

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

*On Applications for Stays of Injunctions Issued by the United States District Courts
for the Western District of Louisiana and Eastern District of Missouri Pending
Appeals to the United States Courts of Appeals for the Fifth and Eighth Circuits*

**MOTION OF 400 PHYSICIANS, SURGEONS, NURSES, AND MEDICAL
PROFESSIONALS OPPOSING OSHA'S UNCONSTITUTIONAL
OVERREACH LEAVE TO FILE ATTACHED BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF APPLICANTS**

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MOTION FOR LEAVE

Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing OSHA’s Unconstitutional Overreach (“*Amicus Curiae*”) 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 17-21, 2021, 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 Temporary Standard (“ETS”) on Coronavirus Disease of 2019 (“COVID-19”).

Amicus sought consent from the parties to file a brief in support of the emergency applications and provided notice of this filing on December 21, 2021. Counsel for the Applicants consented to the filing. Counsel for the Department of Justice took no position.

Amicus Curiae is an organization devoted to medical decisions only being made within the bounds of the Constitution and based upon reliable scientific and medical principles. *Amicus Curiae* cares deeply about the impact of a governmental agency improperly usurping an individual’s control over his/her sincerely held religious and moral convictions and personal medical decisions. Indeed, the physicians, surgeons, nurses, and medical professionals have faced the loss of their careers, unpaid suspensions from work, and the denial of religious exemptions—not based on the sincerity of their religious convictions, but due to categorical denials of any religious exemptions at their places of work. Many support their families with their paychecks and fear if they will be able to earn a living due to being publicly

ostracized by their government and their employers for following their sincerely held religious convictions. Many have experienced their employers sharing confidential medical information with their co-workers. Many have faced rigorous and inappropriate interrogation and insults from their employers regarding their religious beliefs. All have faced unjust persecution.

The Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing OSHA's Unconstitutional Overreach worked on the front lines during the beginning of the COVID-19 pandemic, frequently working overtime in unsafe conditions. They willingly sacrificed their own health to serve others; the majority have already contracted COVID-19 and presently have the antibodies against the illness.

Amicus Curiae has worked from the beginning of the pandemic, almost two years ago, without vaccination and without placing others in danger. *Amicus Curiae* willingly follows health and safety protocol to avoid transmission of COVID-19. They just cannot do so when such a protocol, like forced vaccination, violates their sincerely held religious beliefs.

Amicus Curiae has personally felt the backlash of the President's "Emergency" vaccination mandate. Due to *Amicus Curiae's* unique position and experience, the organization would provide a helpful perspective for the Court and ask that their motion for leave be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

The questions presented are:

1. Whether OSHA's private-employer mandate is an unlawful exercise of constitutional or statutory authority.
2. Whether OSHA's private-employer mandate violates the Religious Freedom Restoration Act or the First Amendment.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing OSHA’s Unconstitutional Overreach, submits this brief.¹ *Amicus Curiae* is an organization devoted to medical decisions only being made within the bounds of the Constitution and based upon reliable scientific and medical principles. *Amicus Curiae* cares deeply about the impact of a governmental agency improperly usurping an individual’s control over his/her sincerely held religious and moral convictions and personal medical decisions. Indeed, the physicians, surgeons, nurses, and medical professionals have faced the loss of their careers, unpaid suspensions from work, and the denial of religious exemptions—not based on the sincerity of their religious convictions, but due to categorical denials of any religious exemptions at their places of work. Many support their families with their paychecks and fear if they will be able to earn a living due to being publicly ostracized by their government and their employers for following their sincerely held religious convictions. Many have experienced their employers sharing confidential medical information with their co-workers. Many have faced rigorous and inappropriate questioning and insults from their employers regarding their religious beliefs. All have faced unjust persecution.

¹ On December 21, 2021, *Amicus Curiae* sought consent from the parties and provided notice of this filing. *Amicus Curiae* received consent from the Applicants, and Counsel for the Department of Justice took no position. *Amicus Curiae* further states that no counsel for any 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 or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *Amicus Curiae* brief.

The Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing OSHA's Unconstitutional Overreach worked on the front lines during the beginning of the COVID-19 pandemic, frequently working overtime in unsafe conditions. They willingly sacrificed their own health to serve others; the majority have already contracted COVID-19 and presently have the antibodies against the illness.

Amicus Curiae has worked from the beginning of the pandemic, almost two years ago, without vaccination and without placing others in danger. *Amicus Curiae* willingly follows health and safety protocol to avoid transmission of COVID-19. They just cannot do so when such a protocol, like forced vaccination, violates their sincerely held religious beliefs.

