Nos. 21A244 & 21A247

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *ET AL.*, *Applicants*,
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *ET AL.*, *Respondents*.

OHIO, *ET AL.*, *Applicants*,
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *ET AL.*, *Respondents*.

On Emergency Applications for Stay of Administrative Action
and Petition for Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

Motion of Center for Medical Freedom, America's Future, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Eagle Forum, Eagle Forum Foundation, Downsize DC Foundation, DownsizeDC.org, Virginia Freedom Keepers, Leadership Institute, Intercessors for America, Restoring Liberty Action Committee, and Virginia Delegate David LaRock, for Leave to File Attached Brief *Amicus Curiae* in Support of Applicants; for Leave to File without 10-Days Notice; and for Leave to File in Paper Format

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December 30, 2021

Amici curiae Center for Medical Freedom (a project of the Conservative Legal Defense and Education Fund), America's Future, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Eagle Forum, Eagle Forum Foundation, Downsize DC Foundation, DownsizeDC.org, Virginia Freedom Keepers, Leadership Institute, Intercessors for America, Restoring Liberty Action Committee, and Virginia Delegate David LaRock respectfully move for leave to file the attached *amicus* brief in support of Applicants' applications for stay of respondents' rule pending disposition of the petitions for review or petition for certiorari before judgment and in support of the petition for writ of certiorari before judgment; to file in unbound format on 8.5-by-11-inch paper; and to the extent leave is required, to file without 10 days' advance notice to the parties of *amici*'s intent to file. This motion and brief are being filed before the court-ordered deadline of 4:00 pm, December 30, 2021, to respond to the application and petition.

Petitioners have sought consent to the filing of an *amicus* brief in support of the applications for stay and the petition for certiorari before judgment. Counsel for the parties have either consented or stated they had no objection.

Although this Court's Rules do not expressly provide for *amicus* briefs in support of or in opposition to an application for stay, this Court previously has allowed them. *See*, *e.g.*, *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2327 (June 27, 2017).

Amici organizations have a deep interest in protecting the constitutional checks and balances established in the U.S. Constitution.

In light of the expedited nature of this proceeding, *amici* respectfully request leave to file in unbound format on 8.5-by-11-inch paper and, to the extent leave is required, to file the brief without 10 days' advance notice to the parties of *amici*'s intent to file.

Therefore, *amici* respectfully request leave to file an *amicus* brief in support of the application for stay of the administrative action and in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Center for Medical Freedom (a project of the Conservative Legal Defense and Education Fund), America's Future, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Eagle Forum, Eagle Forum Foundation, Downsize DC Foundation, Downsize DC.org, Virginia Freedom Keepers, Leadership Institute, and Intercessors for America are nonprofit educational and legal organizations, exempt from federal income tax under IRC sections 501(c)(3) or 501(c)(4). Restoring Liberty Action Committee is an educational organization. Virginia Delegate David LaRock is a member of the Virginia House of Delegates. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and defending human and civil rights secured by law. Virginia Delegate David LaRock has represented the 33rd district in the Virginia House of Delegates since 2014.

STATEMENT OF THE CASE

On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") published an "Interim Final Rule; Request for Comments," entitled "COVID–19 Vaccination and Testing; Emergency Temporary Standard." 86 *Fed. Reg.*

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[1] It is hereby certified that counsel for Applicants and for Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

61402 (Nov. 5, 2021) ("OSHA Vaccine Mandate").[2] The OSHA Vaccine Mandate purports to enact an "emergency temporary standard," pursuant to 29 U.S.C. §655(c)(1). The OSHA Vaccine Mandate asserts two main purposes. It alleges that "many employees in the U.S. who are not fully vaccinated against COVID-19 face grave danger from exposure to SARS-CoV-2 in the workplace," and "unvaccinated workers are much more likely to ... transmit COVID–19 in the workplace than vaccinated workers." *Id.* at 61403.[3] To that end, the OSHA Vaccine Mandate demands that "[c]overed employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination." *Id.* at 61402. Although enacted as an "emergency temporary standard," OSHA claims that "it also serves as a proposal ... for a final standard." *Id.* at 61403.

