No. 21A244 (consolidated with No. 21A247)

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.
Applicants,

v.

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 of Administrative Action and Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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The 183 undersigned members of Congress move for leave to file the enclosed brief as *amici curiae* in support of applicants for an administrative stay and alternative petition for writ of certiorari before judgment. As United States Senators and Members of the United States House of Representatives, *amici* provide a unique perspective concerning the alleged delegation of legislative power to the executive agency here.[1]

Amici also move to file this brief without ten days' notice to the parties of their intent to file as ordinarily required by Sup. Ct. R. 37.2(a) and to file this brief in an unbound format on 8½-by-11-inch paper rather than in booklet form. These requests are necessary due to the press of time related to the emergency nature of the applications for stay. *Amici* did email counsel for applicants and respondents to obtain consent for this filing. Applicants provided consent and respondents have not responded to the request.

Amici members of Congress respectfully request leave to file the enclosed brief.

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[1] A complete list of the 47 Senators and 136 Representatives may be found in Appendix A to this brief.

Respectfully submitted,

/s/ John C. Sullivan

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STATEMENT OF INTEREST OF *AMICI CURIAE*[2]

The separation of powers has long been known to be a defense against tyranny. See MONTESQUIEU, THE SPIRIT OF THE LAWS 151–52 (T. Nugent transl. 1949). And so it "remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976)). "To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring).

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[2] Under Rule 37.6 of the Rules of this Court, *amici* state 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 *amici* or their counsel made a monetary contribution to its preparation or submission.

Those safeguards are just as relevant today. For example, if the President becomes impatient with how the citizenry is responding to his plan for dealing with a public health crisis, he may look to act (through an agency) to advance his agenda more quickly. The President may direct an agency to find some authority, somewhere, that could arguably be used in furtherance of the agenda and then use that claimed authority to enact a sweeping public health measure. But when an executive agency overreaches the boundaries of its authority in enacting the President's agenda, it undermines both the vertical and horizontal separation of powers that protect the people.

Amici are 47 United States Senators and 136 Members of the United States House of Representatives concerned with the executive overreach seen in the current administration's response to the COVID-19 pandemic. Congressional members have an interest in the powers they delegate to agencies not being abused—the legislative authority vested in the federal government belongs to Congress, not the Executive branch. In this case, the promulgation by the Occupational Safety and Health Administration (OSHA) of a sweeping, nationwide vaccine mandate on businesses intrudes into an area of legislative concern far

beyond the authority of the agency. And it does so with a Mandate enacted through OSHA's extraordinary (and seldom-used) "emergency temporary standard" (ETS) provision that allows for bypass of notice and comment rulemaking under certain circumstances. That OSHA exceeded its authority in enacting the ETS Mandate is not a "particularly hard" question. *In re OSHA*, 2021 WL 5914024, at *4 (Sutton, C.J., dissenting from the denial of initial hearing en banc).

Moreover, congressional members—as representatives of the people of their States and districts—have an interest in the citizens they represent being able to craft local solutions to problems facing their States and districts. Federalism concerns should be addressed before requiring federally-imposed solutions. And this is especially true when the question at issue involves an area typically reserved to the States (such as vaccine mandates). At the least, Congress should be forced to make clear any delegations of authority into areas of State control.

INTRODUCTION AND SUMMARY OF ARGUMENT

Time and again this Court has recognized that a clear statement of congressional intent must be present to find that Congress has ceded decisions of great economic and political significance. *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). And this case involves an issue broader and more important than those of the past addressed by this principle. See, e.g., *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–43 (2000). Even assuming Congress has the power to enact mandatory vaccination requirements across the country—a difficult question, see *NFIB* v. *Sebelius*, 567 U.S. 519, 549–61 (2012)—such power cannot be assumed to have been given away accidentally. To hold otherwise would infringe the separation of powers necessary both to avoid arbitrary or tyrannical rule and to make government effective and accountable. See *Loving*, 517 U.S. at 757.

While OSHA misinterprets its textual authority to take the action it attempts here, the lack of a clear statement from Congress that it could do so presents an insurmountable hurdle to the agency's expansion of the ETS provision of the Occupational Safety and Health Act (OSH Act). Vaccine mandates—a prototypical state police power—are not within the

purview of the OSH Act, let alone something on which Congress intended OSHA to take unilateral action under its "emergency" powers. The ETS Mandate proposed by OSHA cannot stand.

ARGUMENT

I. Congress Did Not Provide OSHA With The Authority It Claims Here.

The ETS provision of the OSH Act allows OSHA to address only "grave danger" in the workplace, which includes any "toxic or physically harmful" agent, without going through notice and comment when such an emergency standard is "necessary." 29 U.S.C. § 655(c)(1). And in the statutory scheme established by Congress, these conditions are a meaningful restraint on the agency. OSHA, however, aggressively reads the restrictions as an opportunity for the agency to branch out into public healthcare policy. Not only does this reading violate the text of the OSH Act, it would also create a nondelegation problem. That is because Congress provided no authority—let alone an intelligible principle—for OSHA to become a roving public health agency. The problem is avoided, though, because the ETS Mandate does not meet the conditions for issuing such a nationwide requirement on businesses.

