No. 21A252

In the Supreme Court of the United States

Scott Bedke, in his official capacity as Speaker of the Idaho House of Representatives; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho Senate; and the Sixty-Sixth Idaho Legislature,

Petitioners,

v.

Occupational Safety and Health Administration, et al.

Respondents.

IDAHO LEGISLATURE'S REPLY IN SUPPORT OF EMERGENCY APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

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INTRODUCTION

Emergency Applicants Sixty-Sixth Idaho Legislature, Scott Bedke in his official capacity as Speaker of the Idaho House of Representatives, and Chuck Winder in his official capacity as President Pro Tempore of the Idaho Senate (collectively, "Idaho Legislature" or "Legislature") hereby reply to OSHA's Response to the Legislature's Application.

The State of Idaho, together with most of the States,[1] also applied in this Court for a stay of the Sixth Circuit's split panel decision dissolving the stay of the OSHA Emergency Temporary Standard ("ETS") entered by the Fifth Circuit. Dec. 18, 2021 Ohio, et al. Emergency Appl., Case No. 21A247. The legislative power of the State of Idaho is vested in the Idaho Legislature to the exclusion of the other branches of Idaho's government. Idaho Const. art. III, sec. 1; *Mead v. Arnell*, 791 P.2d 410, 414 (Idaho 1990). The Legislature has plenary power over all Idaho legislative matters except those prohibited by the state constitution. *Rich v. Williams*, 341 P.2d 432, 439 (Idaho 1959). The Idaho Legislature thus was compelled to separately seek review of the ETS in the Sixth Circuit and separately apply for emergency relief from this Court to emphasize and protect the Legislature's *raison d'être*: the exercise of the State's police power to promulgate laws to protect the health, safety, and welfare of Idaho's citizenry. *Van Orden v. Dep't of Health & Welfare*, 637 P.2d 1159, 1163 (Idaho 1981). The ETS unlawfully infringes on the Idaho Legislature's police power and the Court should therefore issue an order staying the ETS.

[1] OSHA footnotes a "significant question" whether the States can invoke the circuit court's jurisdiction because States are not "persons" as defined by the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 652(4). Dec. 30, 2021 Resp. in Opp'n to the Appls. for Stay ("Resp.") n.14. Because the Idaho Legislature makes police power arguments similar to the States' arguments and the Legislature is clearly an "organized group of persons" within the definition of "persons," OSHA cannot escape the police power arguments on a jurisdictional basis.

SUMMARY OF THE ARGUMENT

OSHA's ETS fails as a matter of statute and as a matter of constitutional law. As a statutory matter, the OSH Act does not give OSHA the power to regulate efforts to mitigate diseases in the workplace. To the contrary, the Act expressly carves out an exception to federal preemption to ensure that the States retain their traditional powers to protect their citizens from diseases like COVID-19.

As a constitutional matter, the ETS cannot be reconciled with the Commerce Clause or the Tenth Amendment. Through adoption of the ETS, OSHA purports to assert a federal power that extends far beyond the limits imposed by the U.S. Constitution. Because OSHA cannot save its ETS from legal challenge, the Court should grant the emergency application.

ARGUMENT

I. The OSH Act's exemption of workplace diseases from the Act's scope reserves the regulation of COVID-19 to the States.

The divided Sixth Circuit panel misapprehended the scope of OSHA's statutory authority in a manner that fundamentally undercuts the Legislature's power to legislate health policy for Idahoans. Judge Larsen's dissent succinctly captured the key issue: "OSHA cannot act without a source of authority. The ordinary way to bring about a rule affecting people's health and safety is for a state legislature, or sometimes Congress, to pass one into law." App. A-42.[2]

The panel majority—and the Government in its Response in Opposition—found no threshold concern that OSHA had exceeded its authority under the statute. *Id*. at A-17. The panel then focused on the ordinary definitions of key words from the ETS-authorizing statute

[2] "App." refers to appendices to the Dec. 20, 2021 Idaho Legislature Appl., No. 21A252.

(29 U.S.C. § 655), such as "grave danger" and "necessity." But the dissent's caution about the need for a threshold source of authority deserved greater attention.