The OSHA Vaccine Mandate "applies to employers with a total of 100 or more employees at any time the standard is in effect," and may in the future be applied to employers with fewer than 100 employees. *Id.* at 61403. Accordingly, OSHA has also sought comment from "[e]mployers with fewer than 100 employees" in order "to

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[2] https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf.

[3] At the same time that OSHA touts vaccination as "effectively protect[ing] vaccinated individuals against severe illness and death from COVID-19," the OSHA Vaccine Mandate denies the superior protection of natural immunity, claiming that "workers who have been infected with COVID-19 but have not been fully vaccinated still face a grave danger from workplace exposure to SARS-CoV-2." *Id.* at 61403.

determine whether to adjust the scope of the ETS to address smaller employers in the future." *Id.*

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit upheld a district court preliminary injunction against OSHA's enforcement of the Vaccine Mandate. Speaking for the court, Judge Engelhardt stated that:

> [w]e begin by stating the obvious. The Occupational Safety and Health Act, which created OSHA, was enacted by Congress to assure Americans "safe and healthful working conditions and to preserve our human resources." ... It was not — and likely *could* not be, under the Commerce Clause and nondelegation doctrine — intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make **sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways**. [*BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *8 (5th Cir. 2021) (emphasis added).]

As there were numerous petitions for review that were filed against the OSHA Vaccine Mandate, the United States Judicial Panel on Multidistrict Litigation consolidated the petitions and assigned them to the U.S. Court of Appeals for the Sixth Circuit on November 16, 2021. On December 17, 2021, the Sixth Circuit granted the government's motion to dissolve the Fifth Circuit's stay, which resulted in the petitioners filing the various applications for stay and petitions for certiorari with this Court.

STATEMENT

The OSHA Vaccine Mandate is exactly what the Framers most feared when they established the federal government: a raw exercise of arbitrary power. In issuing this mandate at the direction of President Biden, OSHA exercised powers that it does not

have. Neither does any other component of the federal government have the authority to issue such directives. Not even a bill passed by the House and Senate and signed by the President could lawfully authorize such a mandate. Accepting any drug into one's body is a personal decision. Although state government has a modicum of authority on public health matters as part of its police powers, no such directive is within the limited powers of the federal government.

The ability to make one's own medical decisions represents one of the basic, natural, and fundamental choices that Americans can make, choosing how best to protect their health, free from federal government oversight or interference. Demanding that every American bend his knee to decisions being imposed by federal bureaucrats, OSHA's paternalistic Vaccine Mandate intrudes into an area of our lives in which no government has authority.

SUMMARY OF ARGUMENT

The federal government possesses only the few and limited powers set out in the U.S. Constitution. None of those powers give the federal government a general police power to order mandatory vaccines. The federal government has no other source of authority, such as the commerce power, to command decisions to refuse healthcare. If the OSHA Vaccine Mandate is upheld, it would be difficult to envision a natural right which the government could not undermine.

More than two-thirds of all American workers are employed by businesses with 100 or more employees.[4] And, the OSHA regulation indicated the agency's desire to expand the mandate to smaller numbers of employees as well to capture many or most of the remaining third. Currently, most of these individuals can go to work, make a living, take care of their family, and live in peace. Under the OSHA regulation, these individuals can either (I) be administered a drug over their objection, or (ii) resign or be fired at great personal and familial cost.

Congress enacted the OSHA law pursuant to its authority under the Commerce Clause, but that constitutional provision provides no authority for OSHA to impose a broadscale COVID vaccination mandate. *See* Section I. This Court's 1905 decision in *Jacobson* regarding a different vaccination mandate provides no endorsement of OSHA's vaccine mandate. *See* Section II. The federal government has no plenary police power under the Constitution to impose the vaccine mandate, even if the OSHA law could be read as providing OSHA that authority. *See* Section III. Even if authorized under the Constitution and the OSHA law, the OSHA vaccine mandate is arbitrary and capricious as its factual predicate is flawed. *See* Section IV. It is up to the States, under the federal constitutional structure, to determine the health and safety of their citizens. *See* Section V.

