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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.

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD, 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021

UNION PETITIONERS' BRIEF IN OPPOSITION TO EMERGENCY APPLICATION FOR IMMEDIATE STAY

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Corporate Disclosure Statement

Neither the AFL-CIO nor any of the unions filing this Brief are corporations and thus neither the AFL-CIO nor any of the unions have a parent corporation or issue any stock.

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Introduction

The American Federation of Labor & Congress of Industrial Organizations ("AFL-CIO") and the eight national, regional and local labor organizations that join this Brief,[1] all of which were petitioners in the Court of Appeals and supported the government's motion to dissolve the Fifth Circuit's stay ("the Unions"), represent workers protected by the Occupational Safety and Health Act ("OSH Act") in every industry and in every region of the country – meat packers, grocery store cashiers, construction workers, teachers, security guards, broadcast technicians, and myriad others.

Since the pandemic began, the Unions have repeatedly urged the Occupational Safety & Health Administration ("OSHA") to adopt mandatory rules to protect workers from the grave danger COVID-19,

[1] American Federation of Teachers Pennsylvania; Massachusetts Building Trades Council; Media Guild of the West, The News Guild-Communications Workers of America, Local 39213; National Association of Broadcast Technicians – The Broadcasting & Cable Television Workers Section of the Communications Workers of America; North America's Building Trades Unions; Service Employees International Union, Local 32BJ; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; United Food and Commercial Workers International Union; and Union of American Physicians and Dentists.

the disease caused by the novel coronavirus, SARS-CoV-2, poses at the workplace. In March 2020, the AFL-CIO petitioned OSHA to adopt an Emergency Temporary Standard ("ETS") covering COVID-19. *See* Per Curiam Order, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. June 11, 2020). When OSHA failed to adopt a specific standard, reasoning at that time that the grave danger could be addressed with guidance coupled with enforcement of existing standards and the Act's general duty clause, the AFL-CIO sought a writ of mandamus to compel the agency to issue an ETS. *Id.* Finally, after OSHA issued an ETS covering only healthcare workers in June of this year, the AFL-CIO and the United Food and Commercial Workers Union ("UFCW") filed a petition for review, seeking to compel the agency to extend the standard's protections to all workers. *UFCW v. OSHA*, No. 21-1143 (D.C. Cir.).[2]

[2] That action has been held in abeyance pending the resolution of this matter. However, on December 27, 2021, OSHA announced that the ETS was no longer in effect. *See* OSHA, Statement on the Status of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), https://www.osha.gov/coronavirus/ets. OSHA explained that it "intends to continue to work expeditiously to issue a final standard that will protect healthcare workers from COVID-19 hazards." *Id.*

The Unions petitioned for review of the ETS at issue here in the court of appeals *not* because OSHA lacks authority to issue this standard, but instead because OSHA has not mandated all the steps necessary to address this grave danger. The Unions oppose the emergency applications for an immediate stay because the ETS is necessary to protect the workers they represent, and millions of others, from the grave danger COVID-19 currently poses in their workplaces. In addition, accepting the arguments the Petitioners[3] advance would undermine OSHA's ability to fulfill its statutory duty "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," 29 U.S.C. § 651(b), not only with respect to the grave danger of COVID-19, and not only with respect to other infectious diseases that may pose dangers in the workplace, but also with respect to many other occupational hazards American workers now face and will face in the future. The Unions therefore strongly oppose the applications for an immediate stay.

[3] We use the term "Petitioners" to refer to all the parties that have sought a stay in this Court.

Summary of the Argument

We proceed in three parts below. First, we demonstrate that the Sixth Circuit correctly concluded that Congress has expressly provided OSHA with clear authority to issue standards governing infectious diseases that pose a hazard in the workplace, including, specifically, COVID-19, and to do so in the kind of exigent circumstances workers currently face by issuing an ETS. Most recently, Congress appropriated funds to OSHA "for enforcement activities related to COVID-19." American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2101, 135 Stat. 4, 30. Congress thereby plainly recognized that COVID-19 is a workplace hazard subject to regulation by OSHA. Moreover, Congress made the appropriation after the President had ordered OSHA to "consider whether any emergency temporary standards on COVID-19 . . . are necessary." Exec. Order No. 13,999, Protecting Worker Health and Safety, § 2(a), 86 Fed. Reg. 7211 (Jan. 21, 2021). And Congress previously expressly recognized OSHA's authority to require both vaccination and medical examination except of workers with religious objections. *See* 29 U.S.C. § 669(a)(5). Additional congressional actions and decades of agency practice provide further support for OSHA's issuance of the ETS.

