Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, and 21A260

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

MOTION OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND JOBS WITH JUSTICE EDUCATION FUND FOR LEAVE TO FILE ATTACHED AMICUS BRIEF IN OPPOSITION TO EMERGENCY APPLICATIONS FOR A STAY OR INJUNCTION PENDING CERTIORARI REVIEW; FOR LEAVE TO FILE WITHOUT 10 DAYS' NOTICE; AND FOR LEAVE TO FILE IN PAPER FORMAT

Michael T. Anderson*
**Counsel of record*
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com

December 27, 2021

Counsel for Movants/Proposed Amici National Employment Lawyers Association and Jobs With Justice Education Fund

Amici National Employment Lawyers Association (NELA) and Jobs With Justice Education Fund (JWJEF) respectfully move for leave to file the attached *amicus curiae* brief in opposition to the eleven Emergency Applications, filed on December 17–20, 2021, seeking a stay or injunction pending certiorari review of the Sixth Circuit's decision granting a motion to dissolve a stay of the Occupational Safety and Health Administration (OSHA) Emergency Testing Standard on COVID-19 vaccination and testing, which had been issued by the Fifth Circuit before the matter was transferred to the Sixth Circuit. *Amici* further move for leave to file the attached brief without 10 days' advance notice to the parties of amici's intent to file, and to file in unbound format on 8½-by-11-inch paper. *See* Sup. Ct. R. 37.2(a).

By email on December 24, 2021, *amici* provided notice to the parties in 21A244 and 21A247 of their intent to file an *amicus* brief in opposition to the emergency applications. Counsel for the petitioners-applicants (the National Federation of Independent Businesses in 21A244 and the State petitioners in 21A247) stated that they do not oppose the filing. Counsel for the respondent U.S. Department of Labor has not yet responded.

Amici curiae NELA and JWJEF are worker-advocacy organizations that seek to empower workers who demand fair treatment in the workplace and dignity on the job. *Amici* have an interest in the application of regulatory mandates in American workplaces, and thus urge clarity from this Court concerning the reach of its decision in this case to other restrictions that courts have upheld over worker challenges for decades.

Amici NELA and JWJEF seek to file an *amicus* brief in opposition to the emergency applications for a stay or injunction pending certiorari review because Petitioners' arguments, if accepted, would effectively end workplace regulation as it has existed since the early 20th Century.

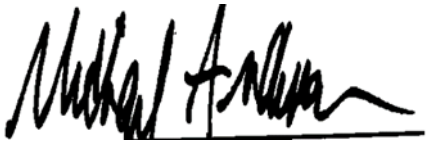
No counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than the *amici curiae*, contributed money intended to fund preparing or submitting this brief.

The applications for a stay were filed in this Court on December 17, 18, and 20. The Court has now set a deadline of December 30 for respondent's brief, with oral argument in Cases 21A244 and 21A247 on January 7, 2022. Counsel for amici provided notice to all parties in Cases 21A244 and 21A247 on December 24. Given the expedited consideration of this matter, *amici* respectfully request leave to file the attached brief without 10 days' advance notice to the parties of intent to file and to file in unbound format on 8½-by-11-inch paper. Because of the rapid schedule, preparation of this brief in printed booklet form will not be practicable. Because no party has opposed the filing, *amici* request that the Court grant leave to file the attached *amicus* brief without 10 days' advance notice to the parties and in unbound format.

CONCLUSION

Amici NELA and JWJEF respectfully request that the Court grant this motion to file the attached proposed *amicus* brief and accept it in unbound format without the 10 days' notice.

Respectfully submitted,



Michael T. Anderson*
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com
*Counsel of record

Counsel for Movants/Proposed Amici National Employment Lawyers Association and Jobs With Justice Education Fund

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[PROPOSED] BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND JOBS WITH JUSTICE EDUCATION FUND IN OPPOSITION TO EMERGENCY APPLICATIONS FOR A STAY OR INJUNCTION PENDING CERTIORARI REVIEW

Michael T. Anderson*
*Counsel of record
Adam C. Breihan
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com

December 27, 2021

Counsel for Movants/Proposed Amici National Employment Lawyers Association and Jobs With Justice Education Fund

CORPORATE DISCLOSURE STATEMENT

The National Employment Lawyers Association (NELA) has no parent corporation, nor has it issued shares or securities. The Internal Revenue Service has determined that NELA is organized and operated exclusively for advancing employee interests and serving lawyers who advocate for workers, pursuant to Section 501(c)(6) of the Internal Revenue Code and is exempt from income tax. NELA is organized and operated as a not-for-profit corporation under the laws of the state of Ohio.

