No. 21-60845

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST Holdings, LLC; RV Trosclair LLC; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; Trosclair Williams LLC; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall,

Petitioners,

v.

Occupational Safety and Health Administration,
United States Department of Labor,

Respondent.

PETITIONERS' BRIEF

Daniel R. Suhr
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for Petitioners

CERTIFICATE OF INTERESTED PERSONS

1. Pursuant to Fifth Circuit Rule 28.2.1, Petitioners file this Certificate of Interested Persons. The case number has yet to be assigned in this case, and the complete case caption of parties is on the preceding cover page.

2. The undersigned counsel of record certifies that the following listed persons and non-governmental entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

a. BST Holdings, LLC

b. RV Trosclair L.L.C.

c. Trosclair Airline LLC

d. Trosclair Almonaster LLC

e. Trosclair and Sons LLC

f. Trosclair & Trosclair, Inc.

g. Trosclair Carrollton LLC

h. Trosclair Claiborne LLC

i. Trosclair Donaldsonville, LLC

j. Trosclair Houma LLC

k. Trosclair Judge Perez LLC

l. Trosclair Lake Forest LLC

m. Trosclair Morrison LLC

n. Trosclair Paris LLC

o. Trosclair Terry LLC

p. Trosclair Williams LLC

q. Ryan Dailey

r. Jasand Gamble

s. Christopher L. Jones

t. David John Loschen

u. Samuel Albert Reyna

v. Kip Stovall

3. Opposing counsel in this case will be the United States Department of Justice.

/s/ Sarah Harbison
Attorney of record for Petitioners

REQUEST FOR ORAL ARGUMENT

Petitioners respectfully request that this Court permit oral argument because the Petition presents novel questions of law; oral argument would aid the Court in rendering a decision. *See* Fed. R. App. P. 34(a)(2); 5th Cir. Rule 28.2.3.

The dispositive issues have never been decided because the Emergency Temporary Standard is unprecedented in its scope. It imposes substantial costs and burdens on employers and employees in every industry in the economy. *See* Emergency Temporary Standard addressing occupational exposure to COVID-19 issued by the Respondent, Occupational Safety and Health Administration, United States Department of Labor ("OSHA"), published in the Federal Register on November 5, 2021 at Volume 86, pages 61402 through 61555 (the "ETS"), App'x 004-158. This sweeping ETS 1) exceeds OSHA's authority under its enabling statute, 2) exceeds Congress's authority under the Commerce Clause, and 3) exceeds Congress's authority under the nondelegation doctrine. These novel questions of law have implications for two-thirds of the American workforce. For the foregoing reasons, the Petitioners request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

Constitutional Provisions

JURISDICTIONAL STATEMENT

The petition challenges an Emergency Temporary Standard issued by OSHA pursuant to 29 U.S.C. § 655 on November 5, 2021. The Petition for Review was filed pursuant to Federal Rule of Appellate Procedure 15 on November 5, 2021. The Petition was filed within the 60-day window established in 29 U.S.C. § 655(f); therefore, it is timely. Jurisdiction is conferred on this Court by 29 U.S.C. § 655(f), which states, "Any person who may be adversely affected by a standard issued under this section may . . . file a petition challenging the validity of such standard with the United States Court of Appeals for the circuit wherein such person resides." Petitioners are all adversely affected by the ETS, and they reside within the Fifth Circuit.

STATEMENT OF ISSUES

1. Whether the ETS exceeds OSHA's authority under its enabling statute.

2. Whether the ETS exceeds Congress's authority under the Interstate Commerce Clause.

3. Whether the ETS exceeds OSHA's authority under the nondelegation doctrine.

STATEMENT OF THE CASE

I. Introduction

Last summer, the Biden Administration went all the way to the U.S. Supreme Court in defense of its eviction moratorium from the U.S. Centers for Disease Control. The answer: Don't try this again without explicit congressional approval. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320, 2320 (2021) (Kavanaugh, J., concurring). And then after telling the American people the CDC lacked the legal authority to renew the eviction moratorium, the Administration went ahead and reimposed the moratorium anyway, which the Supreme Court promptly and definitively shot down. *Ala. Ass'n of Realtors v. HHS*, 210 L.Ed.2d 856 (U.S. 2021) (per curiam).

Now here we are again, and again the law is clear: the Occupational Health and Safety Administration is no more the nation's public health authority than the CDC was the nation's rental regulator. The Emergency Technical Standard (ETS) exceeds OSHA's statutory authority and flunks the high bar set for such sweeping exercise of economy-wide administrative power.

Vaccination is a public health issue that affects people throughout society; COVID-19 is not a hazard particular to the workplace. And there is no need to utilize an emergency rule to address COVID-19, which has been going on for nearly two years. Congress did not grant OSHA such sweeping and broad powers in its authorizing statute. And if it did, the statute violates both the Interstate Commerce Clause and the nondelegation doctrine of the U.S. Constitution, which properly left society-wide public health decisions to the police powers of the states.

A. Factual Background

On September 9, 2021, President Joe Biden held a press conference in which he stated that his "patience is wearing thin" with unvaccinated Americans, and he announced COVID-19 vaccine mandates on nearly 100 million Americans.[1] The mandates would be imposed on federal workers, federal contractors, and—most aggressively of all—on employers and workers at private companies like Petitioners.

The purported tool for imposing as broad a mandate as possible was an Emergency Temporary Standard (ETS) promulgated by OSHA. After

[1] Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans,* CNN (Sept. 9, 2021, 9:01 P.M.), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html.

many publicly questioned whether OSHA had such power, President Biden explained at a press conference on September 24, 2021, that he was "moving forward with vaccination requirements wherever [he] can."[2]

The ETS requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to mask and produce a negative test result on at least a weekly basis before coming to work. App'x 005. Moreover, the rule requires that employers bear the cost of vaccination, but intentionally pushes the cost of testing toward the employee to heighten the pressure on the employee to get vaccinated. App'x 040.