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[4] In 2018, firms with over 100 employees had approximately 88 million employees of a total of 131 million employees, or 67.2 percent of the total. *See* 2018 SUSB Annual Data Tables by Establishment Industry, U.S. & states, U.S. Census Bureau (last revised Oct. 8, 2021). *See also* "National Business Employment Dynamics Data by Firm Size Class," U.S. Bureau of Labor Statistics (last modified Oct. 27, 2021).

ARGUMENT

I. THE OSHA STATUTE WAS ENACTED AS AN EXERCISE OF THE COMMERCE POWER.

The Williams-Steiger Occupational Safety and Health Act of 1970 was enacted as an exercise of the commerce power:

> The Congress declares it to be its purpose and policy, through **the exercise of its powers to regulate commerce** among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.... [P.L. 91-596, § 2(b) (emphasis added).]

The website of the United States Department of Labor primarily sources OSHA's authority in the Commerce Clause:

> The power of Congress to regulate employment conditions under the Williams-Steiger Occupational Safety and Health Act of 1970, is derived **mainly** from the **Commerce Clause of the Constitution**. (Sec. 2(b), Public Law 91-596; U.S. Constitution, Art. I, Sec. 8, Cl. 3; "United States v. Darby," 312 U.S. 100.) [U.S. Department of Labor, Standard No. 1975-2: "Basis of Authority" (emphasis added).]

That website describes the Commerce power in the broadest possible manner:

> The reach of the Commerce Clause **extends beyond Federal regulation of** the channels and instrumentalities of **interstate commerce** so as to empower Congress to regulate conditions or activities which **affect commerce** even though the activity or condition **may itself not be commerce** and may be purely intrastate in character. ("Gibbons v. Ogden," 9 Wheat. 1, 195; "United States v. Darby," supra; "Wickard v. Filburn, 317 U.S. 111, 117; and "Perez v. United States," 91 S. Ct. 1357 (1971).).... [T]he commerce power is plenary and has no restrictions placed on it except specific constitutional prohibitions and those restrictions Congress, itself, places on it. ("United States v. Wrightwood Dairy Co.," 315 U.S. 110; and "United States v. Darby," supra.) [*Id*. (emphasis added).]

Without pausing to challenge these expansive assertions of authority under the commerce power, and even if an individual's decision to receive a drug into his body qualifies as interstate commerce, the vaccine mandate is not an exercise of the power to regulate commerce. The challenged action purports to regulate the absence of commerce.

National Federation of Independent Business v. Sebelius ("*NFIB*") 567 U.S. 519 (2012), provides strong modern authority refuting any OSHA authority to implement a vaccine mandate. The decision written by Chief Justice John Roberts offers strong arguments against use of the Commerce Clause as a justification for a vaccine mandate, having held that the federal government **may not compel economic activity** under the Commerce Clause:

> Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are **doing nothing** would open a new and potentially vast domain to congressional authority. Every day individuals **do not do** an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the **effect of inaction on commerce** would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and — under the Government's theory — empower Congress to make those decisions for him. [*NFIB* at 552 (emphasis added).]

However, the *NFIB* decision expressly denied that the federal government has the power to override individual medical decisions in order to protect "society."

> **People**, for reasons of their own, **often fail to do things that would be good for them or good for society**. Those failures — joined with the similar failures of others — can readily have a substantial effect on interstate commerce. **Under the Government's logic,** that authorizes Congress to use its commerce power to **compel citizens to act as the Government would have them act**.... [*Id.* at 554 (emphasis added).]

Chief Justice Roberts warned about the damage to the nation if the government's assertion of the power to regulate inaction was adopted:

> Accepting the Government's theory would give Congress the same license to regulate what we do not do, **fundamentally changing** the relation between the citizen and the Federal Government.... The Framers gave Congress **the power to *regulate* commerce, not to *compel*** it.... [*Id.* at 555 (emphasis added).]