Jobs With Justice Education Fund is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code and has no parent corporation. No publicly held company has 10% or greater ownership in Jobs With Justice Education Fund.

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INTEREST OF *AMICI CURIAE*

Amici Curiae National Employment Lawyers Association (NELA) and Jobs With Justice Education Fund (JWJEF) are advocacy organizations that empower workers who demand fair treatment in the workplace and dignity on the job.

NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys committed to the rights of workers, engaged in on-premises work, in employment, wage and hour, labor, and civil rights disputes.

JWJEF is a non-profit organization which advocates for all workers to have employment security and a decent standard of living within an economy that works for everyone. During the COVID-19 pandemic, Jobs With Justice Education Fund has advocated on behalf of essential workers with a focus on their health, safety, voice, and dignity in the workplace.

No counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than the amici curiae, contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY

Petitioners urge the Court to strike down OSHA's COVID-19 mandate, by asking the Court to make an independent judicial assessment that the costs to individual worker choice outweigh its benefits. Petitioners also argue that OSHA's COVID-19 mandate of vaccination or regular testing in large workplaces exceeds Congress' Article I power under the Commerce Clause. If these arguments are accepted, a substantial number of workplace requirements, both regulatory and privately-mandated, will be subject to similar challenges.

In Part I, we outline the many regulatory requirements that would become fair game for relitigation if Petitioners' theory were adopted. For example, the Department of Transportation (DOT) mandates drug-testing for all employees in aviation, rail, motor carrier, mass transit, maritime and pipeline industries. If Petitioners' argument is accepted, individual workers would be entitled to revisit whether DOT-mandated drug testing is truly worth the cost to individual workers' personal choices.

In Part II, we discuss the right to refuse unsafe working conditions, a countervailing right of pro-vaccine workers that would be triggered by any stay on OSHA's mandate. This Court has upheld the right of workers to refuse work under OSHA when they reasonably fear unsafe working conditions. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980), upholding 29 C.F.R. § 1977.12. If workers who object to vaccination are given a liberty interest that supersedes the government's, then vaccinated workers who fear the spread of COVID-19 may choose to exercise their equal and opposite right to refuse work if Petitioners' theory is adopted.

In Part III, we examine the glaring problem in Petitioners' demand that courts refuse to enforce OSHA regulations whenever judges deem them too "major" to suit judge-made notions of administrative policy. This would require courts to engage in the quasi-legislative line-drawing that courts improperly indulged in prior to *West Coast Hotel v. Parrish*, 300 U.S. 379, 398–399 (1935). If OSHA is acting within the scope of its statutory commission, courts have no legitimate role in declaring that Congress gave it too much power.

In Part IV, we show that even privately-imposed employer mandates would now be subject to challenge under Petitioners' theory.

In Part V, we show that Petitioners' Commerce Clause challenge, if accepted, would invalidate virtually all federal anti-discrimination law, including Title VII, the ADEA, the ADA and the RFRA.

ARGUMENT

I. Petitioners' Theory Will Open the Door to "Personal Liberty" Challenges to Employment Regulation Generally.

Petitioners claim that OSHA's vaccine or testing requirement imposes more burden on individual choices than it yields tangible economic benefits. Petitioners' core position is that courts may second guess OSHA's determination that a vaccine requirement is warranted. Until now, courts have rejected such arguments, by according deference to OSHA's cost-benefit judgments. *See, e.g., American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 510 (1981).