In light of Congress' clear delegation of authority to OSHA, the ETS does not present any issue under either the major question or non-delegation doctrine.

Second, we demonstrate that the court below correctly concluded that OSHA satisfied Congress' directions by reasonably finding, based on substantial evidence, that COVID-19 is both an "agent[] determined to be . . . physically harmful" and a "new hazard[]" that is exposing employees "to grave danger" and that the steps the ETS requires employers to take are "necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

Finally, we show that the balance of equities and the public interest strongly favor protecting workers from the ongoing COVID-19 pandemic and that any stay of the ETS will contribute to a substantial increase in death and illness among working Americans.

Argument

I. Congress Has Expressly Provided OSHA Clear Authority to Issue an Emergency Temporary Standard to Address Occupational Exposures to the Coronavirus; the ETS, Therefore, Does Not Present Any Issue Under The Major Question or Non-Delegation Doctrine

In Section 6(c) of the OSH Act, Congress directed OSHA to forgo notice and comment rulemaking and issue a standard, effective immediately but for a limited period of time, when it determines that workplace conditions expose employees to a "grave danger" from exposure to toxic or physically harmful "substances or agents," or from "new hazards," and an ETS is "necessary" to protect employees from that danger. 29 U.S.C. § 655(c)(1). Congress crafted this Section with "precision," *BST Holdings, LLC v. OSHA,* No. 21-60845, 2021 WL 5279381, at *4 (5th Cir. Nov. 12, 2021), clearly and unequivocally granting OSHA emergency authority to respond expeditiously when workers face grave dangers.

Section 6(c) represents Congress' recognition that OSHA would confront situations that the legislative branch did not and could not anticipate. That is precisely what OSHA has faced with the COVID-19 pandemic. OSHA has found that workplace exposure to the novel

coronavirus – both a physically harmful agent and a new hazard – poses a grave danger to unvaccinated workers and has mandated that employers address workplace exposure to the coronavirus by requiring their employees either to be vaccinated or to be tested weekly and wear face coverings while at work.[4]

Petitioners' central contention is that the coronavirus is a ubiquitous public health problem, control of which Congress did not authorize OSHA, a workplace safety agency, to address through an ETS. This contention ignores the fact that Congress has not only plainly given this occupational safety and *health* agency authority to address viruses and other contagious diseases that exist both inside and outside the workplace, but also has specifically confirmed OSHA's authority to issue an ETS to protect employees from the coronavirus. Moreover, the ETS's purpose is to encourage reliance on the most effective methods of protecting workers from contracting the virus while in the workplace,

[4] As the Sixth Circuit found below, employers also have a third option, to permit employees to work remotely. Slip op. at 7, Nat'l Fed'n of Indep. Bus. Emergency Application, App 1 at 233, U.S. No. 21A244 ("App.").

even if the protection afforded by one of the options given to employers – requiring vaccination – extends outside the workplace.

A. Congress unambiguously and specifically recognized OSHA's authority to protect workers from occupational exposure to the coronavirus, including by issuing an ETS, when in 2021 it appropriated $100,000,000.00 to OSHA in the American Rescue Plan ("ARA") to be used "to carry out COVID-19 related worker protection activities." American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2101, 135 Stat. 4, 30. Congress specifically allocated $10,000,000.00 of the ARA appropriation "for enforcement activities related to COVID-19." *Id.* Congress' appropriation of funds "for enforcement activities related to COVID-19" presupposes that OSHA has authority to regulate occupational exposure to COVID-19. That is because employers have two duties under the OSH Act that the agency can enforce: to comply with OSHA standards and regulations, 29 U.S.C. § 654(a)(2), and to provide employment and places of employment "free from recognized hazards," 29 U.S.C. § 654(a)(1). OSHA can only engage in "enforcement activities," *i.e.*, issue citations to an employer, when the employer violates one of these two duties. *See* 29 U.S.C. § 658(a) (Secretary has authority to cite

employers for violating a standard, regulation, or requirement of the Act). Thus, the appropriation for enforcement recognizes OSHA's authority to address COVID-19 as a workplace hazard.

