Nos. 21A244 and 21A247

IN THE

Supreme Court of the United States

IN RE: MCP NO. 165, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.,

Applicants,

v.

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

Respondents.

STATE OF OHIO, ET AL.,

Applicants,

v.

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

Respondents.

On Applications for Stay or Injunction Pending Review of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF TORE SAYS LCC FOR LEAVE TO FILE ATTACHED *AMICUS* BRIEF IN SUPPORT OF APPLICATIONS FOR STAY OR INJUNCTION PENDING REVIEW; FOR LEAVE TO FILE WITHOUT 10-DAYS' NOTICE; AND FOR LEAVE TO FILE IN PAPER FORMAT

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December 28, 2021

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Tore Says LLC respectfully moves under Supreme Court Rule 37.2 for leave (1) to file the attached brief as *amicus curiae* in support of the Emergency Applications filed on December 17-18 2021, designated Application Nos. 21A244 and 21A247, seeking a stay or injunction pending review of the Sixth Circuit's decision to dissolve a stay of the Occupational Safety and Health Administration (OSHA) Emergency Testing Standard (ETS) on COVID-19 vaccination and testing, (2) to file in unbound format on 8.5-by-11-inch paper, and (3) to the extent leave is required, to file without 10 days' advance notice to the parties of *amicus*'s intent to file.

By email on December 24, 2021, *amicus* sought consent from the parties to file an *amicus curiae* brief in support of the Emergency Applications designated Applications Nos. 21A244 and 21A247. *Amicus* attempted to obtain the consent of all applicants who have thus far filed Emergency Applications in regard to the OSHA ETS. Counsel for the Applicants in eight of the thirteen applications—Nos. 21A243, 21A244, 21A245, 21A247, 21A251, 21A252, 21A258, and 21A260—consented to the filing. Counsel for the remaining Applicants had not responded as of 12:00 p.m. on December 28, 2021. Counsel for the respondent U.S. Department of Labor has not yet responded.

Tore Says LLC is a multimedia independent news outlet and online community dedicated to educating American citizens as to their sovereign, natural

rights as memorialized, in part, in the United States Constitution. Tore Says LLC has an interest in ensuring that the Constitution is read, consistent with a literal application of its text as intended by the founding fathers of this nation, to ensure the federal government does not overstep and exceed the limited authority it has been granted by the citizens of the United States of America (the People).

Pursuant to Rule 37.1, *amicus* respectfully submits that its *amicus curiae* brief will bring to the attention of the Court relevant matters that have not already been brought to the Court's attention by the parties in the Emergency Applications but that nevertheless may be of considerable help to the Court. Specifically, the implementation of OSHA's vaccine-and-testing rule for all businesses who employ 100 or more employees, which would impact "two-third of all private-sector workers," 86 Fed. Reg. 61,402, 403 (Nov. 5, 2021), or over 25% of the population, *id.* at 61,475, infringes upon the constitutional freedoms that this Court has consistently recognized as belonging to business entities. See, e.g., *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886); *NAACP v. Button*, 371 U.S. 415, 428–429, (1963); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, (1978); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 687-91 (2014). The imposition of the OSHA ETS on business entities is contradictory to the holdings of this Court recognizing that certain liberties may not be restrained due solely to the corporate nature of the

aggrieved party.

In addition, *amicus* asserts that the OSHA ETS violates the Ninth Amendment to the United States Constitution, which, while seldomly addressed by this Court, should nonetheless be considered a critical component of any thorough and well-reasoned analysis of whether the ETS is able to pass constitutional muster. As noted by Justice Goldberg in his concurring opinion in *Griswold v. State of Connecticut*, "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold v. State of Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring in the judgment). Because no express constitutional authority exists for the federal government to mandate the vaccine-and-testing regime, which has been wrought with controversy from its inception, businesses retain the fundamental right to determine whether to require employees to undergo such measures.

Finally, *amicus* avers that even if a governmental entity possessed the authority to mandate that employees undergo vaccination or testing measures in response to the COVID-19 outbreak, such power would belong to the respective states, not the federal government, by virtue of the Tenth Amendment to the United

States Constitution. As noted by the United States Court of Appeal for the Fifth Circuit, "to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power." *BST Holdings, LLC. v. Occupational Safety & Health Admin.*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *21, 17 F.4th 604 (5th Cir. Nov. 12, 2021), citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905). Accordingly, the OSHA ETS is unconstitutional as no federal police power exists that would validate the federal government's draconian imposition of the vaccine-and-testing mandate.