If courts accept Petitioners' arguments, the consequences cannot be limited to COVID-19 vaccination. For decades, unions and individual workers have challenged many workplace regulations on the same theory, but were unsuccessful. The Court needs to be clear that a decision for Petitioners would revive challenges that until now the courts have uniformly rejected.

A. Mandatory drug testing

As it has with OSHA, Congress has delegated authority to the Department of Transportation to require mandatory drug-testing of airline employees, 49 U.S.C. § 45102(a)(1), commercial motor carrier operators, 49 U.S.C. § 31306(b), merchant

mariners, 46 U.S.C. §§ 2103, 7101, mass-transit workers, 49 U.S.C. § 5331, and railroad employees, 49 U.S.C. § 20140. This includes direct observation of some employees' urine testing to prevent cheating. *See BNSF Ry. Co. v. Dep't of Transp.*, 566 F.3d 200, 208 (D.C. Cir. 2009), *citing* 49 C.F.R. § 40.67, *approved in Norris v. Premier Integrity Solutions*, 641 F.3d 695, 701–702 (6th Cir. 2011).

These regulations are not enforced as a paternalistic measure to reform the personal lifestyles of American workers. The Agency's stated purpose is to protect fellow workers and the public who may be harmed by impaired workers. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989); 49 C.F.R. § 382.101 (commercial trucking); 46 C.F.R. § 16.101 (shipping). The Supreme Court has until now held that such agency mandates for invasive testing are permissible because (like COVID-19 infection) the signs of impairment are not always obvious. *Skinner*, 489 U.S. at 621.

If this Court rejects OSHA's COVID-19 vaccination/testing requirements as "unduly" invasive, then workers affected by mandatory drug-testing would have a fresh opportunity to challenge DOT drug-testing regulations on the same ground.

Petitioners advance Judge Sutton's dissent in the Sixth Circuit that mandatory drug-testing under DOT regulations is somehow different because it is limited to transportation workers. App. 211. Yet DOT's mandate covering any and all workers within its jurisdiction is also subject to criticism as overbroad. Plaintiffs challenging such industry-wide regulations have argued that the justification for drug-testing airline pilots does not have the same force for flight attendants,

baggage handlers or pipeline workers. Yet this Court and the lower courts have deferred to the Government's judgment that all transportation workers may legitimately be covered by a blanket rule, even though impairment may be more dangerous in pilots than in airport clerks. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989); *Int'l Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1296 (9th Cir. 1991).

Justice Scalia made the same point for this Court in upholding mandatory urinalysis for school athletes without individualized suspicion in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 656–657 (1995). Justice Scalia cited the universal requirements for school vaccinations. He noted that students' expectation of privacy in crowded schools is less than that of the general public:

> For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. . . In the 1991–1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio. [cit.om.] Particularly with regard to medical examinations and procedures, therefore, students within the school environment have a lesser expectation of privacy than members of the population generally.

Id. What is true for crowded schools is true for large workplaces in interstate commerce. If the government may legitimately require vaccination in the former, it may legitimately do so in the latter. Petitioners are merely rehashing the arguments rejected in *Skinner* and *Vernonia School District 47J*.

B. Physical requirements for employment

DOT regulations also impose requirements that workers satisfy vision, hearing, blood pressure, and other physical standards. *See, e.g.,* 49 C.F.R. § 391.41.

Absent such regulations, affected workers might have a claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 (a) and (b)(5), for a more lenient accommodation. Until now, this Court has been firm that employer compliance with DOT regulations supersedes any affected worker's ADA rights. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 518 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 519, 522–23 (1999). This Court has not until now allowed workers to sue their employers by collaterally attacking government regulations, any more than those workers may ask judges and juries to reconsider judgments by medical professionals about a worker's fitness for work. *See Murphy*, 527 U.S. at 522.

Petitioners' theory, if accepted, would change this decisional law. If courts have the authority to second-guess the wisdom of minimum workplace safety standards, then compliance with those regulations cannot remain a complete defense to an ADA claim for accommodation. Employers will no longer have a safe harbor to comply with federal workplace regulations, if those regulations are now open to collateral attack by individual workers who object to them.