Amicus Curiae has personally felt the backlash of the President's "Emergency" vaccination mandate and its political theater. In its roll-out, the President explained that the purpose of the mandate is "to protect vaccinated workers from unvaccinated coworkers." <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-COVID-19-pandemic-3/>, last visited Jan. 5, 2022. The polarization, on a national level, of *Amicus Curiae's* sincerely held religious beliefs has exacerbated the discrimination and hardship they have faced and continue to face. Ironically, it is *Amicus Curiae's* religious beliefs that drew them to careers of service in the medical field and inspire them to care for sick individuals despite the potential risk doing so could pose to themselves and their families.

Amicus Curiae has undergone rigorous schooling, boards, residencies, and have significant debt to pay for their schooling. Yet, due to forced vaccination mandates, face the inability to earn an income. *Amicus Curiae* oppose the villainization of unvaccinated individuals. First, doing so minimizes the importance of religious liberty and welcomes religious discrimination. Indeed, *Amicus* have experienced this firsthand and are living it presently. Second, the fighting words upon which this mandate are based, such as “protecting vaccinated workers from unvaccinated coworkers” forwards a serious falsehood about what the presently available COVID-19 vaccinations do, and what the effect of vaccination is.

Amicus Curiae files this brief to encourage this Honorable Court to not justify the President’s OSHA mandate. It is unconstitutional and, undoubtedly, catalyzes religious discrimination.

SUMMARY OF THE ARGUMENT

OSHA asserts that its Mandate is authorized under the Commerce Clause. It is not. The Commerce Clause has never been used to force businesses, nationwide, to purchase, procure, and regulate vaccination, facial coverings, and weekly testing for communicable disease for all of their employees. OSHA wants this Court to improperly interpret the Commerce Clause more broadly than it has ever been interpreted in the history of our nation. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). Pursuant to the principles and constructs of the Constitution, this Court must abstain from doing so.

Amicus Curiae additionally urges this Court that OSHA’s Mandate violates the Religious Freedom Restoration Act. *Amicus Curiae* has personally faced religious persecution due to the announcement and beginning implementation of OSHA’s Mandate. OSHA’s mandate requires individuals with sincerely held religious beliefs to divulge those beliefs to their employer, subject to scrutiny and backlash, and then publicly identify themselves as unvaccinated by wearing a facial covering—that is a substantial burden that triggers strict scrutiny review. OSHA’s mandate falls short of satisfying the “most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

ARGUMENT

I. NEITHER THE CONSTITUTION NOR ANY CONGRESSIONAL STATUTE AUTHORIZES OSHA’S OVERREACHING MANDATE.

The United States was founded on the ideal that the federal government cannot control every aspect of a person’s life—especially regarding matters of religious exercise and livelihood.

OSHA’s Mandate aggrandizes the power of a federal agency in a manner never upheld before by this Court.

The Federal Government “is acknowledged by all, to be one of enumerated powers.” That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. . . .

The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.”

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404, 405 (1819)); U.S. Const., art. I § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 Wheat. 1, 194-95, 6 L.Ed. 23 (1824). Congress never delegated OSHA authority to force all employers with over 100 employees the power to require vaccination of their employees or to clearly designate who is unvaccinated by forcing a facial coverings mandate.

Congress expressly delegated OSHA the power to enact an ETS—limited by its power to regulate interstate commerce. 29 U.S.C. §§ 651–678 (1970). OSHA published its ETS for employers with 100 or more employees on November 5, 2021, 29 C.F.R. § 1910.501, 86 Fed. Reg. 61402 (Nov. 5, 2021) – almost a year after Pfizer’s COVID-19 vaccine became publicly available.² And OSHA admits that it relies upon “Congress’s Commerce Clause authority” as the constitutional power source for its Mandate. <https://www.federalregister.gov/d/2021-23643/p-1117>, last visited Jan. 5, 2022. This, in and of itself, is fatal for OSHA.

The Commerce Clause does not grant the power to force employers or employees to “*become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” *Sebelius*, 567 U.S. at 520-21. Forcing employers or employees to obtain vaccinations, weekly testing COVID-19 testing, and facial coverings does not regulate existing interstate commerce, but requires

² The Occupational Safety and Health Act (“OSH Act”) requires substantial evidence that an ETS is necessary to protect employees from grave occupational risks, and the Act is only “applicable to businesses affecting interstate commerce.” 29 U.S.C. §§ 651, 655. Yet, the 100-employee line was not based on interstate-commerce considerations, OSHA admits the line was not based on a difference in occupational risk, and OSHA placed the burden on employers to impose the mandate while stating employees may need to bear the costs of testing, an agency first.

the purchase and procurement of these measures. By definition, OSHA's Mandate does not regulate interstate commerce under Art. I, § 8, cl. 3. It forces employers and employees to become active where they are not presently.