Moreover, when Congress passed the ARA in March of 2021, OSHA was actively addressing workplace COVID-19 exposure by providing guidance and enforcing existing standards and the statute's general duty clause.[5] In addition, pursuant to an Executive Order President Biden issued on January 21, 2021, directing OSHA to "consider whether any emergency temporary standards on COVID-19 . . . are necessary," the agency was already evaluating the need for one or more ETSs. Exec. Order No. 13,999, Protecting Worker Health and Safety, § 2(a), 86 Fed. Reg. 7211 (Jan. 21, 2021). Congress was undoubtedly aware of this executive branch activity. The legislation is thus a clear congressional

[5] From the onset of the pandemic, including under President Trump and Secretary of Labor Scalia, OSHA has exercised its authority to address the workplace hazard posed by COVID-19, initially through guidance, reporting requirements, and enforcement actions based on existing standards not specifically aimed at COVID-19 and the Act's general duty clause. COVID-19 Vaccination & Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,429-30, 61,440-43 (Nov. 5, 2021) ("Pmbl-") (App. 29-30; 40-43). Having determined that those earlier efforts were ineffective, OSHA determined it was necessary to issue this ETS. Pmbl-61,430-31 (App. 30-31).

finding that COVID-19 is a workplace hazard OSHA may address, including by issuing an ETS. The Petitioners all ignore this critical piece of legislation, and for good reason: Their arguments that OSHA lacks authority over viruses, which pose hazards both inside and outside the workplace, including COVID-19, cannot stand once Congress' clear, express direction to the agency is considered.

B. The ARA's recognition of OSHA's authority to address workplace exposure to this virus is entirely consistent with both the terms of the OSH Act itself and longstanding congressional and administrative action. Section 6(c) requires OSHA to issue an ETS if it "determines . . . that employees are exposed to grave danger from exposure to . . . agents determined to be . . . physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). As the Sixth Circuit explained, there can be little question that the coronavirus, "[a]n agent that causes bodily harm, . . . falls squarely within the scope of" this section. Slip op. at 10 (App. 236) (a virus is an "agent," *i.e.,* "a chemically, physically, or biologically active principle," that is "'physically harmful,' (*i.e.,* causing bodily harm)" (citation omitted)). It is also unquestionably a "new

hazard," as "SARS-CoV-2 was not known to exist [in the U.S.] until January 2020." Pmbl-61,406 (App. 6).[6]

OSHA has a long history of seeking to prevent the spread of infectious diseases in the workplace using a variety of regulatory tools, Slip op. at 12-13 (App. 238-9), without challenge from the regulated community or any evidence of disapproval by Congress. Indeed, since 1970, Congress has repeatedly affirmed its understanding that OSHA may address infectious diseases by (1) twice directing the agency to act more forcefully in protecting against workplace exposures to bloodborne pathogens, *see* Departments of Labor, Health & Human Services, & Education, & Related Agencies Appropriations Act, 1992, Pub. L. No. 102-170, 105 Stat. 1107 (1991) (directing OSHA to finalize rulemaking on bloodborne pathogen standard); Needlestick Safety & Prevention Act, Pub. L. No. 106-430, 114 Stat. 1901 (2000) (directing OSHA to strengthen its bloodborne pathogens standard and providing language for the regulatory text), and (2) adding the Workers Family Protection Act to the

[6] Petitioners' argument that a hazard cannot be both "new" and "recognized" is misplaced, as even a "new" hazard must be recognized as such before the agency can take action to ameliorate its effects.

OSH Act to protect the health of workers and their families by, *inter alia,* studying "issues related to the contamination of workers' homes with hazardous chemicals and substances, *including infectious agents*, transported from the [workers'] workplaces . . . ." Slip op. at 11-12 (App 237-8), quoting 29 U.S.C. § 671a(c)(1)(A) (emphasis supplied by the court).[7]

C. Petitioners' argument that exposure to the coronavirus is a public-health problem traditionally regulated by the states, not an occupational health issue within OSHA's purview, does not withstand scrutiny. OSHA found that SARS-CoV-2 "is readily transmissible in workplaces" and although "COVID-19 is not exclusively an occupational disease . . . transmission can and does occur in workplaces." Pmbl-61,411 (App. 11). While the risk of transmission may vary by type of workplace,

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[7] Courts have also affirmed OSHA's authority to regulate exposure to infectious diseases. *See, e.g.*, *Farm Worker Just. Fund, Inc. v. Brock,* 811 F.2d 613, 615, 633 (D.C. Cir. 1987), *vacated as moot,* 817 F.2d 890 (D.C. Cir.) (finding OSHA had unreasonably delayed issuing a field sanitation standard to protect workers against "transmission of fecal-born bacterial and viral diseases and other debilitating parasitic infections."); *Am. Dental Ass'n v. Martin,* 984 F.2d 823, 826 (7th Cir. 1993) (Although contesting the standard's application to their particular workplaces, the petitioners did not even "contend that there should be no regulation of bloodborne pathogens.").