Concluding its Commerce power analysis, Chief Justice Roberts then addressed — and denied the existence of — a federal police power:

> Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to **direct them to purchase** particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave.... Any **police power** to regulate individuals as such, as opposed to their activities, remains **vested in the States**. [*Id.* at 557 (emphasis added).[5]]

II. *JACOBSON V. MASSACHUSETTS* OFFERS NO SUPPORT FOR THE OSHA VACCINE MANDATE.

The OSHA proposed regulation relies on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), to defend its vaccine (drug) mandate. 86 *Fed. Reg.* at 61406. The OSHA regulation first concedes that "OSHA's authority to regulate employers is hedged by constitutional considerations." *Id.* at 61405. Yet despite this nod to the notion that the federal government possesses only limited, enumerated powers, OSHA confidently asserts its power to promulgate this mandate as if the authority to do so were beyond question. On the contrary, never before in American history has any federal agency

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[5] The *Jacobson* Court also added that, where the congressional command to engage in commerce cannot be supported under the Commerce Clause, it similarly cannot be justified under the Necessary & Proper Clause. *See NFIB* at 560.

sought to claim the authority to impose a medical procedure upon American employees generally, let alone so-called vaccines with rapidly waning benefits and proven risk of death and permanent disability.

OSHA's reliance on the Supreme Court's decision in *Jacobson v. Massachusetts* is misplaced. *Jacobson* was a challenge to a state-imposed vaccine mandate. Whatever the continuing efficacy of *Jacobson* more than a century later, that ruling was expressly limited to state and local governments purporting to exercise a police power, providing no cover for the federal government's actions here.

Moreover, *Jacobson* was decided in a prior era dominated by the widely accepted "Science" of Eugenics, under which the Supreme Court later sanctioned state sterilization of women, relying on the *Jacobson* holding. *See Buck v. Bell*, 274 U.S. 200 (1927). Contrary to OSHA's claims here, *Jacobson* made clear that the police power belongs only to states:

> [t]he authority of the State to enact this statute is to be referred to what is commonly called **the police power — a power which the State did not surrender** when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description…." [*Jacobson* at 24-25 (emphasis added).]

A century later, in 2020, the U.S. Supreme Court granted a request by a Catholic church and a Jewish synagogue to enjoin a New York rule limiting attendance at religious services to no more than 25 persons during the purported zenith of COVID-19. In his concurrence, Justice Gorsuch made clear that *Jacobson* provides no warrant for extra-constitutional federal action due to a health emergency:

> *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue — exactly what the Court does today.... Why have some mistaken this Court's modest decision in *Jacobson* for a towering **authority that overshadows the Constitution** during a pandemic? In the end, I can only surmise that much of the answer lies in a particular **judicial impulse to stay out of the way in times of crisis**. But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack**. Things never go well when we do. [*Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring) (emphasis added).]

It should be beyond debate that the duty of this Court to defend the Constitution from attack applies even in times of crisis.

III. THE U.S. CONSTITUTION GRANTS THE FEDERAL GOVERNMENT NO FEDERAL POLICE POWER.

In *Jacobson*, the U.S. Supreme Court addressed police powers of a state — not the federal government, stating: "the **police power of a State** must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the **public health** and the public safety." *Jacobson v. Massachusetts* at 25 (emphasis added). The Supreme Court has never said anything even remotely similar about the powers of the **federal government**. Indeed, "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good — what we have often called a '**police power**.' *United States v. Lopez*, 514 U.S. 549, 567 (1995) (emphasis added).[6] The Federal Government, by contrast, has

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[6] *See also, United States v. Morrison,* 529 U.S. 598, 618 n.8 (2000) ("the principle that "'[t]he Constitution created a Federal Government of limited powers,'" while reserving

no such authority and 'can exercise only the powers granted to it....'" *Bond v. United States*, 572 U.S. 844, 854 (2014).