C. Mandatory retirement age

Federal agencies like the Federal Aviation Administration often impose mandatory retirement ages as a regulatory condition for employment. *See, e.g.*, 14 C.F.R. § 121.383(e) (air carrier pilots must retire after their 65th birthday); 5 C.F.R. § 842.806 (mandatory retirement for air traffic controllers, law enforcement officers, and firefighters); *Vance v. Bradley*, 440 U.S. 93, 100 (1979) (mandatory retirement age for foreign service officers). It is not illegal age discrimination for employers or

unions to comply with such regulations. *Bondurant v. Air Line Pilots Ass'n, Intern.*, 679 F.3d 386, 396 (6th Cir. 2012).

Mandatory retirement-age regulations would be subject to the same objections that Petitioners urge here. Courts would have to entertain collateral attacks on the wisdom of mandatory retirement mandates under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

D. Hard-hat and beard restrictions

OSHA regulations also require employees in many industries, like construction and longshore, to wear hard hats. *See* 29 C.F.R. §§ 1910.135, 1926.100. Until now, this has been thought an unexceptional exercise of OSHA's authority delegated by Congress under the Commerce Clause, even as to small employers. *See CMC Elec. Inc. v. OSHA*, 221 F.3d 861, 868–69 (6th Cir. 2000) (small electrical contractor cited for failing to enforce hard-hat policy).

Hard hats may be uncomfortable. They may interfere with the wearing of religious headgear by Sikh or Orthodox Jewish workers. The risk of head injury is arguably confined to the person choosing to forgo the protection. But few until now would have challenged mandatory hard-hat regulations in the name of each worker's freedom to work bare-headed. *See Kalsi v. New York City Transit Auth.*, 62 F.Supp.2d 745, 760 (E.D.N.Y. 1998) (rejecting Sikh employee's claim for religious accommodation from employer's hard-hat policy, inter alia, because of the potential for injury to other workers), *aff'd*, 189 F.3d 461 (2d Cir. 1999).

Similarly, government regulations forbid certain workers like firefighters from wearing beards that some religions require, since beards may create a hazard

for people who may need to wear respirators. *See, e.g., Bey v. City of New York*, 999 F.3d 157, 167–169 (2d Cir. 2021). Even where the aggrieved workers offer to prove that the risk is too minimal to justify the restriction against their religious observance, courts until now have deferred to the agencies' regulatory judgment.

Yet Petitioners' theory, if adopted, would open the door to lawsuits by workers who claim their personal freedom outweighs the benefit of the occasional head injury or respiratory malfunction. At a minimum, courts would have to legislate "safe harbor" exemptions from general mandates in every case. If this is available to Petitioners here, it must be available to all other workers whose personal and religious freedoms are affected by workplace mandates.

II. Pro-Vaccine Workers' Right to Refuse Unsafe Work

Petitioners' individual liberty theory ignores the countervailing OSHA rights of vaccinated workers to refuse unsafe work alongside unvaccinated, untested co-workers. As Petitioners' Brief in Case No. 21-4080 pointed out, a vaccinated worker is still at risk of a "breakthrough" infection if he/she works in close contact with unvaccinated co-workers. Pet'rs' Mot. to Stay at 17, *BST Holdings LLC v. OSHA,* Case No. 21-60845 (5th Cir. Nov. 5, 2021).

Those vaccinated workers who fear contracting COVID also have rights under OSHA. Absent a uniform mandate, vaccinated workers who reasonably fear breakthrough infections from their unvaccinated colleagues have a legally protected right to refuse to work. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980) (upholding 29 C.F.R. § 1977.12, protecting employees' right not to perform assigned

tasks because of a reasonable apprehension of injury); *see also* 29 U.S.C. § 143 ("[T]he quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike."). Petitioners' theory would then open the door to a civil war between pro- and anti-vaccine workers, each with a countervailing right to refuse to work with the others based on their own conflicting opinions about COVID-19 safety and vaccine efficacy.

Until now, government authorities had the police power to resolve these scientific and social debates. Government could enforce mandatory vaccination in response to pandemics, without having to litigate its wisdom against those who doubt the Government's scientific judgment. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). Even in 1905, the *Jacobson* Court acknowledged that some questioned the efficacy and safety of smallpox vaccination. But the presence of dissenters could not disable the Government from taking decisive action based on the majority consensus. *Id.*, 191 U.S. at 34.