The sixteen corporate entity petitioners (the "Trosclair Companies") are a management company and fifteen locally owned supermarkets that conduct business under the names Ralph's Market, Butcher Boy, and Save A Lot and have been in operation in Louisiana since 1984. They share common ownership and common management, as Brandon Trosclair is the single member-manager of the limited liability

[2] Robert Towey, *Biden Says Unvaccinated Americans Are 'Costing All of Us' as He Presses Covid Vaccine Mandates,* CNBC (Sept. 24, 2021, 11:12 A.M.), https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html.

companies and president of the incorporated entity. App'x 161. They are all incorporated in Louisiana and maintain their principal place of business in Louisiana. App'x 160. Combined, they employ almost 500 workers and are currently subject to OSHA regulations. App'x 161. They will be adversely affected by the ETS because they already face a shortage of full-time employees, and many current and prospective workers do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. App'x 161-162. Thus, the ETS will make it even harder to hire and to maintain employees in an already tight labor market. App'x 162.

The six individually named petitioners (the "CaptiveAire Employees") are residents of Texas and employees of CaptiveAire Systems, Inc., a corporation with approximately 1,500 employees. App'x 165, 168, 171, 174, 177, 180. They will be adversely affected by the ETS because it will force them, against their will, to show their employer proof of COVID-19 vaccination or be subjected to (and likely forced to pay for) weekly COVID-19 testing—or risk losing their jobs and livelihoods if they refuse. App'x 165-66, 168-69, 171-72, 174-75, 177-78, 180-81. This adverse effect is particularly troubling, unfair, and illegal as it applies to

Petitioners Dailey, Gamble, Jones, and Reyna because they work mostly alone on roofs and cannot spread COVID-19 to any co-workers. App'x 165, 168, 171, 177. OSHA's claimed authority over their private healthcare decisions is an egregious government overreach.

Thus, all Petitioners will face a significant, adverse effect from the ETS. For this reason, they oppose implementation of the ETS and have brought this Petition for Review.

LEGAL STANDARD

The burden of proving the validity of an occupational health and safety standard rests with OSHA. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.,* 448 U.S. 607, 653 (1980). *See Color Pigments Mfrs. Ass'n v. OSHA*, 16 F.3d 1157, 1161 (11th Cir. 1994); *Tex. Indep. Ginners Ass'n v. Marshall*, 630 F.2d 398, 414 n.27 (5th Cir. 1980).

SUMMARY OF ARGUMENT

The OSHA authorizing statute does not grant the Secretary of Labor (the "Secretary") the power to issue a COVID-19 vaccine mandate. In order to be lawful, an ETS must address a workplace-specific safety issue, address a grave danger, be necessary to protect workers, and address a toxic or physically harmful substance, agent, or new hazard.

The ETS fails on all four counts. First, the ETS addresses a society-wide health concern, not a work-place specific harzard. Second, even assuming that COVID-19 mitigation remains a compelling interest, *see Does v. Mills*, 595 U. S. ____ (2021), Slip Op. at *6 (Gorsuch, J., dissenting from denial of emergency application), that does not automatically qualify it as a "grave danger" as the Occupational Safety and Health Act uses that term. The Administration's failure to act expeditiously on the ETS proves that it is not, in fact, a grave danger. Third, the ETS is also not necessary—there are many other tools for combatting COVID-19, and just months ago OSHA examined the same facts and determined that a vaccine mandate was not necessary even for healthcare workers. Moreover, the ETS addresses an infection disease, not a toxic substance or workplace hazard. Finally, general principles of statutory interpretation support Petitioners' reading of the OSHA statute.

In the alternative, if the ETS is allowed under the OSHA authorizing statute, then that statute exceeds the powers of Congress under the Interstate Commerce Clause. Imposing a vaccine mandate on employers with more than 100 employees exceeds the limits of congressional power to regulate interstate commerce because there is no

finding that all such companies engage in interstate commerce. Such a widespread regulation of nonecomic activity is not allowed under the auspices of the Commerce Clause.

Or if it is found that the Secretary does have the power to issue the ETS under the OSHA authorizing statute, then such administrative power violates the nondelegation doctrine. Congress cannot delegate to an administrative official the broad ability to make law by utilizing a new, unforeseen statutory power to issue an emergency rule which has only a tangential connection to workplace safety. In this instance, the Secretary has failed to follow an intelligible principle from Congress.

For all three reasons, the Court should permanently enjoin the ETS throughout the United States.

ARGUMENT

I. The ETS exceeds the authority Congress gave OSHA in its enabling statute.

Congress passed the Occupational Safety and Health Act (the "Act") in 1970, codified at 29 U.S.C. §§ 651-678, to assure safe and healthy working conditions for the nation's workforce and to preserve the nation's human resources. 29 U.S.C. § 651 (1976). Toward that goal, the Act allows the Secretary, after public notice and opportunity for comment by

interested persons, to promulgate "any occupational safety or health standard," *id.* at § 655(b), but "only where a significant risk of harm exists[,] and . . . the Agency [bears the] burden of establishing the need for a proposed standard." *Indus. Union Dep't*, 448 U.S. at 652–53. A permanent standard may be issued under 29 U.S.C. § 655(b) to serve the objectives of OSHA and requires procedures similar to informal rulemaking found in the Administrative Procedure Act at 5 U.S.C. § 553.

The Act allows the Secretary to bypass these normal procedures by promulgating an Emergency Temporary Standard to take effect immediately upon publication in the Federal Register only if the Secretary determines that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and also determines "that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). An ETS also serves as a proposed rule, and the Secretary must act on final promulgation no later than six months after publication. 29 U.S.C. § 655(c)(1).

Any standard, permanent or temporary, has the force of law because the Act imposes upon every employer the duty to "comply with

occupational safety and health standards promulgated under this chapter" or face civil and criminal penalties. 29 U.S.C. § 654. Therefore, the Secretary must include "a statement of reasons for such action" in the Federal Register. 29 U.S.C. § 655(e); *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 124 (5th Cir. 1974) (citing *Dry Color Manufacturers' Ass'n v. U.S. Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973)).

On November 5, 2021, OSHA published the ETS requiring all employers with 100 or more employees to ensure their workforces are fully vaccinated or show a negative test at least once a week. App'x 005. The ETS is effective immediately, though the compliance date is set for 30 days later, except for the testing component, which is set at 60 days. App'x 152. The ETS exceeds OSHA's statutory authority in several ways.