Although this Court has creatively found grounds to sanction the creation of as many as 6,000 federal crimes, this was not what the Framers provided. There is no general federal power to punish private behavior, such as through the creation of new federal crimes. Long ago, this Court determined from the Constitution's text that "[i]t is clear, that Congress cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. 264, 428 (1821). In fact, the Constitution specifically authorizes creation of only three types of crimes, each of which involve uniquely federal concerns. First, "[t]o provide for the **Punishment** of counterfeiting the Securities and current Coin of the United States." Art. I, Sec. 8, cl. 6 (emphasis added). Significantly, this express authority to criminalize counterfeiting immediately follows the delegation of power to Congress to "coin Money, regulate the Value thereof, and of foreign Coin," making it clear that the Framers did not believe the power to create a crime was implicit in each delegation of power. Second, "[t]o define and **punish** Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Art. I, Sec. 8, cl. 10 (emphasis added). Third, "Congress shall have Power to declare the **Punishment** of Treason." Art. III, Sec. 3 (emphasis added). If Congress had a general warrant to punish and criminalize private behavior, these provisions would have been unnecessary surplusage.

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a generalized police power to the States, is deeply ingrained in our constitutional history. *New York* [*v. United States*, 505 U.S. 144, 155 (1992)] (quoting *Gregory v. Ashcroft*, *supra*, at 457)...." (Rehnquist, C.J.).

More specifically, courts have uniformly held that the Commerce Clause does not convey a federal police power. *See NFIB v. Sebelius*, discussed *supra*. In *Lopez*, the Court demonstrated clear limits on the broad sweep of the commerce power. There, the Court struck down a federal ban on possession of firearms within 1,000 feet of a school. The Court did so on the limited basis that mere possession of a firearm did not constitute "commerce" and thus did not fall within the Commerce Clause ambit. The Court refused to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. In his concurrence, Justice Thomas went further. He undertook a detailed analysis of the text and history of the Commerce Clause and criticized those who would apply *Wickard* so broadly as to create something of a federal police power:

> Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. ... on this crucial point, the majority and [dissent] agree in principle: The Federal Government has **nothing approaching a police power**. [*Lopez* at 584-85 (Thomas, J., concurring) (emphasis added).]

There is no constitutional waiver during pandemics. Only a few decades into our federal experiment, in *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court stated that "[i]nspection laws, quarantine laws, **health laws of every description**, as well as laws for regulating the internal commerce of a State" are but a small part of an "immense mass of legislation ... **not surrendered to the general government**" by the states. *Id.* at 203 (emphasis added).

IV. THE OSHA REGULATION IS PREDICATED ON A FALSE ASSUMPTION AND IS THUS ARBITRARY AND CAPRICIOUS.

Even if the federal government had a police power, which Sections I to III argue that it does not, the OSHA mandate is arbitrary and capricious, and worse, as it is based entirely on a false assumption about COVID-19.

OSHA was ordered to implement its vaccine mandate by a frustrated President Biden,[7] whose opinion about the efficacy of the vaccine has been rejected even by his own Centers for Disease Control and Prevention ("CDC"). Just two weeks ago, President Biden assured the American people: people vaccinated for COVID-19 "do not spread the disease to anyone else." Even *PolitiFact* was forced to rate this statement "Mostly False," in a headline that asserts: "That's not what CDC says."[8] President Biden's statement defending vaccine mandates was extraordinary:

> "This is a pandemic of the unvaccinated," Biden said in the full interview. "The unvaccinated. Not the vaccinated, the unvaccinated. That's the problem. Everybody talks about freedom and not to have a shot or have a test. Well guess what? How about patriotism? How about **making sure that you're vaccinated, so you do not spread the disease to anyone else**." [*Id.* (emphasis added)]

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[7] President Biden directed OSHA to implement its regulation some weeks after expressing his frustration that efforts to encourage voluntary vaccination had not achieved the ever-evolving government goals. *See, e.g.*, Al. Nazaryan, "A 'frustrated' Biden lashes out at the unvaccinated as he announces new plan to battle Delta variant," *MSN News* (Sept. 9, 2021).

[8] A. Sherman, "Biden says that vaccinated people can't spread COVID-19. That's not what CDC says," *PolitiFact* (Dec. 22, 2021).