"OSHA . . . expects transmission to occur in diverse workplaces all across the country." *Id.*

OSHA found what even a cursory reading of the newspaper during the pandemic reveals – that the workplace has been a primary and a devastating source of exposure to the coronavirus. Slip op. 21-22 (App. 247-8). In addition to the workplace outbreaks detailed in the preamble to the ETS, Pmbl-61,411-17 (App. 11-17), and the Sixth Circuit's opinion below, Slip op. at 24 (App. 250), more recent data illustrate that workplace clusters of COVID-19 cases continue unabated. In Michigan, for the week ending December 20, there were 99 new outbreaks in workplace settings such as long-term care, K-12 education, corrections, and health care and 638 ongoing outbreaks in those settings.[8] Tennessee reported 250 active COVID-19 outbreaks on December 20, 144 of which were in work settings.[9] In Washington State, 80 of 84 new outbreaks

[8] *Outbreak Reporting*, State of Michigan, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173_102057---,00.html (Updated on Mondays at 3pm - last updated Dec. 20, 2021).

[9] *COVID-19 Critical Indicators*, Tennessee Department of Health, https://www.tn.gov/content/dam/tn/health/documents/cedep/novel-coronavirus/CriticalIndicatorReport.pdf (last updated Dec. 20, 2021). Work settings include all except community settings.

reported during the week of December 5-11 were in workplace settings outside of health care, a 175% increase in two weeks.[10] California has reported 1,474 outbreaks, broken down by industry sector, in the last three months alone.[11] While some of these reports may include infections among people who are not employees (customers, for example), the point remains that being in the workplace creates a heightened risk of exposure to the coronavirus and that workplace outbreaks of COVID-19 infections are widespread.

The Sixth Circuit correctly concluded that even though exposure to the coronavirus is not unique to the workplace, OSHA may regulate to protect workers from occupational exposure to the virus. Slip op. at 13 (App. 239); Pmbl-61,407 (App. 7). In fact, OSHA has historically regulated workplace exposures to a variety of hazards that are present

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[10] These work settings include education, assisted living, manufacturing and construction (industrial settings), childcare/youth programs, health care, jail/prison/detention centers and food industry and retail. *Statewide COVID-19 Outbreak Report*, Washington State Dep't of Health, https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/StatewideCOVID-19OutbreakReport.pdf (Dec. 25, 2021).

[11] October, November, December *COVID-19 Outbreak Data*, California Dep't of Health & Human Servs. Open Data, https://data.chhs.ca.gov/dataset/covid-19-outbreak-data/resource/a266496d-7a23-4426-b521-d7a19c659106 (last updated Dec. 22, 2021).

both in the workplace and in society more generally, and courts have upheld its authority to do so. *See Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1442 (4th Cir. 1985) (en banc) (upholding OSHA regulation of workplace noise to prevent hearing loss); *Am. Dental Ass'n v. Martin*, 984 F.2d at 826 ("infectious character of HIV and HBV [hepatitis B] warrants even on narrowly economic grounds more regulation than would be necessary in the case of a noncommunicable disease"). So long as its standard is aimed at protecting workers against a risk of exposure from employment or at a place of employment, OSHA acts within its statutory authority. The fact that non-occupational risks exist alongside occupational risks does not limit OSHA's obligation to protect workers. Any holding to the contrary would call into question the validity of dozens of long-established workplace protections, such as fire protection and electrical safety protocols; requirements for ladders and motor vehicles; limits on exposure to silica, asbestos, and lead; and requirements for labeling of hazardous chemicals, to name a few.[12]

[12] OSHA has issued an advance notice of proposed rulemaking on heat stress, Heat Injury & Illness Prevention in Outdoor & Indoor Work Settings, 86 Fed. Reg. 59309 (Oct. 27, 2021), another hazard that exists

D. Nor does the fact that states have traditionally regulated public health mean that OSHA is precluded from regulating the occupational risk of contracting COVID-19. To the contrary, in enacting the OSH Act, Congress recognized that it was bringing "the Federal Government into a field that traditionally had been occupied by the States," but did so to "establish[] a system of uniform federal occupational health and safety standards." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96, 102 (1992). *See also Farmworker Just. Fund*, 811 F.2d at 625 ("Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health.").