A. The ETS is not an "*occupational* health and safety" standard.

The ETS exceeds the statutory authority given to OSHA by Congress because it is not related to the workplace. *See* 29 U.S.C. § 651. OSHA has authority over workplace-related hazards, not any hazard one might encounter anywhere in the world.

The purpose of the Act, in accordance with Congress's power under the Interstate Commerce Clause, is to "assure so far as possible every

working man and woman in the Nation safe and healthful working conditions." 29 U.S.C.S. § 651(b). The Secretary is authorized to issue "occupational health and safety standards," which "means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652(8). While Congress authorized the Secretary to "set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce," 29 U.S.C. § 651(b)(3), "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't*, 448 U.S. at 651. The ETS exceeds this authority because it is not an *occupational* health and safety standard.

OSHA has never attempted to implement a rule this broad. It has considered doing so since 2010 with an "Infectious Diseases Regulatory Framework."[3] This Framework purports to give it regulatory authority

[3] *Regulatory Framework,* Regulations.gov (Oct. 9, 2014), https://www.regulations.gov/document/OSHA-2010-0003-0245.

over airborne infectious diseases, but OSHA has repeatedly shelved the suggestion, leaving it to languish on the agency's no-action agenda.[4]

The only other vaccination ever covered by an OSHA standard is its Bloodborne Pathogens standard, mandating that employers whose workers could be exposed to blood or other potentially infectious materials at work *offer* free Hepatitis B vaccination to employees. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). Workers who choose not to be vaccinated for Hepatitis B are required to sign a form acknowledging that they were offered the shot and declined. *Id.*; *see also* 29 C.F.R. § 1910.1030(f)(2)(iv). Unlike the ETS, that rule did not require employees to be vaccinated or test negative. And that rule applied only to workers who could potentially be exposed to bloodborne pathogens in specific fields *at work*. Yet even that rule was found partially unlawful because it applied in an overbroad manner to sites not controlled either by the employer or by a hospital, nursing home, or other entity that is

[4] "No infectious diseases standard forthcoming, acting OSHA head says," Safety+Health Magazine (May 29, 2020), https://www.safetyandhealthmagazine.com/articles/19929-no-infectious-diseases-standard-forthcoming-acting-osha-head-says.

itself subject to the bloodborne-pathogens rule. *Am. Dental Ass'n*, 984 F.2d at 830.

All OSHA standards apply to places of employment where the harm that the standard seeks to mitigate happens in the workplace, as opposed to private homes, retailers, or other public spaces. OSHA standards are historically focused on dangers at work *because of the work*. Allowing OSHA to implement standards based on dangers in society generally, rather than work-specific dangers, would be a huge shift in the law, giving OSHA far more power than Congress intended.

COVID-19 is a danger to society generally. It is likely to spread anywhere people come together, not just the workplace, as the ETS itself admits: "COVID-19 is not a uniquely work-related hazard." App'x 010. Thus, the workplace is being used as a pretext for a larger goal: to increase vaccinations everywhere. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). "Accepting contrived reasons [for administrative law decisions] would defeat the purpose of the enterprise." *Id*.

The President announced that the true purpose of the ETS is "to reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace."[5] The ETS is part of a comprehensive scheme to limit the spread of COVID-19 everywhere by forcing vaccinations on as many people as possible, ensuring federal employees, military personnel, federal contractors, health-care workers, and employees of large companies are all less likely to spread the disease anywhere each individual goes.

Thus, the ETS exceeds OSHA's statutory authority because it is not targeted at dangers specific to the workplace. It unlawfully attempts to shift the administrative burden of a social problem onto employers with more than 100 employees, even though it only incidentally concerns their workplaces. It commandeers them into forcing a federal government social policy onto their employees, and makes them pick up the cost to boot. This overly broad attempt to address a universal health risk

[5] *Path Out of the Pandemic,* The White House, https://www.whitehouse.gov/covidplan/ (last visited Sept. 22, 2021).

contradicts the Act, which requires the Secretary to determine a significant risk of material health impairment *in a job site*. *Indus. Union Dep't*, 448 U.S. at 639–40.

B. The ETS does not address a "grave danger."

The ETS also exceeds OSHA's authority because the Secretary cannot adequately show that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). Congress has "narrowly circumscribed the Secretary's power to issue temporary emergency standards." *Indus. Union Dep't*, 448 U.S. at 651. Before issuing any emergency standard, the Secretary must make the "threshold determination" that the substance is a grave danger for job sites. *Indus. Union Dep't*, 448 U.S. at 639–40. The "grave danger" requirement to implement an ETS sets an even higher bar than the "significant risk" requirement that applies to normal standards promulgated by OSHA.

"The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those

in which an ETS is necessary to avert grave danger." *Asbestos Info. Ass'n/North Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). "[T]he ETS statute is not to be used merely as an interim relief measure, but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Id.* (citing *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)); *see also Taylor Diving & Salvage v. U.S. Dep't of Labor*, 537 F.2d 819, 820-21 (5th Cir. 1976); *Florida Peach Growers*, 489 F.2d at 129; *Dry Color Mfrs.' Ass'n*, 486 F.2d at 104 n.9a. OSHA must show that the spread of COVID-19 is a grave danger that requires it to implement the measure now rather than waiting for the normal notice-and-comment procedure. "[T]he plain wording of the statute limits [the court] to assessing the . . . grave danger that the ETS may alleviate, during the six-month period that is the life of the standard." *Asbestos Info. Ass'n/North Am.*, 727 F.2d at 422.

OSHA's recent actions undermine its assertion that the spread of COVID-19 is a grave danger that cannot wait for the notice-and-comment process. Just a few months ago, OSHA evaluated this exact same hazard—whether COVID-19 presents a grave danger to all covered

workplaces—and came to the opposite conclusion: that only workplaces providing healthcare services faced enough grave danger to warrant an ETS. 86 Fed. Reg. 32,376 (June 21, 2021). This was not simply an oversight: OSHA explicitly considered—and rejected—proposals to apply the June 21 ETS beyond healthcare.[6] Furthermore, though emergency-use-authorization vaccines were in widespread circulation, there was no mandate for jobs necessitating contact with those who have tested positive for COVID-19. The fact that OSHA concluded that all workplaces did *not* face a grave danger just a few months ago should lead this Court to doubt whether the evidence OSHA has recently proffered shows a "grave danger." OSHA is really attempting to use the ETS as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS.

