21-60845, 2021 U.S. App.

[4] Respondents' Emergency Motion to Dissolve Stay (hereinafter "Gov't Mot.") (Doc. 52), at 10 (citing 29 C.F.R. 1910.1020(c)(13)).

LEXIS 33698, at *16 n. 16 (5th Cir. Nov. 12, 2021) (citing CDC, Covid Data Tracker, https://cvid.cdc.gov/covid-data-tracker/#datatracker-home) (noting that OSHA estimates that approximately seventy-eight (78) percent of Americans age 12 and above are fully or partially vaccinated, and bear little risk of contracting the virus, much less suffering severe illness); 86 Fed. Reg. 61402, 61402-03 ("COVID-19 vaccines authorized or approved by the [FDA] effectively protect vaccinated individuals against severe illness and death from COVID-19"); *Biden Remarks* ("fully vaccinated [are] highly protected from severe illness, even if you get COVID-19"); *id*. (noting that risk of severe illness is "very low" and that only 1 out of every 160,000 fully vaccinated Americans was hospitalized with COVID per day). In fact, according to the Administration, "recent data indicates there is only one confirmed positive case per 5,000 fully vaccinated Americans per day" because "vaccines provide strong protections for the vaccinated." *Id*.

OSHA also admits that it "cannot state with precision the total number of workers in our nation who have contracted COVID-19 at work and became sick or died." Fed. Reg. 61424. While OSHA suggests there is "extensive evidence of 'workplace transmission,'" *see* Fed. Reg. 61411, many of the studies relied upon by OSHA fail to support this assertion.[1] *See* Fed. Reg. 61411-12 (citing studies which did *not* confirm that the virus was contracted in the workplace, but, instead, only that there was "plausible" evidence of transmission in a shared location *other than a*

household). Further, "outbreaks" were identified in many cases if even *2 cases* of COVID–19 occurred within 14 days of each other. *Id*. at 61412-13 (citing reports by select state health departments including Washington and Tennessee, as well as a published peer- reviewed study conducted in Utah – all of which defined "outbreak" or "cluster" similarly such as "two or more laboratory confirmed COVID-19 cases" that "is not a household exposure"). Notably, the reporting of many of these "outbreaks" failed to take into account factors which OSHA admits contribute to the spread of the virus – *i.e.* distancing – specifically whether people are "within six feet for at least fifteen minutes," *see* Fed. Reg. 61409 – and the adequacy of air ventilation and sanitation practices. *Id.*[5]

As the Fifth Circuit properly noted, OSHA's extreme measures are not proven to be necessary and do not account for "workplace controls" that, if put into place, might achieve the same goal. Consider, for example, that under the Mandate, "a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on." *BST Holdings, LLC. v. OSHA*, 2021 U.S. App. LEXIS 33698, at *16. Also consider that the Mandate covers "all

[5] *See also* Fed. Reg. 61404 (indicating that "distancing, barriers, ventilation and sanitation" are "workplace controls against SARS-CoV-2 transmission").

employers with a total of 100 or more employees *at any time this section is in effect*." Fed. Reg. 61504 (emphasis added). In determining the number of employees, however, employers must include all employees across all of their U.S. locations, regardless of employees' vaccination status or where they perform their work. Part-time employees count towards the company total, but independent contractors do not. *Id*. at 61513. As OSHA acknowledges, "[i]f an employer has 102 employees and only 3 ever report to an office location, that employer would be covered." *Id*. at 61514. OSHA's assertion that it "need not operate on an employer-by-employer or employee-by-employee basis" misses the point. *See* Gov't Mot., at 38. Section 655(g) provides that the Secretary must "give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." 29 U.S.C. § 655(g). Despite that language, and as the Fifth Circuit noted, there was no regard given to the needs of different industries or environments. This is indeed hard to reconcile with OSHA's earlier acknowledgments and pronouncements that (1) "the best approach for responding to the pandemic is to . . . issue detailed, industry-specific guidance" because such guidance is generally "more effective than promulgating a rigid set of requirements for all employers in all industries based on limited information," *BST Holdings, LLC*, 2021 U.S. App. LEXIS 33698, at *19 (citing Letter from Loren Sweatt, Principal Deputy Assistant Sec'y, OSHA, to Richard L.

Trumka, President, AFL-CIO at 3 (May 29, 2020)), and (2) that "[b]ased on substantial evidence . . . an ETS is not necessary both because there are existing OSHA and non-OSHA standards that address COVID-19 and because an ETS would actually be counterproductive. . . to address all employers and to do so with the requisite dispatch . . . OSHA's time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility." *Id*. at 16 (citing OSHA D.C. Circuit Brief at 16, 17, 21, 26).

B. The Fifth Circuit Was Not Mistaken; The Constitutional Concerns and Infringements Are Undisputable Here.

1. *OSHA's mandate exceeds the federal government's authority under the Commerce Clause*.

OSHA's assertion that there is no merit to constitutional concerns or claims here in its extraordinary action is alarming. More disconcerting is OSHA's apparent belief that there is no definitive limit to its authority to "require businesses to take steps to protect employees from workplace dangers," even when those steps force employees, not employers, to take a vaccine. *See* Gov't Mot., at 18.