The fact that vaccinated persons **can spread** the disease is now so widespread that even the CDC shortly thereafter was compelled to post the following correction to its website:

> CDC expects that anyone with Omicron infection can **spread the virus to others, even if they are vaccinated** or don't have symptoms. ["Omicron Variant: What You Need to Know," CDC (Dec. 20, 2021) (emphasis added).]

While the CDC has recanted the President's position, apparently the word has not yet reached OSHA, which is sticking with the President's original position, regardless of the facts. In fact, supportive facts have been difficult to come by. So many of the "facts" communicated by the President and much of the rest of the federal government about the COVID-19 virus have been erroneous, if not fabricated. Consider President Biden's famous defense of vaccines at a CNN Town Hall where he strung together no fewer than four falsehoods, saying "you're": [i] "not going to get COVID if you have these vaccinations;" [ii] "not going to be hospitalized;" [iii] "not going to die;" and [iv] "not going to be in the ICU Unit." D. Dale and T. Subramaniam, "Fact check: Biden makes false claims about Covid-19, auto prices and other subjects at CNN town hall," *CNN* (July 22, 2021). Here, even notoriously pro-Biden CNN host Anderson Cooper and others were forced to call out the President on these fabrications.

The OSHA notice asserts: "**unvaccinated** workers are **much more likely to** contract and **transmit** COVID-19 in the workplace than vaccinated workers." 86 *Fed. Reg.* 61403 (emphasis added). This factual assertion does not withstand scrutiny. It is either a mistake or a fabrication.

Although the CDC has only conceded that the vaccinated **can spread** the virus, that statement leaves open the possibility that the vaccinated are **less likely** to spread the virus. However, this is false. Recent medical research has demonstrated that the unvaccinated **are no more likely to spread** COVID-19 than the vaccinated. *See, e.g.*, A. Singanayagam, *et al.,* "Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study," *The Lancet* (Oct. 29, 2021) ("[F]ully vaccinated individuals with breakthrough infections have peak viral load similar to unvaccinated cases and can efficiently transmit infection in household settings, including to fully vaccinated contacts." C. Acharya, *et al.,* "No Significant Difference in Viral Load Between Vaccinated and Unvaccinated, Asymptomatic and Symptomatic Groups When Infected with SARS-CoV-2 Delta Variant," *medRxiv* (Sept. 29, 2021) ("We found no significant difference in cycle threshold values between vaccinated and unvaccinated, asymptomatic and symptomatic groups infected with SARS-CoV-2 Delta.").

Even more shockingly, Dr. Robert W. Malone, the inventor of the mRNA vaccine, has explained that since vaccinated people have fewer symptoms than the unvaccinated, but are fully able to spread the virus, the vaccinated will be **more likely** to be at work, and thus **more likely** to spread the virus, than the unvaccinated. Thus, the vaccinated are the true super-spreaders of the virus. *See e.g.*, J. Loffredo, "Fully Vaccinated Are COVID 'Super-Spreaders,' Says Inventor of mRNA Technology," *The Defender* (Oct. 12, 2021) ("If you consider the scientific fact that vaccinated people have

less symptoms than the unvaccinated, but can still easily spread disease, consider your fellow vaccinated worker, whose unvaccinated son brought the disease home and gave it to him.… He might not have any symptoms … but he'll definitely be producing the virus. And he's going to say, hey, I can go to work today. But he's going to be spreading the virus like crazy.").

Therefore, based on the current state of "science," an OSHA regulation that limited the access of vaccinated persons to the workplace would make more sense than the rule it promulgated. In any event, together, these medical facts completely undermine the rationale for the OSHA Vaccine Mandate.