But if courts now assert the authority to entertain skeptical litigation over the value of COVID-19 vaccination, they will not be able to deny the pro-vaccine majority of workers the right to believe, with OSHA and the Center for Disease Control, that unvaccinated co-workers pose a clear and present danger to their health. OSHA and its enabling Congress will have lost any ability to impose binding regulations to protect workplaces in interstate commerce, since each side of the debate will have a judicially conferred right not to work with the other side.

III. The Problem of Judicial Line-Drawing

Petitioners imply that a vaccination mandate might be permissible if it were limited to specific industries. *See, e.g.,* Pet'rs' Mot. to Stay, at 20-24. They also argue for a vague, judge-made distinction between "major" and "minor" administrative orders. They argue that courts have the power to refuse enforcement of agency regulations if judges deem they are too consequential. *Id.* at 16-18.

But here it is hard for unelected courts to define which workplaces are uniquely at risk of COVID-19 outbreaks compared to others. Healthcare institutions serve especially vulnerable patients, *see We The Patriots USA Inc. v. Hochul*, 17 F.4th 266, 270 (2d Cir., 2021) (denying injunction against New York law requiring vaccination for healthcare workers), *application for injunctive relief denied*, ___ S.Ct. ___ 2021 WL 5873122 (Dec. 13, 2021), as do institutions that serve the elderly or children, *see Does 1-6 v. Mills*, 16 F.4th 20, 33 (1st Cir. 2021) (denying injunction against Maine regulation mandating vaccination for nursing and residential care facilities); *Maniscalco v. New York City Dep't of Educ.,* No. 21-CV-5055 (BMC), 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021), *aff'd,* No. 21-2343, 2021 WL 4814767 (2d Cir. Oct. 15, 2021) (same for school employees), *pet. cert. docketed* Dec. 9, 2021. But ultimately all occupations that serve the public create the risk of infection to and from customers, and even in-person workplaces without public contact involve close proximity between co-workers.

Similarly, Petitioners do not identify any statutory or constitutional test, beyond judges' own policy preferences, to distinguish "major" from "routine"

administrative action, Petitioners do not dispute that OSHA's Congressional mandate is to address "personal injuries and illnesses arising out of work situations [that] impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). The spread of COVID-19 through workplace contact is clearly within that statutory mandate. Petitioners are not complaining that OSHA is acting outside its statutory authority; they are complaining that Congress gave OSHA too much power, and that Congress may only delegate OSHA authority to do things that judges deem sufficiently routine.

Petitioners do not give any clear rationale for unelected judges to decide how consequential an OSHA order must be to lose its right to judicial enforcement, nor which industries might be legitimately subject to such a mandate. If hospitals may be subject to such a mandate, why not schools, meatpacking plants or offices? OSHA has stated that COVID-19 does not discriminate in the public venues where the virus may be transmitted, so it is hard to see how any court may legitimately draw lines where Congress and the Executive Branch have not. *See West Coast Hotel v. Parrish*, 300 U.S. 379, 398-399 (1935) (elected officials, not courts, should make policy decisions whether worker-protection statutes should be limited to specific industries or classes). If courts return to the pre-*West Coast Hotel* regime by making judicial policy choices about when Congress may authorize OSHA to respond to a nationwide pandemic, judges will become the relevant policy-makers in place of Congress and the President.

IV. Petitioners' Theory Implicates State, Local and Private Employer Mandates as Well as Federal Government Mandates.

A. If federal mandates are invalid, then so are State mandates.

Petitioners suggest that the vice of the OSHA mandate is that it is federal. They imply that COVID is a matter for State and local regulation.