Mandating a vaccine is hardly comparable to requiring employees to fill out paperwork or wash their hands while at work. Gov't Mot., at 19-20. Further, and aside from the obvious difference between requiring employers to *offer* the option of a vaccine to employees (as OSHA did in 1991 to deal with bloodborne

pathogens)[6] and *mandating* the same, there are two other distinctions worth noting that set OSHA's regulation of a bloodborne pathogen apart from the vaccine mandate. First, "OSHA followed a notice-and-comment rulemaking process and did not resort to an emergency temporary standard. Second, Congress took the extraordinary step of rewriting the regulation in 2000, leaving no doubt that it intended for the agency to exercise that authority." *Badger*, supra n. 1.[7]

The purpose and intent behind OSHA's enactment of the Mandate leaves little room for debate that OSHA is unlawfully "commandeer[ing]' employers," to achieve a vaccination goal held by the current Administration. *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *22. President Biden was unequivocally clear that OSHA's Mandate, together with the other measures he mentioned during his September announcement, is intended to "require more Americans to get vaccinated." *Biden Remarks*.

The Supreme Court has made clear that it will not construe the Commerce Clause in a manner "to permit Congress to regulate individuals precisely *because* they are doing nothing" because it would then "open a new and potentially vast domain to congressional authority." *Nat'l Fed'n of Indep. Bus. v.*

[6] *See* 29 C.F.R. § 1910.1030.
[7] *See also* Larkin and Badger, *supra* n. 3, at 19-20.

Sebelius, 567 U.S. 519, 552 (2012). The Supreme Court considered the following example particularly relevant here:

> In the health care market, many Americans do not eat a balanced diet. . . . The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. . . . Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.
>
> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures--joined with the similar failures of others--can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
>
> That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293.

Id. at 553-54 (internal citations omitted). In the present case, the government has passed the buck to employers in hopes that the same legal precedent will not apply, but it clearly does.

2. OSHA's mandate violates the Tenth Amendment

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *NFIB*, 567 U.S. at 533. *See also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("The Constitution created a Federal Government of limited powers."). "The powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. This "balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties,'" and reduce "the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458-59 (citing *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) (other citations omitted). "The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.' *Bond v. United States*, 564 U.S. 211, 22 (2011)." *NFIB*, 567 U.S. at 536.

Through smallpox and other outbreaks of disease, the federal government has never imposed vaccination or attempted to regulate it. Public health and safety regulation is traditionally left to the states. As the Supreme Court noted when it struck down the federal government's attempts to require individuals to purchase a health insurance policy, "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties and properties of the people." *Id.* at 536. This principle was again affirmed by the Supreme Court last year in the context of the government's efforts

to limit the spread of COVID-19. "Our constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). The regulation of vaccines is no exception to this rule. *Jacobson* set a precedent for state – not federal – regulation of vaccines. This precedent has been adhered to by courts for more than one hundred years. *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *21 (citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson*, 197 U.S. at 25-26).

Accordingly, "courts must be certain of Congress' intent before finding that federal law overrides this balance." *Id*. Simply put, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (emphasis added). *See also Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) ("The background principles of our federal system belie the notion that Congress would use an obscure grant of authority to regulate areas traditionally supervised by the States' police power"). While the agency continues to assert that its power is unmistakably clear here, its inability to cite to the text of the statute itself (rather than to the Merriam-Webster dictionary) or to any legal precedent to support such an assertion is fatal here.

OSHA's "claim . . . of unheralded power to regulate a significant portion of the American economy," must be rejected by this Court. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 160 (2000); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (plurality). To uphold OSHA's Vaccine Mandate would be to significantly expand its power at the expense of the personal liberty of millions of American workers. As the Fifth Circuit noted, "'courts 'always have rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power." *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *22 (citing *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas J., concurring)).

C. The Fifth Circuit Properly Concluded That The Balance of Equities Warrants A Stay.

The government argues that "petitioners have not shown any injury that outweighs the injuries to the government and the public interest." As explained above, the government's own evidence presented in support of the Mandate indicates that the majority of the public is not at risk for contracting COVID-19, much less suffering severe side effects or death.

Of course, in advancing its arguments the government turns a blind eye to the various constitutional infringements arising from its abuse of power and ignores the legal precedent of this Court holding that the "deprivation of a constitutional right 'constitutes irreparable injury sufficient to justify injunctive relief." *Connection*

Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998). *See also Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 579 (6th Cir. 2002) ("The public clearly has interest in vindicating constitutional rights.").

Further, the injury that will be incurred by employers and employees alike requires no speculation. As the Fifth Circuit noted, OSHA's rule reaches "two-thirds of all private-sector workers in the nation." 86 Fed. Reg. 61,402, 61,403 (Nov. 5, 2021). It compels covered employers to (1) make employees get vaccinated or get weekly tests at their expense and wear masks; (2) "remove" non-complying employees; (3) pay per-violation fines; and (4) keep records of employee vaccination or testing status. *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *27 (J. Duncan, concurring) (succinctly summarizing the "vast economic and political significance" of OSHA's overreach). OHSA invokes no statute expressly authorizing the rule. Compliance costs are not merely "speculative," *see* Gov't Mot., at 43, and the effects are immediate for the employees who must comply. "Complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." Id. at *24 (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment)).

CONCLUSION

This Court should deny the government's motion to dissolve the Fifth Circuit's stay.

December 7, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Fed. R. App. P. 32(g) this response contains 4022 words pursuant to Fed. R. App. P. 27(d)(2)(A), and that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

/s/Abigail A. Southerland
Abigail A. Southerland

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, I caused foregoing to be served on all parties by operation of the Court's CM/ECF system.

/s/ Abigail A. Southerland
Abigail A. Southerland

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