The majority failed to closely examine the threshold inquiry required by *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992). In her plurality opinion, Justice O'Connor explained that the OSH Act "brought the Federal Government into a field that traditionally had been occupied by the States" but "[f]ederal regulation of the workplace was not intended to be all encompassing." *Gade*, 505 U.S. at 96. The OSH Act contains two exemptions from federal preemption. The *Gade* decision briefly discussed both and then focused on the exemption dealing with state-approved plans—which is not applicable to Idaho. The other exemption, however, is critical to this case and applies to every state's power to legislate health and safety policy in response to the COVID-19 pandemic. Specifically, *Gade* quoted the OSH Act's provision that it does not "enlarge or diminish or affect in any other manner the … statutory rights, duties, or liabilities of employers and employees under any law with respect to … ***diseases***… arising out of, or in the course of, employment." *Id*. (quoting 29 U.S.C. § 653(b)(4)) (emphasis added). Importantly, *Gade* held that Congress reserved this area to state regulation. *Id.* at 97.

The panel majority cited *Gade* for the importance of holistically interpreting the OSH Act and key terms such as "agent." App. A-10. The panel wrote, "Other provisions of the Act reinforce OSHA's authority to regulate infectious diseases and viruses." *Id*. The majority thus impliedly equated, without analysis, infectious diseases exempted from the Act's coverage to the dictionary definition of an "agent" that is the foundation for invocation of the ETS statute. 29 U.S.C. § 655(c)(1) (an emergency temporary standard may be issued for employees exposed to grave danger from exposure to toxic or harmful substances or agents).

Neither OSHA nor the Sixth Circuit majority contends with *Gade*'s interpretation of the OSH Act's exemption reserving to the States regulation of diseases that occur in the normal course of being employed. Instead, the circuit court majority swept all infectious diseases into the scope of the OSH Act's ETS provision based on conflation of the term "disease" with terms found in the ETS statute: "substances," "agents," "toxic," "harmful," and "hazards." 29 U.S.C. § 655(c); Resp. at 19–24. The circuit court also relied upon a loosely worded Congressional finding in the OSH Act and OSHA's previous regulation of bloodborne pathogens. App. A-10-14.

Neither the OSH Act, 29 U.S.C. § 652, nor OSHA's regulations, 29 C.F.R. § 1910.1020(c), defines "disease." Yet that word is key to the limitations on the Act's scope, including its ETS power. The dictionary definition of *disease* is "a condition of the living animal or plant body or of one of its parts that impairs normal functioning and is typically manifested by distinguishing signs and symptoms: sickness, malady, infectious diseases." www.merriam-webster.com/dictionary/disease. OSHA certainly considers COVID-19 to be "an infectious and highly communicable disease." App. B-4; 86 Fed. Reg. 61406 (Nov. 5, 2021) (ironically citing as its legal authority this Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27-28 (1905), which upheld a *state legislative* police power to mandate vaccinations for smallpox, not a *federal executive* police power to do so); *see also Zucht v. King*, 260 U.S. 174, 176 (1922) (*Jacobson* settled that "it is within the police power of a State to provide for compulsory vaccination.").[3] As this Court held in *Gade*, the regulation of diseases that occur "in the course of[] employment" is reserved to the states and not included within the ETS statutory

[3] Liberty, Life and Law Foundation's proffered amicus brief discusses the *Jacobson* decision and its import in greater detail.

provision. *Gade*, 505 U.S. at 97. The circuit court panel and OSHA strain to implicitly include "disease" within the coverage of the ETS provision at the same time that OSHA calls for consideration of the "plain text" and "ordinary meaning" of the statute. Resp. at 4-5. It cannot be denied that COVID-19 is a disease. As such, *Gade* instructs that its regulation is left to the States to address.

The Sixth Circuit's invocation of OSHA's regulation of bloodborne illness, such as hepatitis B, is also unavailing in the context of OSHA preemption of the Idaho Legislature's exercise of its police power. As the court noted, OSHA's regulation merely requires employers to make the hepatitis B vaccine available to employees at risk of exposure. App. A-12. That is not a vaccine mandate; it is a vaccine offer and as such does not preempt the Idaho Legislature's ability to exert its police power on the matter. Indeed, the Legislature already has. *See, e.g.*, Idaho Code § 39-601 (2021) (prohibiting knowing exposure of another person to the hepatitis B virus), *id.* § 39-610 (requiring the state department of health and welfare to inform persons significantly exposed to the hepatitis B virus).