Given the expedited consideration of this matter of significant national interest, *amicus* respectfully requests leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file (to the extent such notice is required in this matter) and to file in unbound format on 8½-by-11-inch paper. The Sixth Circuit granted the government's motion to dissolve the stay imposed by the Fifth Circuit on the evening of December 17, 2021, and the Emergency Applications were filed in this Court on December 17-21. The Court has now set a deadline of December 30 for respondent's brief. In addition, on December 22, the Court scheduled oral argument for Application Nos. 21A244 and 21A247 for January 7. Because of the rapid schedule and because no party has opposed the filing, *amicus* requests that the Court grant leave to file the attached *amicus* brief without 10 days' advance notice to the parties and in unbound format.

For the foregoing reasons, Tore Says LLC respectfully requests that this

motion be granted.

Respectfully submitted,

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On Applications for Stay or Injunction Pending Review of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF TORE SAYS LLC AS *AMICUS CURIAE* IN SUPPORT OF APPLICATIONS FOR STAY OR INJUNCTION PENDING REVIEW

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December 28, 2021

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INTEREST OF *AMICUS CURIAE*[1]

Tore Says LLC is a multimedia independent news outlet and online community dedicated to educating American citizens as to their sovereign, natural rights as memorialized, in part, in the United States Constitution. Tore Says LLC has an interest in ensuring that the Constitution is read, consistent with a literal application of its text as intended by the founding fathers of this nation, to ensure the federal government does not overstep and exceed the limited authority it has been granted by the citizens of the United States of America (the People).

INTRODUCTION AND SUMMARY OF ARGUMENT

As the world stands at what one can only hope is the precipice of the COVID-19 era, the Court is once again faced with a decision that will monumentally impact the ability of Americans to enjoy the natural rights bestowed upon them by virtue of their sovereignty. The implementation of The Occupational Safety and Health Administration (OSHA) Emergency Testing Standard (ETS) on COVID-19 vaccination and testing would unconstitutionally constrain all businesses who employ 100 or more employees, thereby impacting "two-third of all private-sector workers," 86 Fed. Reg. 61,402, 403 (Nov. 5, 2021), or over 25% of the population, *id.* at 61,475. Never has the federal government attempted such a blatant affront on the sovereign rights of businesses and individuals. The founding fathers of this

[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

nation may not have envisioned a world where a federal government drawing its power solely from the consent of the governed would presume to enforce vaccination and testing requirements on two-thirds of private-sector employees. The framers of our Constitution and the authors of its amendments, however, did have the incredible foresight to anticipate a time where businesses and individuals would need to protect their inherent liberties from infringement by an overreaching federal government.

The Ninth and Tenth Amendments to the United States Constitution clearly reflect that any rights not delineated in the Constitution belong solely to the people or, otherwise, the states. These two amendments provide critical context for how narrowly our forefathers intended the Constitution to be construed. Moreover, this Court on several occasions, including in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 687-91 (2014), has also recognized that corporate entities are afforded constitutional protections. Thus, as discussed below, the decision to mandate vaccination and testing requirements in the course of employment belongs to the employer or, to the extent any governmental entity would have the authority to regulate such a matter, the state. Accordingly, *amicus* respectfully requests that Court reinstate the stay of the OSHA ETS put into place by the Fifth Circuit.

ARGUMENT

I. THE COURT HAS RECOGNIZED THAT BUSINESS ENTITIES ARE AFFORDED CONSTITUTIONAL PROTECTIONS; IN LINE WITH THOSE DECISIONS, CORPORATE ENTITIES HAVE THE AUTONOMY TO DETERMINE WHETHER TO IMPLEMENT VACCINATION-AND-TESTING REQUIREMENTS.

The OSHA ETS stands to impact two-thirds of the nation's private-sector employees, 86 Fed. Reg. 61,402, 403, and a staggering 25% of the country's population, *id.* at 61,475. One cannot deny that business entities across the nation have a vested interest in ensuring the wellbeing of their respective employees and business affairs are not adversely affected by a controversial and widely unpopular vaccine-and-testing mandate. Indeed, this Court on numerous occasions over the past 135 years has recognized that constitutional protections are inherent not only in individuals but are also extended to private companies.