A. The Text of the OSH Act Does Not Support Implementation of the ETS Mandate for COVID-19 Vaccines.

With its ETS Mandate, OSHA imposes a COVID-19 vaccine mandate for all large employers (those having more than 100 employees). This exceeds the scope of OSHA's congressionally-defined role, though. As a matter of statutory interpretation, the OSH Act "covers only *workplace-specific* hazards and permits only *workplace-specific* safety measures." *In re OSHA*, 2021 WL 5914024, at *7 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). After all, OSHA rules apply to "employment and places of employment." 29 U.S.C. § 652(8). But OSHA now wants to dictate virus protection measures outside the workplace to stop a virus outbreak that is also taking place outside the workplace. The ETS Mandate was thus flawed from its inception.[3]

[3] While the ETS Mandate also offers a testing option, OSHA is likely aware that the increased cost to employers for testing will probably cause them to simply mandate vaccines for their employees. Alternatively, if testing costs are imposed on employees, they would likely take the vaccine unwillingly or quit their job. Either way, the testing option in the Mandate will largely be illusory in practice as both employers and employees would be reticent to pay for it. Moreover, the testing option is rightly viewed as a punitive measure for those unwilling to get the vaccine since individuals with a vaccine can contract and spread COVID-19.

The ETS Mandate also elides the specific statutory provisions set forth by Congress to constrain use of OSHA's emergency powers. *First*, under OSHA's own analysis, there is no "grave danger" as defined by the OSH Act. *BST Holdings*, 17 F.4th 604, 613 (5th Cir. 2021). OSHA itself has conceded that the "effects of COVID-19" range from *mild* to critical. 86 Fed. Reg. 61,402–61,403. Moreover, despite OSHA's excuse that smaller employers might not be able to administratively handle its new rule, the exemptions from the Mandate for those small employers shows that there is no grave danger. After all, "[i]f [OSHA] suddenly realized that exposure to a new chemical created a 'grave' danger of cancer, it is difficult to imagine that anyone would permit an emergency rule targeting the problem to apply only to companies with over 100 employees in order to save the other companies money." *In re OSHA*, 2021 WL 5914024, at *13 (Sutton, C.J., dissenting from the denial of initial hearing en banc); see also *BST Holdings*, 17 F.4th at 616 ("[It may be true that] companies of 100 or more employees will be better able to administer (and sustain) the mandate * * * * But this kind of thinking belies the premise that any of this is truly an emergency.").

Second, a virus is not a "toxic or physically harmful" "agent" as defined in the OSH Act. See 29 U.S.C. § 655(c)(1). In context, an agent is a substance that is used for a particular purpose in the workplace—e.g., a chemical being used by an employee is the employee's agent to do a particular job. COVID-19 does not fall into this category, irrespective of whether OSHA can find a potential dictionary definition of "agent" that matches the agency's preferred outcome. Moreover, to avoid overreading statutes, this Court will "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps." *Yates* v. *Untied States*, 574 U.S. 528, 543 (2015). Here, the phrases "substances or agents" and "toxic or physically harmful" denote something far different than a virus. Thus "OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness* is yet another transparent stretch." *BTS Holdings*, 17 F.4th at 613.

Third, the ETS Mandate is not "necessary" as required by the statute. That term in the OSH Act's emergency standard goes far beyond mere advisability. Indeed, it means that the action must be

indispensable, not "just appropriate." *In re OSHA*, 2021 WL 5914024, at *9 (Sutton, C.J., dissenting from the denial of initial hearing en banc). But OSHA cannot argue that the mandate is indispensable for many categories of workers under "any standard of review." *Id.* at *11. It is thus unsurprising that OSHA itself previously preferred "less intrusive, more tailored protective measures" for this exact problem. *Id.* at *10.

Moreover, mandatory vaccinations do not stop individuals from contracting and transmitting COVID-19. Vaccinated workers can still contract and transmit COVID-19, including the new Omicron variant. Given that fact, imposing masking and testing restrictions *only* on unvaccinated workers makes no sense because *all* workers regardless of vaccination status remain potential carriers and transmitters of the virus. If the Rule does not cure the supposed grave danger in the workplace, it cannot be necessary under the statute. Thus the ETS Mandate cannot rise to the level of "necessary" required by the text of the OSH Act.