Congress adopted the OSH Act to level the playing field, "subject[ing] employers and employees to only one set of regulations." *Gade*, 505 U.S. at 99. The need for uniform, minimum federal standards is particularly acute in the case of COVID-19 because employers are facing inconsistent requirements, with some states mandating vaccine or

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both within and outside of work. That effort, too, would be undermined if Petitioners' arguments prevail.

masking policies and other states prohibiting them. Pmbl-61,445; 61508-10 (App. 45; 108-10).

Moreover, the ETS does not completely displace state public health regulation. OSH Act standards apply only "to employers and employees in workplaces," *Steel Inst. of N.Y. v. City of New York*, 716 F.3d 31, 33 (2d Cir. 2013); they do not preempt non-conflicting state laws "of general applicability" that address "public safety as well as occupational safety concerns," *Gade*, 505 U.S. at 104, 107. Thus, state COVID-19-related laws protecting the public can co-exist with the ETS under the preemption principles this Court outlined in *Gade*. Pmbl-61,509 (App. 109). In short, the fact that the states have authority to regulate public health generally has no bearing on OSHA's authority to protect workers from grave dangers that make their employment or places of employment unsafe.

E. Not only is OSHA specifically authorized to regulate occupational exposure to viruses, including the coronavirus, Congress also specifically recognized that OSHA has authority to mandate both vaccination and medical examination when necessary to protect workers.

And OSHA's authority to require protective clothing, such as face coverings, has never been questioned.

Section 20(a)(5) of the OSH Act provides "[n]othing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds except where such is necessary for the protection of the health or safety of others." 29 U.S.C. § 669(a)(5).[13] As the Sixth Circuit correctly concluded, in Section 20, Congress clearly authorized OSHA to require vaccination and medical examination when necessary to protect workers, as the limited religious exemption would be meaningless had Congress not otherwise recognized OSHA's authority to use these tools. Slip op. at 11 (App. 237).[14]

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[13] The suggestion that Section 20 applies only to the Secretary of Health and Human Services is incorrect. The section applies to all "provision[s] of this chapter," with the reference to "this chapter" being to 29 U.S.C. Chapter 15, the OSH Act. The provision is designed to facilitate research by HHS that will "enabl[e OSHA] to meet [its] responsibility for the formulation of safety and health standards." *Id.* § 669(a)(2). Thus, the narrow prohibition on vaccination and medical examination and the implicit authorization outside the prohibition clearly applies to OSHA.

[14] In fact, the Sixth Circuit observed that this provision demonstrates not only Congress' authorization of immunization requirements when they are appropriate, but also its understanding that OSHA could regulate exposures to infectious disease. *Id.* ("The provision's reference to

Petitioners ignore this section of the Act and argue that the ETS exceeds OSHA's statutory authority because "a 'lack of historical' precedent is often 'the most telling indication' that . . . an agency lacked the power to promulgate a regulation." States' Pet. at 1, *Ohio v. Dep't of Labor*, U.S. No. 21A247 (Dec. 18, 2021) (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal citations omitted)). Surely historical practice is less "telling" than express congressional authorization. Moreover, while no prior OSHA standard has mandated immunization, neither has OSHA done so here. Instead, the ETS requires employers to ensure either immunization or weekly testing and masking at work. Section 20(a)(5) also recognizes OSHA's authority to mandate medical examinations and OSHA has previously done so, including a variety of medical tests in its standard for commercial divers, because "the safety of the diver and other dive team members can depend on the health of the individual diver." Commercial

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immunization and its creation of a limited exception to the Act's authorization of standards involving immunization would be rendered meaningless if the statute did not contemplate both that 'harmful agents' include infectious, disease-causing agents, such as viruses, and that OSHA would employ the use of immunizations to combat those agents.")

Diving Operations, Occupational Safety and Health Requirements, 42 Fed. Reg. 37,650, 37,657 (July 22, 1977) (requiring several specific tests, including blood test). *See Taylor Diving & Salvage Co. v. U.S. Dep't of Labor,* 599 F.2d 622, 625 (5th Cir. 1979) (striking down a different portion of the commercial diving standard and observing "OSHA may arguably provide for a threshold determination of medical fitness.") That the agency has not previously seen the need to require vaccination – another of the tools Congress recognized in Section 20(a)(5) that OSHA possesses – does not negate the congressional authorization.

F. The Sixth Circuit properly rejected Petitioners' claims both that the "major question doctrine" requires some form of *additional*, express congressional authorization, and that Section 6(c) of the OSH Act violates the non-delegation doctrine.