One of the first cases before this Court which highlighted the rights of corporate entities was *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886). In that case, the Court ruled that the State of California improperly assessed taxes to a railroad company; however, it is not so much the Court's holding, but a headnote written by the Report of Decisions and approved by Chief Justice Morrison Waite, through which the case has earned its reputation as a landmark decision concerning the constitutional rights of business entities. *Russell v. Croy*, 164 Mo. 69, 63 S.W. 849, 853 (Mo. 1901). During the argument of the

matter, Chief Justice Waite declared,

> The court does not wish to hear argument on the question whether the provision in the fourteenth amendment of the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to corporations. We are all of the opinion that it does.

Russell, 63 S.W. at 853, citing *Santa Clara Co.*, 118 U. S. 394. Thus, *Santa Clara Co.* is widely considered a pivotal case through which the Court acknowledged the constitutional rights (in this case, Equal Protection Clause of the Fourteenth Amendment to the United States Constitution) of business entities.

In another key decision, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court recognized that a corporation's ability to spend unlimited funds on ballot initiatives was part of its First Amendment right to freedom of speech. Noting the Court's history of affirming the constitutional rights of corporate entities, the Court in *Bellotti* explained,

> Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, [internal citations omitted], and the Court has not identified a separate source for the right when it has been asserted by corporations. See, e. g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47, 81 S.Ct. 391, 393, 5 L.Ed.2d 403 (1961); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688, 79 S.Ct. 1362 1365, 3 L.Ed.2d 1512 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952).

Bellotti, 435 U.S. at 780.

The Court's recognition of the constitutional rights held by corporate entities again came into focus in the 2010 case *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, (2010), in which the Court overruled *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990), a case wherein the Court had previously upheld prohibitions on independent expenditures by corporations. In doing so, the Court held that political speech by corporations is a form of free speech protected by the First Amendment. Noting that "[t]he Court has recognized that First Amendment protection extends to corporations," *Bellotti*, 435 U.S. at 780, n. 14 (internal citation omitted), and that "[t]his protection has been extended by explicit holdings to the context of political speech," *NAACP v. Button*, 371 U.S. 415, 428–429 (1963), *Grosjean v. American Press Co.*, 297 U.S. 233, 244, (1936), the Court reasoned that "political speech does not lose First Amendment protection 'simply because its source is a corporation,'" *Bellotti*, 435 U.S. at 784; *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986). *Citizens United*, 558 U.S. at 342. Furthermore, the Court explained,

> Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting Bellotti, 435 U.S., at 783, 98 S.Ct. 1407)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." Id., at 776, 98 S.Ct. 1407; see *id.*, at 780, n. 16, 98 S.Ct. 1407. Cf. *id.*, at 828, 98 S.Ct. 1407 (Rehnquist, J., dissenting).

Citizens United, 558 U.S. at 343.

Most recently, the Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), ruled that closely held companies cannot be prohibited from filing for exemptions to federal laws on religious grounds. The Court was asked to determine whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq., permitted the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. *Burwell*, 573 U.S. at 687-91. The Court held that the mandate was unlawful because it substantially burdened the exercise of religion and was not the least restorative means of serving a compelling government interest. *Id.* The Court explained,

> In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships.

Id. The Court added, "Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections." *Id.* at 692.

Whether recognizing a business entity's freedom from unlawful taxation

(*Santa Clara Co.*), acknowledging a corporate entity's right to engage in free speech under the First Amendment (*Bellotti* and *Citizens United*), or identifying that a business owner's closely held religious beliefs entitle the owner to see exemptions to federal laws on behalf of the corporate entity (*Burwell*), this Court has consistently maintained that constitutional protections do not lose their legitimacy if asserted by a private business as opposed to a natural person. In this vein, business entities also have the right to be free from the federal government's gross overreach of power through the imposition of the OSHA ETS.

Whether the constitutional provisions implicated through the vaccination and testing mandate include the First, Ninth, Tenth, or Fourteenth Amendments or some other provision, corporate entities across this nation have a vested right in ensuring that their constitutional protections, as recognized in the litany of cases discussed above, are not infringed upon through the actions of the federal government. Certainly if a private company is entitled to engage in unsuppressed political speech, oppose excessive taxation, and assert sincerely held religious beliefs, so too should a corporate entity have the right to determine whether to implement a company-wide mandate requiring vaccination or testing – a matter that is poised to directly impact work forces on a never-before-seen level.