---

[6] Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the health care industry*, N.Y. Times (June 10, 2021), https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html ("[Labor Secretary Marty] Walsh indicated that the risks to most workers outside health care had eased as cases had fallen and vaccination rates had risen. He also indicated that guidance by the Centers for Disease Control and Prevention last month advising those who have been vaccinated that they generally need not wear a mask indoors played a role in OSHA's decision to forgo a broader Covid-19 standard.")

OSHA's guidance published a few short months ago, in June 2021, saying, "most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated."[7] Thus, OSHA must now explain why the spread of COVID-19 is a grave danger warranting the ETS. In a matter of months, OSHA went from "most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace" to COVID-19 exposure in *every* workplace is a "grave danger." Such inconsistency by the Agency should lead this Court to view with suspicion its current claim that COVID-19 exposure is a grave danger requiring an emergency rule and allowing the Agency to skip notice-and-comment procedures.

Second, Pfizer received full, non-EUA approval from the Food & Drug Administration on August 23. If this were truly a "grave danger" requiring an emergency standard, OSHA could have promulgated an ETS immediately thereafter. Instead, it waited several weeks, until the

[7] Emily Harbison et al., *OSHA Issues Updated COVID-19 Guidance for All Workplaces*, The Employer Report (June 10, 2021), https://www.theemployerreport.com/2021/06/osha-issues-updated-covid-19-guidance-for-all-workplaces/.

White House suddenly discovered its power to issue an ETS. President Biden announced his intention for an ETS on September 9. It then took his Department of Labor and Office of Management and Budget (OMB) over eight weeks to actually write and promulgate an ETS that went beyond the bare-bones press release initially provided. Again, the extended timeframe for the ETS undermines any claim of exigence. And the real kicker is the same day the ETS was released, November 4, the White House also announced it was delaying its federal contractor vaccination mandate from December 8 to January 4, again undermining its assertion of exigency.[8] Truly "grave dangers" do not wait to spread until after the holidays.

C. OSHA's ETS exceeds its authority because it is not necessary.

The ETS exceeds OSHA's authority because the Secretary cannot show "that such emergency standard is *necessary* to protect employees from such danger." 29 U.S.C. § 655(c)(1) (emphasis added). Recently, OSHA evaluated what was "necessary" to address this same hazard

[8] Maddie Bender, *White House delays Covid-19 vaccine mandates for contractors*, STAT (Nov. 4, 2021), https://www.statnews.com/2021/11/04/white-house-delays-covid-19-vaccine-mandates-for-federal-employees-contractors/.

(COVID-19), and it issued a rule that did not include a vaccine mandate. 86 Fed. Reg. 32,376 (June 21, 2021). OSHA's previous ETS applied only to healthcare employers and required masking but not vaccinations. 29 C.F.R. § 1910.502. The fact that OSHA's previous ETS, issued just months ago, did not find the need for a vaccine mandate even for healthcare workers, who treat COVID-19 patients, undermines OSHA's assertion now that such a requirement is necessary.

The Administration's stance on COVID-19 in other settings also undermines its "necessary" argument. The vast majority of school children are not vaccinated because the FDA only recently approved an emergency-use vaccine for them.[9] Yet OSHA still supports them meeting together in person. The OSHA coronavirus webpage says that, "Schools should continue to follow applicable CDC guidance," and directs visitors to a CDC webpage.[10] The first bullet point on the CDC webpage says,

[9] *FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 through 11 Years of Age*, FDA (Oct. 29, 2021), https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age.

[10] https://www.osha.gov/coronavirus/safework.

"Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority."[11]

Further, OSHA's requirement that employees either be vaccinated *or* show a negative test once a week is both underinclusive and overinclusive, conditions which undermine OSHA's claim that it is necessary. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Souter, J., concurring). It is underinclusive because it is insufficient to stop the spread of COVID-19. The CDC recognizes that even vaccinated people may be infected and may transmit the disease to others.[12] Further, a weekly negative COVID-19 test also won't ensure that unvaccinated employees don't spread the virus since they could obtain and spread the virus between their weekly tests. Thus, the ETS is not necessary because it is underinclusive.

The ETS is also underinclusive because it does not cover many of the real spreaders in the workplace: non-employees. Multiple times, the

---

[11] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html.

[12] Laurel Wamsley, *Vaccinated People with Breakthrough Infections Can Spread the Delta Variant, CDC Says*, NPR (July 31, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/07/30/1022867219/cdc-study-provincetown-delta-vaccinated-breakthrough-mask-guidance.

ETS says spread comes from not only coworkers but "clients, members of the public, patients, and others, any one of whom could represent a source of exposure to SARS-CoV-2." App'x 011. *Accord* App'x 014 ("When employees report to their workplace, they may regularly come into contact with co-workers, the public, delivery people, patients, and any other people who enter the workplace."). In fact, the ETS cites a study showing "employees who had direct customer exposure . . . were 5.1 times more likely to have a positive test for COVID-19 than employees without direct face-to-face customer exposure." App'x 017. Yet the ETS does nothing about non-employees in the workplace.

The ETS is also overinclusive as it applies to employees across the board. It does not account for vulnerability related to age or preexisting health conditions; it rejects preexisting immunity; and though it excuses remote and outdoor workers from its scope, it covers every other employee even while acknowledging employees in different roles face vastly different risk levels. App'x 017 (Grocery Study). The ETS, applying across the board regardless of the risk to an employee cannot be said to be "necessary" for every employee at a large firm.