While these *amici* leave to others the responsibility to show that these vaccines are exceedingly dangerous, one irrefutable piece of evidence has been released during the pendency of these challenges. Until recently, few autopsies had been performed on COVID-19 and COVID-19 vaccinated patients, and now we know why. The authors of a recent paper autopsied 15 patients who died from seven days to six months after receiving the COVID shot and discovered that, in 14 of the 15 patients, there was widespread evidence of the body attacking itself, something that had never been seen before. *See* S. Bhakdi & A. Burkhardt, "On COVID vaccines: why they cannot work, and irrefutable evidence of their causative role in deaths after vaccination," *Doctors for COVID Ethics* (Dec. 15, 2021) ("Histopathologic analysis show clear evidence of vaccine-induced autoimmune-like pathology in multiple organs. That myriad adverse events deriving from such auto-attack processes must be expected to very frequently occur in all individuals, particularly following booster injections, is self-evident.

Beyond any doubt, injection of **gene-based COVID-19 vaccines places lives under threat of illness and death**. We note that both mRNA and vector-based vaccines are represented among these cases, as are all four major manufacturers." (Emphasis added).) Even more recently, a video explaining and updating this study has been posted: "Dr Sucharit Bhakdi: Organs Of Dead Vaccinated Proves Auto Immune Attack - 22/12/2021," *Bitchute* (Dec. 24, 2021).

This study of autopsies is not an outlier. World renowned Internist and Cardiologist Peter A. McCullough, M.D., MPH, FACC, FAHA, FASN, FNKE, FNLA, FCRSA, one of the most published physicians in the nation, has exposed the concerted effort to distort information about the risks and benefits of the COVID-19 vaccine. *See, e.g.,* "COVID-19 Vaccine Safety and Efficacy and the Urgent Need for Early Ambulatory Therapy," Presentation at Calvary Chapel Chattanooga (Dec. 15, 2021). Scientist and entrepreneur Steve Kirsch, an inventor of the optical mouse and founder of the COVID-19 Early Treatment Fund, catalogued what he believed to be the 11 biggest lies being perpetrated about COVID-19 and the COVID-19 vaccine. *See* S. Kirsch, "COVID pandemic: The 11 biggest lies" (Dec. 7, 2021). A recent book by Robert F. Kennedy, Jr. has literally blown the cover off the prevailing COVID vaccine narrative. *See* R.F. Kennedy, Jr., The Real Anthony Fauci (Skyhorse: 2021). The inventor of the mRNA vaccine, Robert Malone, has led the fight against the COVID-19 vaccines, describing the psychosis behind the COVID-19 narrative. *See* Robert W. Malone, M.D., M.S., "Mass Formation Psychosis" (Dec. 9, 2021).

For a century, vaccines have involved the administration of a dead or attenuated pathogen to trigger the body to develop an immunity. Until the dictionary definition of the word "vaccine" was changed on February 5-6, 2021 to include the experimental gene therapy used in all three COVID-19 shots, they would not have been considered vaccines. *See* "Merriam-Webster Dictionary Quietly Changes Definition of 'Vaccine' to Include COVID-19 mRNA Injection," *TheRedElephants.com* (Mar. 2, 2021). This change in definition was believed to be necessary to "sell" the COVID-19 shots to the public. Stefan Oelrich, President of Pharmaceuticals at Bayer, explained this rhetorical device at the World Health Summit:

> ULTIMATELY, the mRNA vaccines are an example for that sort of gene therapy. I always like to say, if we had surveyed, two years ago, the public,"would you be willing to take gene or cell therapy and inject it into your body?" we probably would have had a 95 per cent refusal rate. I think this pandemic has opened many people's eyes to innovation in a way that was maybe not possible before. [Paul Craig Roberts, "Big Pharma Executive Admits the Covid 'Vaccine' is Gene Therapy," *Institute for Political Economy* (Nov. 21, 2021).]

For this reason, these *amici* refer to the COVID-19 "shot," rather than the COVID-19 vaccine. If American businesses were required to impose "gene therapy" or a "drug" on their employees, there would be an even greater outcry by employers and employees — but this is exactly what OSHA is requiring. This Court should not be fooled by Big Pharma's changing nomenclature because the COVID-19 shot is now being marketed as a "vaccine."