Because the federal government through the OSHA ETS has violated the constitutional protections recognized by this Court as belonging to business

entities, *amicus* respectfully requests that the Court grant the Emergency Applications filed in this consolidated matter.

II. THE OSHA ETS INFRINGES UPON THE UNENUMERATED RIGHTS RETAINED BY THE PEOPLE AS ACKNOWLEDGED BY THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Ninth Amendment of the United States Constitution, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," has been interpreted by the Court to acknowledge the freedom from intrusion by government into matters not delineated in the Constitution. In the matter of *Griswold v. State of Connecticut*, 381 U.S. 479, 488 (1965), in which the Court held that the Constitution protects the liberty of married couples to buy and use contraceptives without government restrictions, Justice Goldberg in his concurring opinion noted that "[i]n reaching the conclusion that the right of marital privacy is protected as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante* at 381 U.S. 484." *Griswold*, 381 U.S. at 487 (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring in the judgment). Justice Goldberg explained,

> The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family – a relation as old and as fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are

> fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

Id. at 495-96.

In his concurrence, Justice Goldberg recognized that the Court "has had little occasion to interpret the Ninth Amendment." *Id.* at 490. However, he noted that "(i)t cannot be presumed that any clause in the constitution is intended to be without effect" (citing *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803)) and that "[i]n interpreting the Constitution, 'real effect should be given to all the words it uses.'" *Myers v. United States*, 272 U.S. 52, 151 (1926). *Griswold*, 381 U.S. at 490-91 (internal citation omitted). Justice Goldberg added that "[t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488. Accordingly, "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Id.* at 492.

Noting the relationship between the Ninth Amendment and other constitutional provisions, Justice Goldberg explained,

> While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Id. at 493, citing *United Public Workers v. Mitchell*, 330 U.S. 75, 94—95 (1947).

The Court also briefly addressed the Ninth Amendment in *Roe v. Wade*, 410 U.S. 113, 122, (1973), where the district court had held that the "fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that certain Texas statutes that criminalized abortion were unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. While this Court, in ruling in favor of the plaintiffs, did not expressly rely on the Ninth Amendment in recognizing the right to abortion, the Court did acknowledge the district court's reasoning in reliance on that constitutional provision, noting as follows:

> The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her

> pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); id., at 460, 92 S.Ct. 1029, at 1042, 31 L.Ed.2d 349 (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S., at 486, 85 S.Ct., at 1682 (Goldberg, J., concurring).

Roe, 410 U.S. at 129. The Court further explained that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 113.

As Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, noted in his concurring opinion in *Griswold*, and as touched upon by this Court in *Roe*, the Ninth Amendment recognizes that unenumerated rights are retained by the American people (and, applying the line of cases discussed in the preceding section, by private business entities), and these rights are protected from infringement by the federal government. In addition, through application of the Fourteenth Amendment, the states are also prohibited from these unenumerated rights that belong to the people and business entities. *Griswold*, 381 U.S. at 493

(Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring in the judgment), citing *United Public Workers*, 330 U.S. at 94—95.

While the Ninth Amendment may be seldomly litigated, *amicus* respectfully submits that the importance of the Ninth Amendment cannot be overstated. After all, as acknowledged by Justice Goldberg in his *Griswold* concurrence, this Court has stated "(i)t cannot be presumed that any clause in the constitution is intended to be without effect" and that "[i]n interpreting the Constitution, 'real effect should be given to all the words it uses.'" *Griswold*, 381 U.S. at 490-91, citing *Marbury*, 5 U.S. (1 Cranch) at 174 and *Myers*, 272 U.S. at 151. The framers of our Constitution and amendments could not have predicted every instance in which the federal government would attempt to exert authority, and thus, it would not have been possible or practical for them to delineate all fundamental rights that must be safeguarded against government intrusion.

However, the Ninth Amendment memorializes the notion that the American people, and by extension, private businesses, are sovereign citizens not subject to the whims of an overreaching centralized government. The federal government does after all exist solely through the consent of the governed. The immortal words contained in the Declaration of Independence bears repeating in this instance:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these

> Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed…

Declaration of Independence (US 1776). While many interested parties in this matter have raised arguments regarding the legal propriety of the OSHA ETS, *amicus* poses a broader question – has the American people ever once consented to having the federal government dictate how private businesses should regulate non-workplace safety issues, such as the COVID-19 outbreak? If the answer is "no", then the inquiry should go no further, and the Court should strike down the OSHA ETS as an impermissible overreach by the federal government.