B. Reading the OSH Act to Allow the Agency's Interpretation Would Create a Nondelegation Problem.

"The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy* v. *United States*, 139 S. Ct. 2116, 2121 (2019) (plurality op.). While the legislative branch "may confer substantial discretion on executive agencies to implement and enforce the laws," *id.* at 2123 (citing *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)), Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* No such intelligible principle exists if OSHA's reading of the statute is correct.

OSHA seeks to trade on the broad delegations of authority to executive agencies previously approved by this Court. See, e.g., *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 472–74 (2001). And to be sure, were OSHA strictly relying on an ETS that was "necessary" to stop a "grave danger" from a workplace "agent," the agency could arguably find support for that delegated authority. But the ETS Mandate here opens the door for a power that would lack an intelligible principle—it would allow OSHA to become a roving committee for general health policy. As this

Court has recognized, a failure to limit a word such as "necessary" vests an agency with a breathtaking amount of authority that will have no functional limitation. *Ala. Ass'n of Realtors* v. *U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

The challengers to the Mandate have not argued against OSHA's finding that individual employees might have better outcomes with COVID-19 if they are vaccinated. This fact is irrelevant to OSHA's claimed power. Employees might also have better outcomes with the disease if they exercised at night, took vitamins at home in the morning, and avoided large gatherings on weekends. Yet no one would argue that OSHA's jurisdiction extends beyond the workplace to these activities. A vaccine requirement is functionally an outside-the-workplace requirement that individuals take action to provide themselves with better individual outcomes when they do contract the virus. But that's not OSHA's job. It was never meant to be the health police, "protect[ing] unvaccinated working people from themselves based on highly personal medical decisions." *In re OSHA*, 2021 WL 5914024, at *11 (Sutton, C.J., dissenting from the denial of initial hearing en banc).

The administration's stated goal for the ETS Mandate is to "reduce the number of unvaccinated Americans by using regulatory powers." Path Out of the Pandemic, The White House, https://www.whitehouse.gov/covidplan/. This is not a purpose of either the OSH Act generally or the emergency rule process specifically. Private healthcare decisions are far afield from federal workplace-safety regimes. To allow OSHA the authority to control such decisions would remove any semblance of an intelligible principle in the delegated authority that Congress has given the agency. As this Court has recognized, a delegation of power that broad would need even more circumscribed discretion. See, e.g., *Loving*, 517 U.S. at 772–73. Such boundaries are clearly not present here and thus it may be inferred that OSHA was not given power on that scale.

In short, there is no mousehole in which Congress could have even tried to hide the elephant of the ETS Mandate here. See *Whitman*, 531 U.S. at 468. It is thus unsurprising that the ETS itself acknowledges that OSHA has never used its authority before to mandate vaccination. 86 Fed. Reg. 61,439. There was no authority for it to begin doing so now, either.

II. Assuming OSHA Has The Authority It Now Claims Would Violate The Major Questions Doctrine.

Under the major questions doctrine, a congressional authorization to mandate vaccines would have to be clear. *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (noting that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance"). The major questions doctrine thus avoids the nondelegation problems discussed above by ensuring that Congress does not confer authority on an agency by accident. This is doubly true when intruding into an area typically reserved for the States. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. An intrusion into state prerogatives on vaccines—if legitimately tried by Congress—would need to be accompanied by intelligible principles to guide the agency's discretion. *U.S. Forest Serv.* v. *Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1850 (2020) ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.").

Vaccine mandates are traditionally the province of the States. *Zucht* v. *King*, 260 U.S. 174, 176 (1922) (finding it "settled that it is within

the police power of a state to provide for compulsory vaccination"); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905) (holding that authority to enact a compulsory vaccination law is found in a state's "police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution"). And courts must operate under the "assumption that the historic police powers of the States [a]re not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Cal. Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

While the panel majority in the Sixth Circuit protested that there may be both federal and state regulatory powers over an area, *In re: MCP No. 165*, (6th Cir. Dec. 17, 2021), at *34, that argument is irrelevant for three reasons. First, it is unclear if even Congress could pass a nationwide vaccine mandate. *See in re OSHA*, 2021 WL 5914024, at *18 (Sutton, C.J., dissenting from the denial of initial hearing en banc) ("For while Congress has long sought to *facilitate* safe and effective vaccines, it has never invoked the commerce power to *mandate* their administration upon the public at large."). Second, it confuses congressional action with agency action—when authority does exist for such actions, it is Congress

that must act in the first instance to initiate its use. Third, and most importantly, the panel's argument misses the point that the inquiry is not *if* Congress *could* legislate in an area but *whether* Congress *has* legislated in an area.

When Congress intends to act in a field known to fall within the purview of the States, it must pass an act clearly authorizing such an intrusion. *Cowpasture River*, 140 S. Ct. at 1850 (requiring "exceedingly clear language"). Because that has not been done here, it is even more plain that Congress did not give that power to an agency bureaucrat. The very purpose of the major questions doctrine is to prevent courts from assuming congressional intent to delegate authority—it is not to assess whether Congress could have done it. The Sixth Circuit panel's rejection of the doctrine only shows that it was answering the wrong question.