Starting with the "major question doctrine," the Sixth Circuit correctly found that the factual premise for its application is absent here. The court found that "OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority." Slip. op. at 15 (App. 241). As we explained above, OSHA has adopted many standards addressing hazards that exist both inside and outside the workplace, has repeatedly

addressed infectious diseases when they pose a particular hazard in the workplace, and has employed requirements of both medical testing and protective clothing as tools to abate hazards. Moreover, OSHA standards regularly apply nationwide to all employers with employees exposed to the regulated hazard.[15]

Even if a "major question" was raised here, the Sixth Circuit also correctly concluded that this Court's prior cases applying the doctrine to strike down executive branch action "are inapposite because here the statutory language unambiguously grants OSHA authority for the ETS." Slip op. at 16 (App. 242). The contrast with this Court's recent decision in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), vividly illustrates why the Sixth Circuit was correct. There, Congress had imposed a temporary eviction moratorium, but when that eviction moratorium expired, Congress did not renew it. In the absence of any specific congressional authorization, indeed in

[15] *See, e.g.*, Hazard Communication, 29 C.F.R. § 1910.1200; Lead, *id.* § 1910.1025; Silica, *id.* §§ 1910.1053 (general industry and maritime) and 1926.1153 (construction); Exit Routes and Emergency Planning, *id.* § 1910.34; Personal Protective Equipment, *id.* § 1910.132; and Fire Protection, *id.* § 1910.155 (requiring fire extinguishers).

the face of this evidence that Congress did not wish to extend the moratorium, "the CDC decided to do what Congress had not." *Id.* at 2486. The CDC did so, moreover, under a statute authorizing it to "implement measures like fumigation and pest extermination," completely unlike an eviction moratorium. *Id.* In striking down the regulatory moratorium, this Court noted that "[i]t would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened." *Id.* Here, such specific congressional authorization *has* happened, as we fully explain above, in Congress' original grant of authority to issue emergency temporary standards, in the 2021 ARA's specific recognition of OSHA's authority to enforce the Act to protect workers against COVID-19, and in OSH Act Section 20's specific recognition of OSHA's authority to require both vaccination and medical examination except of workers who object on religious grounds.

The Sixth Circuit also correctly held that the OSH Act does not delegate legislative power to OSHA in derogation of the constitutional separation of powers. This Court has already sustained another provision of the OSH Act in the face of such a challenge, finding that Congress acted constitutionally in granting OSHA authority to issue

permanent health standards under Section 6(b)(5), 29 U.S.C. § 655(b)(5). *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("*IUD v. API*"). *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (noting that EPA's authority under the Clean Air Act to promulgate rules "requisite to protect public health" was "strikingly similar" to delegations the Court had previously upheld, including the OSH Act's provisions regarding permanent health standards).

OSHA's authority to issue permanent standards under Section 6(b) is broader than its authority to issue an ETS under Section 6(c). To issue a permanent standard, OSHA must demonstrate that it will address a significant risk of material impairment of workers' health. *See IUD v. API*, 448 U.S. at 614-15. And the standard must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). The authority Congress gave OSHA to issue an ETS is far more circumscribed: OSHA must issue an ETS when it determines workers face a "grave danger" from occupational exposure to harmful physical agents or "new hazards," *id.* § 655(c)(1), a level of risk that is greater than the "significant risk" OSHA must find before adopting a standard under Section 6(b), *Int'l Union, UAW v.*

Donovan, 590 F. Supp. 747, 755-56 (D.D.C. 1984), *adopted*, 756 F.2d 162 (D.C. Cir. 1985). An ETS must not only be "*reasonably* necessary," 29 U.S.C. § 652(8) (emphasis added); it must be "*necessary* to protect employees from [the grave] danger" OSHA has identified, and to be so during the limited time the ETS remains in effect. *Asbestos Info. Ass'n v. OSHA,* 727 F.2d 415, 417 n.1, 422 (5th Cir. 1984) (emphasis added). Thus, in Section 6(c), Congress established a clear policy favoring worker protection from new hazards and specified when OSHA must act – when it finds a grave danger exists – and the action it must take – issuing a standard necessary to protect employees from that danger during the brief period the ETS is in effect.

The statute also prescribes the range of tools OSHA can employ in standards adopted under both Section 6(b)(5) and Section 6(c) – "requir[ing] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Combined with Section 20(a)(5), *id.* § 669(a)(5), Congress has thus authorized OSHA to require both traditional practices, like the use of face coverings, and practices the

agency has either rarely or not previously determined to be necessary, such as the requirement of medical examination or vaccination. Accordingly, Congress has done far more than articulate "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform," *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (alteration in original), and there has thus been no unconstitutional delegation here.