For instance, OSHA does not consider different rules that depend on how workplaces are set up. Workers like Petitioners Dailey, Gamble, Jones, and Reyna rarely interact with colleagues in person and should not be required to vaccinate or show a negative COVID-19 test since they are highly unlikely to spread COVID-19 to colleagues they may only see a few times a year. Also, no explanation is given as to why masking alone is not sufficient when employees are not outdoors and cannot remain six feet apart, when masking is recommended indoors for schools attended by unvaccinated children. The ETS, which applies to every workplace of an employer of 100 or more employees, does not consider the different degrees of risk associated with differing workplaces. It cannot be considered "necessary" as to *all* such workplaces.

There is a tailoring aspect to the "necessary" element of the test: OSHA is required to consider other potential rules that could address the proposed harm and show that such potential rules are inadequate. *Asbestos Info. Ass'n/North Am.*, 727 F.2d at 426. OSHA has failed to do so sufficiently here. In several different ways outlined above, OSHA has made insufficient effort at tailoring its ETS. The White House wanted an aggressive, high-pressure mandate, and the ETS delivered; now this

Court must remind OSHA that its authorizing statute requires narrow tailoring for emergency rules adopted without notice-and-comment rulemaking, regardless of the politics of the moment.

D. COVID-19 is not a toxic substance or agent.

The Secretary is allowed to promulgate an ETS only to prevent exposure to "substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). But COVID-19 is not a "toxic or physically harmful" "substance" or "agent." It is an infectious disease. OSHA cannot attempt to shoehorn this disease into the phrase "new hazards." "The expression of one thing implies the exclusion of others (*expression unius est exclusion alterius*)." *Jennings v. Rodriguez,* 138 S. Ct. 830, 844 (2018) (quoting A. Scalia & B. Garner, *Reading Law* 107 (2012)). Because Congress expressly allowed for an ETS to be issued for "substances or agents determined to be toxic or physically harmful," the catch-all phrase to encompass other hazards must be read in light of, and limited to, items similar to those that come before it. *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 163 n.19 (2012) ("The canon of ejusdem generis limits general terms that follow specific ones to matters similar to those specified") (cleaned up).

Indeed, the Supreme Court recently reminded this Administration that a catch-all phrase at the end of a statute is not a loophole through which a mission-specific administrative agency may drive nationwide social policy. *See Ala. Ass'n of Realtors*, 210 L. Ed. 2d 856 (prohibiting the CDC from creating a nationwide landlord-tenant eviction moratorium by an emergency agency rule). If Congress had wanted to include infectious diseases within OSHA's authority, it would have mentioned them expressly.

Under OSHA's interpretation, the Secretary would have unbridled power to promulgate any regulation that would have the arguable effect of preventing the spread of a communicable disease. The Supreme Court has explained that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies. *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) ("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."). Indeed, the Court should be highly skeptical of this newfound power.

Under OSHA's interpretation of Section 361, there would be no limit to the measures the Secretary could impose unilaterally without notice-and-comment. The Secretary could impose a shutdown of an entire industry that might harbor a high instance of COVID-19 spread (food-processing or airlines). Or the Secretary could impose a nationwide shutdown of *all* employers engaged in interstate commerce. Or impose a nationwide mask mandate on all customers visiting OSHA-regulated businesses. The sky is the limit once COVID-19 is deemed to be a "toxic or physically harmful" "substance," "agent," or "new hazard."

In the future, what is to prevent OSHA from declaring diabetes a "new hazard" and mandating employers get rid of vending machines with sugary soft drinks, close elevators to all but those in wheelchairs to make employees take the stairs, and order 10-minute exercise breaks every hour? Or from declaring global warming a "new hazard" and ordering all large employers to use only electric vehicles in their corporate car fleets? If OSHA can mandate eating broccoli to keep workers healthy, it has gone too far. *See Nat'l Fed'n of Indep. Bus. ("NFIB") v. Sebelius*, 567 U.S. 519,

558 (2012) (Roberts, C.J.); *id*. at 660 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). *See also* App'x 011 (acknowledging that COVID-19 trails heart disease as a cause of death).

E. Canons of statutory interpretation counsel against a broad reading of OSHA's powers.

The principles of statutory interpretation also dictate that courts should presume Congress does not intend to invade traditional state prerogatives without saying so clearly. "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." *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (cleaned up). Put differently, "if 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). In the Act, Congress did not make unmistakably clear that it was displacing the traditional state power over public health. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials *of the States* to

guard and protect.") (cleaned up; quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905)) (emphasis added).

Finally, the canon of constitutional avoidance counsels against adopting a radically expansive vision of OSHA's powers. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). OSHA's preferred interpretation raises substantial constitutional issues around the Commerce and Necessary and Proper clauses, as discussed below in Section II. These issues can be avoided through an appropriately narrow reading of OSHA's enabling statute and its authority to issue an ETS.

II. The vaccine and testing mandate exceeds the powers of the federal government under the Interstate Commerce Clause and the Necessary and Proper Clause.

Even if OSHA's enabling act did authorize the vaccine mandate, the statute interpreted in such a way would exceed the enumerated powers of Congress. Congressional powers are "few and defined." The Federalist No. 45 (James Madison). Because Congress does not have a general police

power to enact workplace health and safety regulations it invoked the Commerce Clause to enact the Act. 29 U.S.C. § 651. The Commerce Clause states that Congress may "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8. The Act authorizes the Secretary of Labor to "set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce. . . ." 29 U.S.C. § 651(b)(3). Congress's interstate commerce power must regulate one of three categories:

> (1) "the use of the channels of interstate commerce";
>
> (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and
>
> (3) "activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."

United States v. Lopez, 514 U.S. 549, 558-59 (1995). The third category is known as the "substantial-effects test." *Terkel v. CDC*, No. 6:20-cv-00564, 2021 U.S. Dist. LEXIS 35570, at *12 (E.D. Tex. Feb. 25, 2021). This is the category Congress invoked for its constitutional power to enact the Act. *See Usery v. Lacy*, 628 F.2d 1226, 1228 (9th Cir. 1980).

"The Supreme Court has repeatedly grounded the substantial-effects test in the Necessary and Proper Clause." *Terkel*, 2021 U.S. Dist. LEXIS 35570, at *15. Thus, if Congress has the power to mandate vaccines and testing in the workplace, it can only flow from the Necessary and Proper Clause. But mandating vaccines and testing is neither a necessary nor proper exercise of federal power.