OSHA similarly argues that vaccinations are commonly imposed on citizens, citing a Seventh Circuit opinion holding that a state university's SARS-CoV-2 vaccination requirement for all students was normal and proper. Resp. at 52-53 (citing *Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021)). But OSHA makes the Legislature's point. That vaccine mandate was imposed by the Indiana legislature, not by a federal agency. Writing for the court, Judge Easterbrook found it to be an easy case: "Given *Jacobson v. Massachusetts*, which holds that a *state* may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccinations against SAR-CoV-2." *Id.* (citation omitted) (emphasis added). The Idaho Legislature has similarly imposed immunization requirements on

Idaho school children. *See* Idaho Code § 39-4801(1) (2021) (no school attendance without proof of immunization or exemption); Idaho Dep't of Health and Welfare Rule 16.02.15.100 (2021) (requiring immunization against eleven childhood diseases).[4] Proposed Amici National Employment Lawyers Association, et al., conflate the federal and state governments throughout their brief to assert, for example, that if a state can require student vaccinations, then OSHA can require workplace vaccinations. Dec. 27, 2021 Br. at 5 (citing *Vernonia School District 47J v. Acton*, 515 U.S. 646, 656–57 (1995)). But that case also makes the Legislature's point. The States possess the police power to require vaccinations, not the federal government.

Inexplicably, OSHA cites to Judge Bush's dissent from the Sixth Circuit's denial of petitions for initial hearing en banc for the notion that the Federal Government has encroached on State police power over vaccinations since 1813. Resp. at 70. Judge Bush's historical recounting of federal involvement led him to conclude that Congress has "never invoked the commerce power to *mandate* [vaccine] imposition on the general public…. OSHA would turn this history on its head." *MCP No. 165 v. United States DOL*, Nos. 21-7000 et al., 2021 U.S. App. LEXIS 37024, *69-*70 (6th Cir. Dec. 15, 2021) (en banc) (Bush, J., dissenting). OSHA *did* turn this history on its head in its Response. OSHA also ignored the contemporaneous holding of this Court in *Gibbons v. Ogden*, 22 U.S. 1, 201 (1824), that the legislative power over "health laws of every description" is not "granted to Congress; and, consequently, they remain subject to State legislation."

[4] Proposed Amicus Constitutional Accountability Center argues that the Nation's first quarantine law of 1796 (later repealed) empowered the President to exercise police power in the fight against yellow fever. Dec. 23, 2021 Br. at 7-8. The one-sentence statute directed certain federal officers to "aid in the execution of quarantine, and also in the execution of the health laws of the states." Act of May 27, 1796, ch. 31, 1 Stat. 474. Again, there is no mandate or penalty for non-compliance, only an offer of aid to the States in their exercise of their police power.

The Sixth Circuit also cited to one of the purposes of the OSH Act as evidence that OSHA can regulate COVID-19 in all large workplaces. App. A-11. The court referenced the Act's purpose of exploring ways to discover latent diseases and establish causal connections between diseases and work. *Id*. (citing 29 U.S.C. § 651(b)(1)). The best discernment of Congressional purpose is from the preemption language in the statute itself. *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in judgment). The relevant language is at 29 U.S.C. § 653(b)(4), quoted above, which exempts workplace diseases from the OSH Act's preemptive reach. Second, as a matter of statutory interpretation, the loosely worded, general Congressional policy statement cited by the panel below cannot override the specific preemption exemption for workplace diseases. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012)) (a specific provision controls a general provision).

Thus, when the Sixth Circuit cites *Gade* for the proposition that the ETS impliedly preempts non-OSHA approved state regulation of COVID-19 in the workplace, it does so without first critically applying *Gade*'s threshold analysis that the OSH Act exempts workplace disease from the Act's ETS provisions. App. A-34 (, quoting *Gade*, 505 U.S. at 98–99) ("[N]onapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted."). The Sixth Circuit does so without recognizing "this Court's increasing reluctance to expand federal statutes beyond their terms though doctrines of implied pre-emption." *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part). Which takes us back to Judge Larsen's blackletter admonition in dissent that OSHA cannot act without a source of authority. App. A-42. If OSHA cannot act, it cannot preempt the Idaho Legislature's police power.

The ETS fairly shouts its preemption of State police powers. Words in the ETS beginning with the root word "preempt" appear 75 times in the Federal Register notice. For example, "OSHA's [ETS] preempts any state occupational safety or health standard…." App. B-5. "This ETS will preempt inconsistent state and local requirements…." *Id*. at B-36. "A national standard … will … preempt state or local ordinances that prevent employers from implementing necessary protections." *Id*. at B-39. "[T]he standard is intended to preempt conflicting state and local laws." *Id*. at B-44.