As this Court's non-delegation doctrine precedents recognize, "[t]he Constitution as a continuously operative charter of government" is not a straitjacket that disables Congress from expressly authorizing expert administrative agencies to implement legislative policies where it would be either "impossible" or "impracticable" for Congress to perform the legislative function without such assistance. *Yakus v. United States*, 321 U.S. 414, 424 (1944). *See generally Mistretta*, 488 U.S. at 371-74. Indeed, to impose such a constitutional straightjacket on Congress, this Court has warned, "might well result in serious hardship," *Yakus*, 321 U.S. at 426, and even "paralysis," *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907), in the face of "some of [the] most important" challenges

confronting this country, *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 246 (1915)—one of which, undeniably, is the protection of millions of workers against the ongoing scourge of COVID-19.

The concerns expressed by the Court about an overbroad application of the non-delegation doctrine loom especially large here as the nation faces the new and grave hazard of COVID-19. Although the 1970 Congress that enacted the OSH Act obviously could not have foreseen the occurrence a half century later of a workplace emergency of the gravity and specific type that we now face, the 1970 Congress did—in an act of prudent contingency planning of sorts—vest in OSHA a highly constrained emergency power to respond quickly to a new hazard in the workplace, based on its expert assessment of what steps are immediately necessary to save lives and protect workers' health. Under this Court's non-delegation cases, that prudent congressional action authorizing OSHA to take emergency, temporary action to combat unforeseeable workplace hazards combined with Congress' more recent specific recognition of OSHA's authority to protect workers against the hazard posed by COVID-19 should be respected rather than rendered

nugatory at a moment in our country's history that cries out for OSHA's use of that authority.

Indeed, the assertion of a judicial power to negate Congress' decision to authorize OSHA to deal quickly and effectively with new and unforeseeable workplace hazards through the issuance of an ETS would raise separation of powers concerns that are far more profound and potentially injurious to the country than the separation of powers concerns raised by the Petitioners.

II. Substantial Evidence Supports OSHA's Decision to Issue an ETS

The Sixth Circuit correctly concluded that OSHA acted within its authority in finding that the ETS addresses an "emergency" posing a "grave danger" to unvaccinated workers and was "necessary" to protect them from that danger. The test is whether OSHA has amassed substantial evidence to support each of its findings. 29 U.S.C. § 655(f).[16]

[16] The substantial evidence test required the court of appeals to engage in more rigorous review of OSHA's factual findings than would be the case under the "arbitrary and capricious" test. *See Asbestos Info. Ass'n,* 727 F.2d at 421. Nothing in Section 6(f) of the OSH Act—which governs judicial review of permanent and temporary OSHA standards alike — suggests that the court should take a harder look at factual findings supporting an ETS than would be required when reviewing findings

This Court has made clear that OSHA is not required to support its scientific findings "with anything approaching scientific certainty." *IUD v. API*, 448 U.S. at 656. OSHA acts properly when it relies on a "body of reputable scientific thought." *Id.* This Court should defer to OSHA's expert decision about the proper scope of the ETS and the need for the preventive measures it requires.

OSHA detailed its analysis in 153 Federal Register pages, explaining why occupational exposure to COVID-19 poses a grave danger to all unvaccinated workers, not just to older or infirm workers, Pmbl-61,410 (App. 10);[17] why all indoor workplaces where employees congregate create a heightened risk of exposure, Pmbl-61,414 (App. 14); why the emergence of the Delta variant of the coronavirus and the wide availability of vaccines prompted it to adopt a specific standard in November 2021 when it had not done so earlier, Pmbl-61,431-32 (App.

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supporting a permanent standard. *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor,* 489 F.2d 120, 127-28 (5th Cir. 1974).

[17] In fact, the latest CDC data show that working age adults now make up the majority of COVID-related hospitalizations. Laboratory-Confirmed COVID-19-Associated Hospitalizations, U.S. Centers for Disease Control, https://gis.cdc.gov/grasp/COVIDNet/COVID19_5.html (For week beginning December 11, adults ages 18-64 accounted for 56.2% of COVID hospitalizations).

31-32);[18] and why its prior reliance on existing standards and the general duty clause were not effective methods of reducing the risk of COVID-19, making an ETS necessary. Pmbl-61,440-43 (App. 40-43). The Sixth Circuit, after taking a hard look at OSHA's explanation for the ETS and each of the alleged deficiencies in OSHA's analysis, found the ETS was supported by substantial evidence. Slip op. at 19-31 (App. 245-57). This Court has previously held, in another OSHA case, that it "'will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) ("*ATMI v. Donovan*") (alteration in original) (citation omitted). Petitioners barely mention OSHA's detailed explanations in their briefs and make no effort to show that the Sixth Circuit misapplied the substantial evidence test. They have thus offered no basis for this Court to intervene.