A. The ETS is not necessary because it has no substantial effect on interstate commerce.

By drafting the ETS broadly to apply to all employers with 100 or more employees, many of whom have workplaces only in one state, OSHA inevitably engaged in regulating intrastate activity as well as interstate commerce. For a regulation of intrastate activity to be considered "necessary" to regulating interstate commerce, it must be shown that the intrastate activity substantially affects interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 35-36 (2005) (Scalia, J., concurring). The Supreme Court looks at four factors to determine whether the substantial effects test is met:

> (1) the economic character of the intrastate activity;
>
> (2) whether the regulation contains a "jurisdictional element" that may "establish whether the enactment is in pursuance of Congress' regulation of interstate commerce";

> (3) any congressional findings regarding the effect of the regulated activity on commerce among the States; and
>
> (4) attenuation in the link between the regulated intrastate activity and commerce among the States.

Terkel, 2021 U.S. Dist. LEXIS 35570, at *14 (quoting *United States v. Morrison*, 529 U.S. 598, 609-13 (2000)). These four factors all favor Petitioners.

1. *The ETS does not regulate economic activity.*

When evaluating whether an activity is economic, courts look "only to the expressly regulated activity" itself. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). Here, OSHA is regulating the individual decisions of employees on whether to take a COVID-19 vaccine or weekly test. OSHA is not regulating employers' workplaces because vaccinations extend beyond the workplace, *see* Section I.A., *supra*; they stay in workers' bodies wherever they go, including when they change jobs or retire. Vaccination is irreversible. And weekly COVID-19 testing also implicates bodily autonomy, requiring a swab to be placed inside a person's nose or mouth. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (finding a blood test to be intrusive to bodily autonomy and the right to unreasonable search and seizures). Thus, the ETS regulates employees' private health decisions. These decisions, in and of

themselves, are not an economic activity.

If there is an "economic" component to vaccination and testing at all, it is economic inactivity. OSHA is attempting to regulate an employee's decision not to be vaccinated or not to buy a COVID-19 test. But Congress cannot regulate public health—either through the Commerce Clause or the Necessary and Proper Clause—by regulating the decision to *refrain* from engaging in commerce. *NFIB*, 567 U.S. at 561 (Opinion of Roberts, C.J.); *accord id.* at 653 (Scalia, J. et al., dissenting). For both these reasons, the ETS does not regulate economic activity.

2. *The ETS does not contain a jurisdictional element.*

Next, courts look at whether the mandate contains an "express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12. Here, the mandate's limit to employers with 100 or more employees does not actually limit its reach to interstate activities. Some employers with more than 100 employees do not engage in interstate activities at all. Many municipal governments, for example, employ over 100 police officers, fire fighters, and garbage men, but their reach does not extend beyond their state's

boundaries. On the other hand, some employers with fewer than 100 employees engage in extensive interstate activity. As pointed out above, the ETS makes no distinction based on industry type. Therefore, the haphazard jurisdictional limitation to employers with over 100 employees weighs in favor of the Court finding a violation of the Commerce Clause.

3. *OSHA and Congress did not make any findings regarding the effect of COVID-19 vaccinations and testing on interstate commerce.*

OSHA did not link any of its "Rationale[s] for the ETS" to interstate commerce. App'x 010-027. Nor does it claim to be protecting the 70% of American adults who are fully vaccinated. On the contrary, OSHA's first rationale is that COVID-19 presents a "grave danger to *un*vaccinated workers." App'x 010 (emphasis added). OSHA's protectionism for the unvaccinated reveals that its true purpose is to dictate individual health decisions. Thus, the ETS does not regulate interstate commerce.

More importantly, this third factor focuses on findings *by Congress*. In this case, there are no findings by Congress regarding COVID-19 vaccinations and testing because the mandate is not being imposed by Congress but by OSHA. This is further evidence that the ETS exceeds

both congressional authority and authority under the Interstate Commerce Clause.

4. *The link between the ETS and commerce among the states is attenuated.*

Regulating an individual employee's decision on whether to receive a COVID-19 vaccination or be subjected to weekly testing has an attenuated relationship to interstate commerce. There must be proof that the regulated activity causes an effect on commerce. *Lopez*, 514 U.S. at 563-64. If the government's theory of causation requires "pil[ing] inference upon inference," the court will not find a causal link between the activity and interstate commerce. *Id.* at 567.

Here, OSHA's decision to regulate an employee's personal health decision is similar to the attempt by Congress to regulate gun possession in *Lopez*. *Id.* at 551. There, Congress outlawed gun possession near schools under the auspices of the Interstate Commerce Clause. *Id.* Congress argued that gun possession impacts the "national economy" by increasing the unwillingness of individuals to travel to areas of the country "that are perceived to be unsafe," and threatening the learning environment in schools, which makes the national workforce less productive. *Id.* at 563-64. But the Supreme Court rejected these

arguments because they had no limiting principle. *Id.* at 555. For example, the "national productivity" argument would mean that Congress could regulate even family law because it might impact citizens' productivity. *Id.* Thus, there would not be any "distinction between what is truly national and what is truly local . . . ." *Id.*

Lopez's reasoning applies equally to the ETS. If Congress can regulate employees' individual health decisions under the Commerce Clause, then it can mandate that employers require their workers to attend the gym weekly or to eat broccoli. *See NFIB*, 567 U.S. at 558 (Roberts, C.J.). Those decisions impact employees' health, their productivity, and, thus, the "national economy." But individuals' personal health decisions, including whether to take a vaccine, have traditionally been left to the states to regulate through their police powers of health, safety, welfare, and morals. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). The OSHA mandate obliterates the distinction between what is local and what is national. The lack of a limiting principle shows that individual employee health decisions have an attenuated connection to interstate commerce.

Thus, all four "significant considerations" point this Court to conclude that the ETS has no substantial effect on interstate commerce. *Morrison*, 529 U.S. at 609.

B. Even if the mandate is "necessary" to regulating interstate commerce, it is not a proper means of doing so because it violates the Tenth Amendment and principles of federalism.

