

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY; STATE OF IDAHO; STATE OF KANSAS; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF TENNESSEE; and STATE OF WEST VIRGINIA;

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR; DOUGLAS L. PARKER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES FREDERICK, Deputy Assistant Secretary of Labor for the Occupational Safety and Health; and MARTIN J. WALSH, Secretary of Labor, in his official capacity;

Respondents.

SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; and SIXTY-SIXTH IDAHO LEGISLATURE,

Proposed Intervenors-Petitioners.

Case No. 21-4031

MOTION TO INTERVENE AS PETITIONERS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, the 66th Idaho State Legislature, Scott Bedke in his official capacity as Speaker of the Idaho House of Representatives, and Chuck Winder in his official capacity as President Pro Tempore of the Idaho Senate (collectively, the “Idaho Legislature”), hereby move to intervene in the above-captioned proceeding. The Speaker of the House and the Senate President Pro Tempore are authorized to represent their respective bodies in litigation pursuant to Article III, section 9 of the Idaho Constitution and the promulgated rules of each body. The Speaker of the House and the Senate President Pro Tempore, acting together, may assert interests belonging to the legislature as a whole. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019). In support of its motion, the Idaho Legislature states as follows:

INTRODUCTION

The current Petitioners are seeking review of the emergency temporary standard issued by the Occupational Health and Safety Administration (“OSHA”) entitled “COVID-19 Vaccination and Testing: Emergency Temporary Standard” and published in the Federal Register on November 5, 2021 at Volume 86, pages 61402 through 61555 (“OSHA ETS”). The OSHA ETS applies to all employers with 100 or more employees across every state in the union—including Idaho. OSHA ETS, 86 Fed. Reg. 61402, 61403 (Nov. 5, 2021). The Idaho Legislature,

therefore, has a substantial interest in the outcome of the Petition for Review and shares common questions of law with the issues raised by that petition. Further, the Idaho Legislature seeks only to join in the relief sought in the Petition for Review—judicial review of the OSHA ETS and a stay pending final judgment on the same—and does not seek additional relief beyond that requested by the Petitioners.¹

ARGUMENT

Under Federal Rule of Appellate Procedure 15, “a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene . . .” Fed. R. App. P. 15(d). This Court has granted motions to intervene where the proposed intervenor had a “substantial interest in the outcome of the petition” *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990).² The Idaho Legislature has just such an interest here.

¹ Because the Idaho Legislature is not seeking any additional relief, it need not show standing. *See Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) (“An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing, at least where the intervenor does not seek additional relief beyond that which the plaintiff requests”) (internal quotations omitted). That said, the OSHA ETS’s violation of the Tenth Amendment as alleged in this motion presents an injury in fact to the Idaho Legislature’s inherent authority sufficient to convey standing. *See, e.g., New York v. United States*, 505 U.S. 144, 155 (1992); *New York v. Yellen*, No. 19-3962-cv, 2021 U.S. App. LEXIS 29862, at *15 (2d Cir. Oct. 5, 2021); *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974).

² Although not bound to Federal Rule of Civil Procedure 24, in other contexts this Court has previously relied on the criteria found in that rule in adjudicating a

“The legislative power of the state [of Idaho] shall be vested in a senate and house of representatives.” Idaho Const. art. III, Sec. 1. The Idaho Legislature’s intervention in this case is necessary to protect its power to promote the health, safety, and welfare of Idaho’s citizens during the COVID-19 pandemic.

The Tenth Amendment to the Constitution reserves powers to the States and the people that are not delegated to the federal government. The OSHA ETS, which preempts the Idaho Legislature from exercising its police power, is an affront to the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 175 (1992) (the federal government violates the Tenth Amendment when it “cross[es] the line distinguishing encouragement from coercion”); *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”).

The federal government engages in improper coercion where it compels states to regulate in a particular manner by threatening drastic consequences for failing to regulate in that manner. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575 (2012) (concluding that Congress, through the Affordable Care Act,

motion to intervene. *See Ohio Valley Elec. Corp. v. FirstEnergy Sols. Corp. (In re FirstEnergy Sols. Corp.)*, No. 18-4095, 2019 U.S. App. LEXIS 1164, at *2–3 (6th Cir. Jan. 11, 2019). As shown in this motion, the Idaho Legislature meets the criteria for intervention under both Fed. R. Civ. P. 24(a) and 24(b).

improperly coerced the States by threatening to withhold all of a State's Medicaid grants unless the State complied with particular conditions); *see also New York v. United States*, 505 U.S. at 175 (holding that improper coercion existed where as an alternative to regulating pursuant to the federal government's direction, the state had the "option" of taking title to low level radioactive waste).

The Tenth Amendment's reservation of powers includes the States' police powers. *United States v. Constantine*, 296 U.S. 287, 295–96 (1935). Idaho's police power is exercised by the Idaho Legislature or by the Legislature's delegation of that power to Idaho's Executive Department. *See, e.g., Berry v. Koehler*, 369 P.2d 1010, 1013 (Idaho 1961) ("The Legislature, under the broad field of 'police power', may enact laws concerning the health, welfare and morals of the people."); Idaho Code § 46-601(2)(a) (authorizing the Governor to exercise police power in times of extreme emergency).

The Supreme Court's decision on the scope of state police powers in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is pertinent today. There the Court considered an appeal from a decision of the Massachusetts Supreme Court finding that the commonwealth's mandatory smallpox vaccination program was constitutional. Massachusetts' authority to enact the statute "is commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution." *Id.* at 25; *accord Buchanan v.*

Warley, 245 U.S. 60, 74 (1917) (“The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad . . .”).