Even if the statutory text appeared to leave open the possibility of a vaccine mandate ETS, the "sheer scope" of the agency's claimed authority would counsel against the government's interpretation. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Here the sheer scope isn't just the enormous sums of money and the numerosity of the people affected, either—it is the intrusion into States' rights. *Ibid.* ("And the issues at

stake are not merely financial. The [agency action] intrudes into an area that is the particular domain of state law: the landlord-tenant relationship."). Without clear congressional authority in the regulatory scheme for such an expansion of agency authority into the realm of state police powers, it may not be assumed to exist.

Moreover, the sudden "discovery" of authority under the OSH Act confirms that it was never intended to displace state authority in this area. *Utility Air Reg. Group*, 573 U.S. at 324 ("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." (quoting *Brown & Williamson*, 529 U.S. at 159). As the Fifth Circuit put it, OSHA is attempting to use "an old statute * * * in a novel manner" to impose billions of dollars in compliance costs to "resolve one of today's most hotly debated political issues" in an area "outside of OSHA's core competencies." *BTS Holdings*, 17 F.4th at 617. Thus, under this Court's major questions doctrine, rejection of OSHA's claimed authority here is certain.

CONCLUSION

A stay pending review should be granted.

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DECEMBER 2021

APPENDIX A—LIST OF *AMICI CURIAE*

UNITED STATES SENATORS

John Barrasso
Marsha Blackburn
Roy Blunt
John Boozman
Mike Braun
Richard Burr
Shelley Moore Capito
Bill Cassidy
Tom Cotton
John Cornyn
Kevin Cramer
Mike Crapo
Ted Cruz
Steven Daines
Joni Ernst
Deb Fischer
Lindsey O. Graham
Chuck Grassley
Bill Hagerty
Josh Hawley
John Hoeven
Cindy Hyde-Smith
Jim Inhofe
Ron Johnson
John Kennedy
James Lankford
Cynthia Lummis
Michael S. Lee

Roger Marshall
Mitch McConnell
Jerry Moran
Lisa Murkowski
Rand Paul
Rob Portman
James E. Risch
Mike Rounds
Marco Rubio
Ben Sasse
Rick Scott
Tim Scott
Richard C. Shelby
Dan Sullivan
John Thune
Thom Tillis
Patrick Toomey
Roger Wicker
Todd Young

MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Rick W. Allen
Elise Stefanik
Virginia Foxx
Jim Banks
Kevin McCarthy
Steve Scalise
Robert Aderholt
Mark Amodei
Kelly Armstrong

Jodey C. Arrington
Brian Babin
Don Bacon
James R. Baird
Troy Balderson
Andy Barr
Jack Bergman
Andy Biggs
Dan Bishop
Mo Brooks
Vern Buchanan
Ted Budd
Michael C. Burgess, M.D.
Kat Cammack
Earl "Buddy" Carter
Steve Chabot
Ben Cline
Michael Cloud
Andrew Clyde
James Comer
Eric A. "Rick" Crawford
Dan Crenshaw
Warren Davidson
Rodney Davis
Jeff Davis
Neal Dunn
Ron Estes
Pat Fallon
Drew Ferguson, IV
Michelle Fischbach
Scott Fitzgerald
Brian Fitzpatrick

Chuck Fleischmann
Jeff Fortenberry
Russ Fulcher
Matt Gaetz
Mike Gallagher
Bob Gibbs
Louie Gohmert
Bob Good
Lance Gooden
Paul Gosar
Kay Granger
Garret Graves
Mark Green
Marjorie Taylor Greene
H. Morgan Griffith
Glenn Grothman
Michael Guest
Brett Guthrie
Andy Harris, M.D.
Diana Harshbarger
Vicky Hartzler
Yvette Herrell
Jody Hice
French Hill
Ashley Hinson
Richard Hudson
Darrell Issa
Ronny L. Jackson
Chris Jacobs
Bill Johnson
Dusty Johnson
Mike Johnson

Jim Jordan
John Joyce, M.D.
Fred Keller
Trent Kelly
David Kustoff
Doug LaMalfa
Doug Lamborn
Jake LaTurner
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Nancy Mace
Nicole Malliotakis
Tracey Mann
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Tom McClintock
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David B. McKinley, P.E.
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Steven Palazzo
Gary Palmer
Scott Perry
August Pfluger
Bill Posey
Mike D. Rogers
John Rose
David Rouzer
Chip Roy
John Rutherford
Austin Scott
Adrian Smith
Jason Smith
Lloyd Smucker
Victoria Spartz
Michelle Steel
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