OSHA's mandate explains that it "stops short of requiring the full suite of workplace controls against SARS-CoV-2 transmission recommended by OSHA and the CDC, including distancing, barriers, ventilation, and sanitation." <https://www.federalregister.gov/d/2021-23643/p-64>, last visited Jan. 5, 2022. However, if this Court were to allow OSHA's mandate to be implemented under the Commerce Clause, under the reasoning OSHA is forwarding, nothing would stop OSHA from requiring every employer with over 100 employees from purchasing those items if OSHA decides to require it.

This Court previously held that the Commerce Clause did not extend to federal regulation that required additional activity of employers and employees, instead of regulating ongoing interstate commerce. This Court reasoned that,

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.

Sebelius, 567 U.S. at 552.

Since the Constitution was ratified in 1788, never has a federal agency mandated such expansive action as OSHA attempts here in the form of its

unilaterally crafted and imposed ETS. As this Court warned in *Sebelius*, “sometimes ‘the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent’” 567 U.S. at 549 (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505).

Allowing OSHA’s mandate would desecrate our nation’s constitutional system of limited federal power. This Court has warned “that those limits may not be mistaken, or forgotten.” *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). While the scope of OSHA’s mandate is unprecedented, the problem it brings to this Court is not. The Commerce Clause has been inappropriately invoked for a number of worthy causes, such as the deterrence of violence against women. *United States v. Morrison*, 120 S. Ct. 1740 (2000). And such regulations, albeit based on worthy goals, had to be struck down as unconstitutional—not because the intentions behind the regulations were misguided but because safeguarding the constructs of our Constitution and the separation of powers is vital to good governance under the Rule of Law.

To allow OSHA’s mandate to go into effect pursuant to its Commerce Clause authority, because one agrees with the goal of the regulation, abandons the very principles of our constitutional republic. OSHA’s Mandate far exceeds its constitutional authority under the Commerce Clause. “The Commerce Clause is not a general license to regulate an individual from cradle to grave.” *Sebelius*, 567 U.S. at 557. *Amicus Curiae* urges this Court not to turn it into one.

II. OSHA'S MANDATE SQUARELY VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

Under the Religious Freedom Restoration Act, the Government may only substantially burden the free exercise of religion, if the challenged regulation: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.” 42 U.S.C. § 2000bb-(1)(a)-(b). “[E]xercise of religion” is broadly defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb-2(4) (referencing 42 U.S.C. § 2000cc-5(7)(A)). *See also Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2770, 2778; *see also Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713, 717-18 (1981) (holding that by denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the government imposed a substantial burden on the employee’s exercise of religion by “putting substantial pressure on an adherent to modify his behavior and to violate his beliefs,” noting that “[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial”).

Amicus Curiae oppose forced vaccination pursuant to the tenets of their faiths and pursuant to their sincerely held religious beliefs. OSHA’s mandate invites employers to judge the sincerity of their employees’ religious beliefs and substantially burden them. OSHA Mandate requires employers to determine whether an employees’ sincerely held religious belief merits an exemption. If the employer deems it does, then the employee must publicly wear a facial covering designating to everyone in their workplace that he/she is unvaccinated and also

submit to weekly COVID-19 testing. Such Scarlett Letter treatment imposes “substantial pressure” on employees establishing a substantial burden on religious exercise, and OSHA’s Mandate falls short of strict scrutiny.

Under the Religious Freedom Restoration Act, OSHA must justify its Mandate under strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). This is not a general test, but one that “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’— the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* (emphasis added). OSHA’s Mandate that applies to every employer with more than 100 employees, and every employee at each of those companies, across the entire country, not based on risk or need, could never satisfy this constitutional test. The mandate casts the widest net, not based upon any person’s risk of transmission; it is the antithesis of narrowly tailored.

OSHA’s mandate has not proven, within the bounds of reliable science, that vaccination even stops COVID-19 transmission in the workplace. Indeed, the “CDC expects that anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don’t have symptoms.” <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>, *last visited* Jan. 5, 2022. If OSHA cannot establish this basic premise behind its mandate, how could it ever be able to satisfy strict scrutiny review? It does not.

Instead, OSHA's mandate creates two classes of people, the vaccinated and the unvaccinated. The unvaccinated must divulge their personal religious beliefs to those in positions of power, who may deny them religious exemptions at whim. Then, the exemption still requires those with sincerely held religious beliefs to openly identify as unvaccinated by wearing facial coverings further opening them to disparate treatment in the workplace. Such a construct imposes the substantial burden that the Religious Freedom Restoration Act was enacted to protect. OSHA, however, has not and cannot prove that its regulation of every employer in America with over 100 employees satisfies this standard, nor have they even proven that vaccinated individuals cannot contract or transmit COVID-19 to establish its theory that unvaccinated individuals pose a grave danger, or that the vaccinated do not.

CONCLUSION

OSHA enacted its mandate without constitutional authority, and it perpetuates religious discrimination and violates the Religious Freedom Restoration Act. This Honorable Court should, therefore, reverse the decision of the Sixth Circuit and stop its implementation.

Respectfully submitted,

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