But if individual workers' personal choices are the reason that the OSHA mandate is invalid, State safety regulations will meet the same fate. Indeed, absent a uniform federal standard, individual workers asserting ADA and Title VII rights will have an even stronger argument against State regulation, since their federal ADA and Title VII rights will arguably supersede any contrary state laws that would permit employers to do what federal law prohibits. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). More lenient laws in other states will always be ammunition for dissident plaintiffs against a stronger law in their state. For example, any worker in New York who feels burdened by state COVID mandates need only point to less restrictive rules in Idaho or Arkansas. Absent a uniform national mandate, the least-restrictive State laws will presumptively become the national standard when invoked by plaintiffs objecting to vaccination.

B. Private employer mandates will not survive challenge if Petitioners' theory is accepted.

Petitioners also imply that vaccine mandates would be better left to the management decisions of individual employers. But this ignores the rights of individual workers against private employers under the ADA and Title VII. If OSHA regulation is not a complete defense, then even private employers that choose to mandate vaccination will have to justify that mandate against employees

who assert accommodation under the ADA and Title VII. This would impose a novel burden on private employers without "comparable example in our law." *Albertson's,* 527 U.S. at 577 (finding it unreasonable "to read the ADA as requiring a[private] employer … to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory [safety] standard … issued by the Government itself."). If the Court imposes such a burden here, it must impose that burden on private employers in every other case where safety mandates affect individual worker choice.

V. Petitioners' Commerce Clause Argument Would Invalidate All Federal Employment Legislation.

Petitioners also claim that the OSHA mandate exceeds Congress's power under the Commerce Clause. They argue that Congress and its delegated agency lack the power under the Commerce Clause to protect interstate commerce from the effects of a 50-state pandemic that spreads without regard to state lines.

If that argument is accepted, it is hard to see how the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.,* or the Americans with Disabilities Act 42 U.S.C. §§ 12101 *et seq.*, could be continue to be deemed a valid exercise of the Commerce Clause power. If the prevention of a spreading pandemic in large workplaces is insufficiently related to Congress's power to regulate interstate commerce, the federal interest in a national minimum wage, or preventing sex, age or disability discrimination in employment would not either.

But until now such noncommercial interests in employment fairness have been deemed to have sufficient connection to interstate commerce to give Congress the Article I authority to legislate over them. *See, e.g., United States v. Darby*, 312 U.S. 100, 109 (1941) (Fair Labor Standards Act was constitutional under Commerce Clause when it set a minimum wage standard to prevent the production of goods "for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being"); *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (Congress had power under Commerce Clause to bar employers from discriminating against employees on a protected ground under Title VII); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2005) (ADEA); *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 500 (5th Cir.2003) (noting that "the ADA is an exercise of Commerce Clause power"); *see* 42 U.S.C. § 12111(5) (" 'employer' means a person engaged in an industry affecting commerce"). These cases recognize that an employer's choice to discriminate based on a federally protected category like race is "noneconomic activity," but the effect of that choice on the workplace and the flow of commerce in and from that workplace is economic—hence, it is subject to regulation under the Commerce Clause. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964) (finding "discrimination by hotels and motels impedes interstate travel").

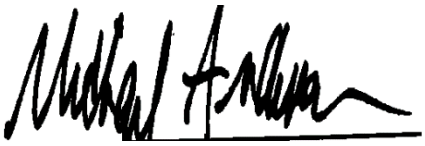
But if preventing the COVID-19 pandemic, including the current omicron variant, from paralyzing the interstate economy by incapacitating America's workers is not a sufficient basis for OSHA's mandate under the Commerce Clause,

it is hard to see how the purely metaphorical "plagues" of substandard wages or invidious discrimination could qualify. There will be nothing left of Congress' power to legislate the FLSA, Title VII, ADEA or ADA if the Commerce Clause is as limited as Petitioners claim.

CONCLUSION

If the Court accepts Petitioners' arguments, the Court should recognize that individual workers and their unions will have the same opportunity to revive similar challenges to regulatory workplace restrictions that courts have rejected for decades. Petitioners may not win relief here without opening the courthouse doors to all other dissenting workers, and obliterating the foundations of all federal employment law.

December 27, 2021



Michael T. Anderson
*Counsel of Record
Adam C. Briehan
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com

Counsel for Proposed Amici Curiae
National Employment Lawyers Association
and Jobs With Justice Education Fund