Despite every effort to "sell the vaccine" to the public and to suppress voices critical of the COVID-19 shots, the people have been awakened and, fortunately are rapidly

turning away from the narrative with which they have been inundated by government, Big Pharma, and the establishment press which Big Pharma's commercials support. With the threat of death and serious injury that the vaccines (drugs) pose to the vaccinated, the OSHA vaccine mandate passes the stage of being unsupported, reckless, arbitrary, and capricious, and can be seen to be inhumane, vicious, evil, and believed by many to be even worse. The perpetrators of the COVID-19 shot should be criminally investigated, not relied upon as spokesmen for true science.[9]

V. WHO IS RESPONSIBLE FOR PUBLIC HEALTH?

On December 27, 2021, President Biden finally threw up his hands during a call with the Governors, admitting: "There is no federal solution. This gets solved at the state level."[10] This admission may have been late in coming, but these *amici* agree — the federal government should stand down and withdraw all mandates — especially the OSHA mandate that it had no authority to issue. Failing that, this Court should issue that stand down order itself, to protect the American people from a regulation that are both unconstitutional and irrational by enjoining OSHA from proceeding to implement this regulation pending review.

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[9] University of Virginia's David Martin, Ph.D. has assembled what he terms "The Fauci/Covid-19 Dossier" demonstrating that the Department of Health and Human Services had funded efforts to enhance coronaviruses between 1999 and 2002, before SARS was detected in humans, in the form of an indictment that he believes should be brought. *See, e.g.*, "David E Martin, The Fauci / Covid-19 Dossier," *Principia Scientific International*, (Nov. 10, 2021).

[10] T. Olson, "Biden says he agrees with Republican governors: There's 'no federal solution' to pandemic," *Fox News* (Dec. 27, 2021).

The unconstitutionality of the OSHA mandate is increasingly obvious. Senate Minority Leader Mitch McConnell (R-KY) recently explained: "'Elites in Washington cannot micromanage citizens' personal choices without a legitimate basis in law and the Constitution.'" H. Alic, "Senate passes bill to nullify Biden's vaccine mandate for employers," *Washington Times* (Dec. 8, 2021). Even if the federal government had the power to impose the mandate, Congress is not pleased that OSHA usurped legislative powers with this mandate. On December 8, 2021, the deeply-divided U.S. Senate invoked the Congressional Review Act to negate the OSHA regulations by a vote of 52-48, with all Republicans being joined by Joe Manchin (D-WV) and Jon Tester (D-MT). On that date, the *Washington Times* reported that: "At the moment, there are 213 signatures — only five short of the number needed to force the bill onto the House floor." *Id.*

These *amici* leave to others the obvious Separation of Powers and Administrative Procedure Act problems with the OSHA regulation, except to point out that it is significant that large swaths of the business community are resisting this action — and the objections are not singular, but multitudinous. A recent op-ed in the *Wall Street Journal* summarizes these concerns:

> The Occupational Safety and Health Act of 1970 authorizes OSHA to enact rules that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." But the Biden mandate is unreasonably and unnecessarily broad. As announced, it applies to all employees, even those who work at home, as millions have done during the pandemic.... It's overbroad in another way: Previous Covid infection doesn't excuse employees from the vaccine requirement.... Another concern is that the administration's interpretation of the OSHA statutory language presents a "delegation" problem.... Additional problems arise from the administration's

> urgency.... [D. Rivkin & R. Alt, "Biden's Lawless Vaccine Mandate," *Wall Street Journal* (Sept. 28, 2021).]

The op-ed concludes: "White House chief of staff Ron Klain retweeted a journalist's comment that 'OSHA doing this vaxx mandate as an emergency safety rule is the ultimate work around for the Federal govt to require vaccinations....'" *Id*. This tactic should not be permitted.

CONCLUSION

Amici urge this Court to reimpose the injunction on OSHA's regulation, before even more Americans are harmed, while awaiting a final resolution of this challenge to OSHA's unconstitutional and *ultra vires* mandate that employees submit to an experimental and highly dangerous gene therapy being falsely marketed as a traditional "vaccine.".

Respectfully submitted,

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