Even if OSHA can show that a COVID-19 vaccine mandate is commercial activity and necessary for OSHA's statutory scheme, the government must still show that the mandate is a "proper" means. Under the Necessary and Proper Clause, Congress must show that its chosen means to effectuate an enumerated power "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Raich*, 545 U.S. at 39 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421-22 (1819)). Regulations are not "proper" when they intrude on areas traditionally reserved to the states. *NFIB*, 567 U.S. at 559; *Bond v. United States ("Bond II")*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring) ("No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'").

Indeed, in *NFIB*, the federal government argued that the Necessary and Proper Clause empowered it to impose financial penalties on

individuals who chose not to buy health insurance, but a majority of justices held that the health insurance mandate exceeded the scope of the Necessary and Proper Clause. 567 U.S. at 560 (Opinion of Roberts, C.J.); *id.* at 653 (Scalia, J. et al., dissenting). Chief Justice Roberts explained that "[e]ven if the individual mandate [were] 'necessary' to the Act's insurance reforms," it was "not a 'proper' means for making those reforms effective" given that it operated like the police power that is reserved to the states. *Id.* at 560 (Opinion of Roberts, C.J.). In their dissent, four justices agreed with Chief Justice Roberts on the Necessary and Proper Clause. They reasoned that "the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated federal power." *Id.* at 653 (Scalia, J. et al., dissenting).

This reasoning applies to the ETS. Public health and safety laws have traditionally been left to the states as part of the police power that states retained when they ratified the Constitution. *See Jacobson*, 197 U.S. at 25. OSHA's mandate expands federal power into that area. Not only that, this expansion is the first of its kind because Congress has

never attempted to mandate that large swaths of private-sector employees get vaccinated from infectious diseases. The novelty of this expansion is yet another sign that the mandate presents a "severe constitutional problem." *NFIB*, 567 U.S. at 549. Because the ETS intrudes into an area where the states have traditionally been sovereign, it is not a proper means to promote workplace safety.

III. The authority claimed by OSHA in this case represents an unlawful delegation of legislative power.

As explained in Section I, *supra*, the ETS is beyond the plain terms of the Act. But if this Court disagrees with Petitioners as to the scope of OSHA's power under the Act, it should still enjoin the ETS because such a broad and capricious grant of lawmaking authority to an executive branch agency violates the nondelegation doctrine. The ETS claims to find buried in the penumbras of the Act new powers that no one noticed for five decades: unilateral executive authority to regulate not simply the workplace, but the medical decisions of two-thirds of working adults in the entire country.

The Supreme Court previously confronted such broad claims of authority by OSHA, and it rejected them: "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended

to give the Secretary the unprecedented power over American industry that would result from the Government's view." *Indus. Union Dep't*, 448 U.S. at 645. "The Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit." *Id.* Such an interpretation of the Act would constitute a "sweeping delegation of legislative power" of the kind rejected in previous Supreme Court cases. *Id.* at 646 (citing *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 539 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935)).

The Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors*, 210 L. Ed. 2d at 860-61. If the Act allows the Secretary to impose a COVID-19 vaccine mandate on 100 million Americans, then it allows almost anything, delegating to the Secretary of Labor plenary power to establish whatever legal requirements he or she wishes, regardless of how attenuated they may be to workplace safety. Such an interpretation would render the Act the equivalent of the delegations the Supreme Court previously enjoined, "one of which provided literally no guidance for the exercise of discretion,

and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The opening sentence of the Constitution specifies, "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Nondelegation doctrine is at bottom an attempt to take this provision seriously: there are legislative powers to make laws, and "all" such power resides in the Congress. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("[T]he separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it."). The President, by contrast, is not empowered to make laws. Instead, the Constitution states that, "The executive Power shall be vested in a President." U.S. Const. art. II, § 1, cl. 1. Implicit in this arrangement is a premise that neither

branch may delegate its sphere of power to any other. "The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002).

The premise that these powers must be separated, and delegations avoided, is not a modern invention. It predates the founding. Commentators as far back as the English Jurist Lord Coke affirmed that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ass'n of Am. R.R.,* 135 S. Ct. at 1245 (Thomas, J., concurring) (quoting Case of Proclamations, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)). Coke's successor, William Blackstone, likewise argued that when "the right both of making and of enforcing the laws . . . are united together, there can be no public liberty." 1 W. Blackstone, Commentaries on the Laws of England 142 (1765). John Adams, in drafting the Massachusetts state constitution, expressly provided, "The executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." Mass. Const. pt. 1, art. XXX. James Madison warned, "The accumulation

of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

The principle is, likewise, recognized in early Supreme Court cases, with Chief Justice Marshall declaring, "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). The basic principle is so well acknowledged that some years later the Court described it as such: "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

Recognizing these concerns, the Supreme Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. Justice Rehnquist explained that the nondelegation doctrine ensures "to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the

popular will." *Indus. Union Dep't*, 448 U.S. at 685–86 (Rehnquist, J., concurring) (internal citation omitted). He then stated Congress must delegate authority with an "intelligible principle' to guide the exercise of the delegated discretion." *Id.* This "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Id. See Schechter Poultry Corp.*, 295 U.S. at 529; *Panama Refining Co.*, 293 U.S. at 430. But what an "intelligible principle" means in practice requires elaboration.

The basic requirement that derives from the Supreme Court's cases is that "Congress must set forth standards sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed." *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U. S. 414, 426 (1944)). The onus is on Congress to "expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

The Court's cases also acknowledge that "no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." *Mistretta,* 488 U.S. at 415 (Scalia, J., dissenting). But this is not a reason to abandon the exercise, because courts "may not—without imperiling the delicate balance of our constitutional system—forego [their] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Ass'n of Am. R.R.*, 135 S. Ct. at 1246 (Thomas, J., concurring). Even where a line is not readily apparent, "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.,* 135 S. Ct. at 1237 (Alito, J., concurring). The failure to enforce these requirements undermines democratic trust and accountability since "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *Id.* (quoting *Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting)).