[18] The Fifth Circuit has held that OSHA's failure to act sooner does not establish the absence of an emergency warranting an ETS. *Asbestos Info. Ass'n*, 727 F.2d at 423.

In the face of a new hazard like that posed by the pandemic, Congress recognized the need to act quickly based on rapidly evolving scientific information. Congress tasked OSHA with making factual findings to implement its policy goal "to assure so far as possible . . . safe and healthful working conditions" by, *inter alia*, "reduc[ing] . . . health hazards at . . . places of employment." 29 U.S.C. § 651(b), (b)(1). The fact that Petitioners read the evidence differently or suggest that OSHA might have drawn lines differently – for example, that it might have adopted different requirements for different industries based on differing levels of risk estimated from incomplete data – does not mean that the ETS is flawed. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *ATMI v. Donovan,* 452 U.S. at 523 (citation omitted). As Judge Gibbons observed about the proper role of the judiciary in reviewing the ETS, "reasonable minds may disagree on OSHA's approach to the pandemic, but we do not substitute our judgement for that of OSHA." Slip op. at 38 (App. 264) (Gibbons, J., concurring).

While Petitioners characterize the ETS as too broad, the Unions petitioned for review of OSHA's ETS in the court below because it is too limited. Our concern, that the ETS does not do enough to protect all at-risk workers, would require a remand to strengthen the ETS, not a stay to put its protections on hold. In any event, questions about the proper breadth of the ETS are properly resolved in the first instance by a three-judge panel in the Sixth Circuit after briefing on the merits, not by this Court after expedited briefing on a petition for a stay.

III. The Balance of Equities Favors Allowing the ETS to Remain in Effect

The Sixth Circuit recognized the unprecedented death and illness COVID-19 has caused over the past two years, observing that the

> pandemic has wreaked havoc across America, leading to the loss of over 800,000 lives, shutting down workplaces and jobs across the country, and threatening our economy. Throughout, American employees have been trying to survive financially and hoping to find a way to return to their jobs. Despite access to vaccines and better testing, however, the virus rages on, mutating into different variants, and posing new risks.

Slip op. at 4. Fifty million people in the United States have been infected with COVID-19 since January 2020; many were infected at work and will suffer long-term adverse health effects from their illness. Eight hundred

thousand people have died in this country, seventy-five thousand more than when OSHA issued the ETS less than two months ago. Pmbl-61,406 (App. 6). OSHA estimates that its ETS will prevent 6,500 additional COVID-19 deaths and 250,000 hospitalizations in just six months. Pmbl-61,408 (App. 8). Even if OSHA's projections do not prove precisely accurate, there is no denying that the ETS will significantly reduce the devastating toll COVID-19 has had, and continues to have, on working families due to exposure in their workplaces.

The Unions represent millions of workers whose lives have been disrupted by the COVID pandemic. Thousands of businesses have closed, laying off their workers. Many workers afraid of contracting COVID-19 have left the workforce. Others have used paid and unpaid leave to recover from COVID-19 or to care for family members who fell ill. Most recently, bus service and airline flights have been canceled during the holidays because so many workers are sick. In many states, hospitals have reached capacity and are rationing care. The public interest demands that OSHA's modest protections against these threats remain in place.

Against this backdrop, Petitioners' speculative claims that they will incur compliance costs – modest by OSHA standards – under the ETS that may prove unnecessary if it is invalidated pale in comparison to the cost of failing to protect workers from this deadly virus. Employers claim they may be forced to "fire employees, suspend employees, or face employees who quit over the [ETS]," Slip op. at 37 (App. 263), but OSHA found that the risk that other employees would opt out of the workforce to avoid exposure to the coronavirus or be absent because of illness or exposure was just as great. Pmbl-61,474 (App. 74). Petitioners' claims also ignore the cost to employers if they are required to close their businesses because of a COVID-19 outbreak among their workforce.

In light of the unprecedented scope and severity of the COVID-19 pandemic and the ever-mutating virus causing wave after wave of spikes in positive cases, hospitalizations and deaths, the balance of equities clearly favors leaving the ETS in place pending full judicial review in the court of appeals.

Conclusion

For the foregoing reasons, this Court should deny the requests for an emergency stay of OSHA's ETS.

Respectfully submitted,

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