While a state’s police power must yield if it is in conflict with the powers of the federal government as granted to it by the U.S. Constitution, *Jacobson*, 197 U.S. at 25, such is not the case here. At a minimum, the Idaho Legislature’s authority over vaccination mandates in Idaho is a fair question for consideration by this Court. It is a question that the proposed intervenors are best positioned to answer in the context of the OSHA ETS rule. Were this Court to favor OSHA’s interpretation of its power to mandate vaccinations in Idaho, it would “practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease.” *Id.* at 44–45. *Jacobson* further instructs that “[t]he safety and health of the people of [a state] are, in the first instance, for that [state] to guard and protect. They are matters that do not ordinarily concern the National Government.” *Id.* at 38.

This Court has considered the *Jacobson* decision in the context of the current pandemic and found it persuasive. “All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts.” *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 127 (6th Cir. 2020) (citing *Jacobson*,

197 U.S. at 29). “This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own.” *Id.* (citations omitted.) The Court added that while the power “is not absolute,” “in the case of a public health crisis like the one presented by COVID-19, [] ‘[Idaho’s] latitude must be especially broad.’” *Id.* at 128 (citing *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Mem.) (Roberts, C.J., concurring in the denial of injunctive relief)). And “[s]haping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people.” *Id.* at 129. Whether the Idaho Legislature’s police power is transgressed by the OSHA ETS is at least a fair question that the Idaho Legislature should be allowed to argue as an intervenor in these proceedings.

The Idaho Legislature’s interest in Idaho’s private sector industries cannot be gainsaid. Yet, OSHA estimates that “all employers in all private sector industries are affected by this ETS to some extent.” OSHA ETS, 86 Fed. Reg. at 61460. This is a remarkable admission: OSHA has acknowledged that the OSHA ETS affects all employers in all private sector industries across Idaho and the Nation. The Idaho Legislature has eschewed calls for it to prohibit employers in

the state from imposing vaccination mandates on their employees.³ Nor has the Idaho Legislature adopted OSHA’s approach mandating that employers coerce their employees to get vaccinated or face expensive weekly testing or unemployment. Rather, the Idaho Legislature has adopted a middle path that allows private employers to craft their own vaccination policies that suit their workplace and their workforce. Some have chosen mandatory vaccinations subject to medical and religious exemptions.⁴ Others have not imposed any mandates beyond those imposed by local governmental jurisdictions. This “middle of the road” approach epitomizes the Idaho Legislature’s exercise of, or restraint from exercising, its police power that will be affected by the outcome of the pending litigation. The Idaho Legislature seeks to intervene to protect its inherent police power and would be best positioned to do so.

Put simply, OSHA’s ETS preempts the Idaho Legislature’s response to the pandemic. OSHA bemoans the “imbalance” in state and local regulation of the pandemic, OSHA ETS, 86 Fed. Reg. at 61445, and the “simple human tendency” to “resist curbs on personal freedoms,” *id.* at 61444. That simple human tendency

³*Idaho GOP Senators Deny Session to Ban Worker Vaccine Rules*, <https://www.ktvb.com/article/news/local/capitol-watch/required-vaccines-special-session/277-5f587b90-ae0b-42c4-ad82-64f3cf8a9c43> (last visited Nov. 10, 2021).

⁴*Big Idaho Health Care Providers Mandate Staff COVID Vaccines*, <https://apnews.com/article/id-state-wire-idaho-business-coronavirus-pandemic-health-bc1d159bb0ab34de57832ae00cc511fe> (last visited Nov. 10, 2021).

is celebrated in Idaho and enshrined in our Constitution. Idaho Const. art. I, sec. 1 (“All men are by nature free . . .”). OSHA also asserts that the OSHA ETS preempts all state occupational requirements even to the extent that the state’s requirements may regulate employers with fewer than 100 employees. 86 Fed. Reg. at 61509. Succinctly put, OSHA maintains that it has “occupied the entire field of regulation on these issues.” *Id.*

If OSHA is correct, then Idaho House Speaker Bedke and Senate Pro Tempore Winder’s announcement that the Idaho Legislature will reconvene on November 15—next week—to take up the impacts of the OSHA ETS on Idaho’s employers, employees, and economy is meaningless. This Court’s ruling on the pending emergency stay motion (ECF 4) and the merits of the Petition for Review (ECF 1-2) will determine whether Idaho’s Legislature has police power over Idaho’s response to this once-in-a-century crisis.

CONCLUSION

The Idaho Legislature shares common concerns with the Petitioners and has a substantial interest in judicial review of the OSHA ETS. This substantial interest is distinct from the interests represented by the Petitioners. Further, the Idaho Legislature, if allowed to intervene, will adhere to the briefing schedules adopted by this Court so as to not unduly delay the adjudication of the Petition for Review. *See League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 577 (6th Cir.

2018) (“In deciding whether to allow a party to intervene, ‘the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties rights’”) (quoting Fed. R. Civ. P. 24(b)(3)).

For the reasons set forth above, the Idaho Legislature respectfully requests that the Court grant its Motion to Intervene as Petitioners in this Petition for Review.

DATE: November 10, 2021

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **MOTION TO INTERVENE AS PETITIONERS** with the Clerk of Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF E-filing system on November 10, 2021.

I further certify that all registered participants in this case will be served by the Appellate CM/ECF System as follows:

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