Such requirements do not undermine the functioning of a proper regulatory scheme: "the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality." *Schechter Poultry*, 295 U.S at 529. Nondelegation principles "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

Yet "recognition of the necessity and validity of such [flexible] provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Schechter Poultry*, 295 U.S. at 530. It is no excuse that Congress was "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting). Our constitutional structure requires that each Congressional enactment "furnish[ ] a declaration of policy or a standard of action." *Panama Ref. Co.*, 293 U.S. at 416. It falls to Congress, and Congress alone, to "establish primary standards, devolving upon others

the duty to carry out the declared legislative policy." *Id.* at 426. Courts, therefore, must reject regimes in which they find "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426.

In this case, the Secretary's position is that OSHA's newfound authority empowers it not simply to set safe levels of potential carcinogens in the workplace, or require safety equipment and employee trainings, but to regulate the off-site medical decisions of employees completely disconnected from work. If OSHA can require that companies mandate vaccines, what can it not require? Perhaps all companies should require their workers to join a local gym, or stick to a favored diet. Since a healthy immune system might arguably prevent all sorts of bacteria from spreading in the office, under this logic, there could be a rule mandating the appropriate regimen of vitamins.

But the claim of authority here is ultimately even more troubling than some other proposed expansions of OSHA's jurisdiction. Previous assertions were at least subject to administrative process. There was notice, comments were heard, and time was taken to consider the merits

of the proposal. But here OSHA operated under no such encumbrances. The ETS was issued pursuant to Section 6(c), 29 U.S.C. § 655(c), circumventing those normal processes which exist to preserve some level of administrative accountability. In the previous half century since the Act was passed, OSHA never before invoked these emergency powers over an infectious disease, nor had it ever attempted to reach beyond the workplace. To allow such an expansion in both subject matter and scope, with no administrative check, would untether the agency from any intelligible principle.[13]

Ultimately, what is proscribed by the nondelegation doctrine is the *making of law*. Blackstone "defined a 'law' as a generally applicable 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'" *Ass'n of Am. R.R.*, 135 S. Ct. at 1244 (Thomas, J., concurring). Where an agency accrues to itself

[13] In the alternative, if this Court finds the ETS does survive the "intelligible principle" test, the test should be overruled. In recent years, six different Supreme Court Justices have questioned whether it should be overruled. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. R. 251, 318 (2014) (describing the "intelligible principle" standard as "notoriously lax").

the prerogative to prescribe unlimited rules, it has transgressed the constitutional boundaries. The failure to check this power endangers the liberty guaranteed to each of us as citizens, as past failures to uphold these principles should remind us. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (approving the delegation of authority to military commanders to inter citizens of Japanese descent). As Justice Rehnquist, examining another provision of the same Act, explained more than forty years ago, "If we are ever to shoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring).

IV. The Biden Administration has previously admitted that a vaccine mandate is not within the scope of its Executive Branch authority.

For further authority that the Biden Administration does not have the power to do what it has done here, look no further than the Biden Administration itself. The White House Press Secretary has repeatedly said that a vaccine mandate is not the federal government's role[14] and

[14] *Vaccine Mandate is Not the Federal Government's Role, Psaki Says,* N.Y. Times (July 25, 2021),

that the decision to get vaccinated should be left to individuals, schools, and private institutions.[15] Dr. Anthony Fauci[16] likewise promised that vaccine passports would not "be mandated from the federal government."[17] The President himself stated that he did not think that vaccines should be mandatory[18] and that he didn't even have the power to order states to prioritize certain groups such as teachers.[19] Finally, after the ETS was announced, the president's Chief of Staff apparently admitted that it was an attempt to "work-around" the constitutional

---

https://www.nytimes.com/video/us/politics/100000007884901/vaccine-mandate-not-federal-role-psaki.html.

[15] Niall Stanage, *The Memo: Biden and Democrats Face Dilemma On Vaccine Mandates,* The Hill (July 8, 2021, 6:00 A.M.), https://thehill.com/homenews/the-memo/561986-the-memo-biden-and-democrats-face-dilemma-on-vaccine-mandates.

[16] Director of the National Institute of Allergy and Infectious Diseases (NIAID) at the National Institutes of Health (NIH).

[17] Justine Coleman, *Fauci Says Federal Government Won't Mandate Vaccine Passports,* The Hill (April 5, 2021, 12:00 P.M.), https://thehill.com/policy/healthcare/546467-fauci-says-federal-government-wont-mandate-vaccine-passports.

[18] Bill McCarthy, *No, Biden Didn't Promote 'Mandatory' COVID-19 Vaccines in Primetime Address,* Politifact (March 12, 2021), https://www.politifact.com/factchecks/2021/mar/12/facebook-posts/no-biden-didnt-promote-mandatory-covid-19-vaccines/.

[19] Alex Seitz-Wald, *Why President Biden Can't Make States Vaccinate Teachers – Or Anyone Else,* NBC News (Feb. 23, 2021, 4:01 A.M.), https://www.nbcnews.com/politics/joe-biden/why-president-biden-can-t-make-states-vaccinate-teachers-or-n1258565.

prohibition on a federal vaccine mandate. He retweeted, "OSHA doing this va[ccination] mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations."[20] But this Court cannot allow an executive agency to "work-around" the Constitution.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court enter an order permanently enjoining enforcement of the ETS in the United States.

November 5, 2021

Respectfully submitted,

Daniel R. Suhr, WI Bar # 1056658
Application for Admission Submitted
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org

/s/ Sarah Harbison
Sarah Harbison, LA Bar # 31948

[20] Callie Patteson, *Biden Chief Apparently Admits Vaccine Mandate 'Ultimate Work-Around,'* The New York Post (Sept. 10, 2021), https://nypost.com/2021/09/10/ronald-klain-retweets-vaccine-mandate-ultimate-work-around/.

Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on November 5, 2021, I caused a copy of this Petitioners' Brief to be served on Respondent by email as directed in the ETS:

Edmund C. Baird
Associate Solicitor of Labor for
Occupational Safety and Health
Office of the Solicitor
United States Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
zzSOLCovid19-ETS@dol.gov

/s/ Sarah Harbison
Attorney of record for Petitioners

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, according to the Word Count function, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2, it contains 9,716 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Word in a proportionally spaced typeface, using Century Schoolbook 14-point font.

/s/ Sarah Harbison
Attorney of record for Petitioners