Amicus asks the Court to consider the words of St. George Tucker, whose *View of the Constitution of the United States* is considered the first extended, systematic commentary on the United States Constitution after it was ratified and amended by the Bill of Rights. Tucker explained:

> The right of governing can, therefore, be acquired only by, consent, originally; and this consent must be that of at least a majority of the people. [Thus,] [l]egitimate government can therefore be derived only from the voluntary grant of the people, and exercised for their benefit.

St. George Tucker, View of the Constitution of the United States, in 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA ed app. at 300 (St. George Tucker ed., Lawbook Exch. 1996) (1803). Neither a majority of the American people nor of private

business entities operating in this country have voluntarily granted the federal government the authority to regulate how corporate entities respond to COVID-19-related issues. Therefore, no legitimate government right exists to justify the forced adaptation of the OSHA ETS by private businesses across the nation.

In summary, the right of the American people and, by extension, American businesses to remain free from unlawful government intrusion cannot and should not be ignored. After all, the authors of the Ninth Amendment clearly foresaw the need to prevent the federal government from interfering with rights that, although unenumerated in the United States Constitution, are nevertheless critical components of the framework of natural rights belonging to every sovereign American citizen. Accordingly, *amicus* respectfully submits that the Emergency Applications should be granted as the OSHA ETS infringes upon the unenumerated rights of American citizens and business entities.

III. EVEN IF A GOVERNMENT AGENCY HAD THE AUTHORITY TO REGULATE THE IMPLEMENTATION OF VACCINATION-AND-TESTING REQUIREMENTS IN PLACES OF EMPLOYMENT, THAT AUTHORITY WOULD BELONG TO THE RESPECTIVE STATES AND NOT TO THE FEDERAL GOVERNMENT.

On a final note, while *amicus* maintains that no government agency has the authority to require employers to implement the vaccination and testing requirements set forth in the OSHA ETS, if any governmental entity were to have such authority, it would be the respective state governments and not the federal government. *Amicus* restates its position that the unenumerated rights referred to

in the Ninth Amendment that belong to the American people and business entities may be infringed upon by neither the federal government nor, through application of the Fourteenth Amendment, the states. *Griswold*, 381 U.S. at 493 (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring in the judgment), citing *United Public Workers*, 330 U.S. at 94—95. However, even if any governmental body were to hold authority over how private businesses respond to COVID-19-based issues, such authority would not belong to the federal government; rather, it would belong to the states.

The Tenth Amendment to the United States Constitution provides, "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." To that end, this Court has stated, "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *NFIB v. Sebelius*, 567 U.S. 519, 533 (2012). The "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 v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (internal citations omitted).

In regard to COVID 19-related personal health measures, as noted by the United States Court of Appeal for the Fifth Circuit, "to mandate that a person

receive a vaccine or undergo testing falls squarely within the States' police power." *BST Holdings, LLC. v. Occupational Safety & Health Admin.*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *21, 17 F.4th 604 (5th Cir. Nov. 12, 2021), citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905). The responsibility of the states to safeguard against health crises was noted by Chief Justice Roberts in a recently issued concurring opinion, wherein he stated, "Our Constitution principally entrusts '[t]he 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, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring in judgment), citing *Jacobson*, 197 U.S. at 38.

In line with these statements, the ability to implement measures to safeguard the public health has historically always resided with the states and not with the federal government. Any attempts by OSHA or any other federal agency to exercise a purported police power should be regarded as repugnant to the United States Constitution, which, through the Tenth Amendment, expressly recognizes the states, or the people, as retaining all powers not delegated to the federal government by the Constitution. Accordingly, the OSHA ETS is unconstitutional as no federal police power exists that would validate the federal government's draconian imposition of the vaccine-and-testing mandate.

While *amicus* adamantly maintains its position that the American people and

private businesses, as sovereign citizens, retain the right to make their own informed decisions regarding COVID-19-related measures, if any government agency were to have the authority to impose a vaccination-and-testing mandate, it would be a state government and not the federal government. For this reason and for the reasons set forth above, *amicus* respectfully requests that the Court grant the Emergency Applications.

CONCLUSION

For all these reasons, this Court should grant the Emergency Applications.

Respectfully submitted,

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