The Court's discussion in *Gade* of the precise limits of federal preemption of State police powers was quoted and reiterated several years later. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (plurality opinion). The preemptive nature of a statute is informed by two presumptions. First, and most relevant here, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id*. at 485 (citation omitted). Citing to its decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545–546 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), the Court reiterated that it employs a "presumption against the pre-emption of state police power regulations" as consistent with "both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc*., 518 U.S. at 485. Moreover, if the OSH Act's preemption exemption language is susceptible to more than one plausible reading, the Court ordinarily

accepts the reading that disfavors preemption. *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (plurality opinion).[5]

Even if the Court is not willing to apply the *Gade* exemption to find the OSH Act inapplicable to COVID-19 as a disease, at a minimum the statutory exemption of diseases in Section 4(b)(4) of the Act injects ambiguity into the scope of the ETS provision's application to agents and substances in Section 6(c)(1). The circuit court did not wrestle with this ambiguity. OSHA outright denies any ambiguity exists in the ETS provision. Neither the circuit court nor OSHA so much as mention Section 4(b)(4)'s exemption, although both cite to *Gade* which expressly discussed it. OSHA says it would be startled to learn that the OSH Act included an exemption to OSHA's "authority to address infectious diseases in the workplace." Resp. at 20. But that it just what Section 4(b)(4) does: "Nothing in this Act shall be construed to enlarge or diminish or affect in any other manner the statutory rights, duties, or liabilities of employers or employees under any law with respect to diseases in the course of employment." 29 U.S.C. § 653(b)(4) (cleaned up).

OSHA's Response is replete with declaratory statements that there is no ambiguity in the OSH Act. OSHA dismisses the major question doctrine arguments of applicants, stating there are no statutory ambiguities that would cause the Court to consider the economic and political significance of the ETS. Resp. at 5, 59–60. And "'Congress could have limited [OSHA's] discretion in any number of ways, but it chose not to do so.'" *Id*. at 55–56 (quoting *Little Sisters*

[5] Second, the Court applies its understanding of the way Congress intended the OSH Act and its regulatory scheme to affect business, consumers, and the law. *Id*. at 485–86. The Idaho Legislature need not repeat the ample briefing in other emergency applications to stay the effect of the ETS on business and consumers. *See, e.g.*, Nat'l Fed'n of Indep. Bus., et al. Emergency Appl., No. 21A244.

of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020)). Congress did limit OHSA's discretion in Section 4(b)(4) of the Act, plainly and tellingly titled "employees unaffected." 29 U.S.C. § 653(b)(4). OSHA also says flatly that the Act "does not carve out exceptions to OSHA's responsibility to protect employees from workplace dangers." *Id*. at 45. This can only be correct if OSHA defines "danger" to exclude "disease" in the course of employment. A few pages later, OSHA writes that the Act's "text does not include any qualifier" excluding any type of health and safety hazards "that arise at the workplace." *Id*. at 48 (unwittingly nearly quoting Section 4(b)(4)'s exclusion of diseases "arising out of, or in the course of, employment."). Then there is this: "Moreover, nothing in the OSH Act disables the agency from employing the most effective control measure to protect workers from a grave danger in the workplace…." Resp. at 54. Again, if "danger" includes disease, then OHSA misreads the Act.

OSHA also brushes aside the constitutional-avoidance canon as inapplicable to a purportedly unambiguous OSH Act. Resp. at 73. The OSH Act *is* unambiguously inapplicable to workplace diseases, but if this Court instead finds ambiguity between the ETS provisions for agents and substances and the exemption provisions for diseases, that ambiguity is enough to invoke the canon to avoid constitutional concerns over application of the Tenth Amendment and the Commerce Clause to the ETS.

II. The Sixth Circuit's Commerce Clause analysis undermines basic principles of federalism and State police power.

The Sixth Circuit panel majority swept aside not only this Court's *Jacobson* decision upholding state legislative police power over infectious disease, but also dismissed the Court's Commerce Clause analysis in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), as inapposite and with it the Fifth Circuit's conclusion that COVID-19

vaccinations and testing is within the States' police power. App. A-32-33. The Sixth Circuit employed a feint to distinguish *NFIB,* echoed by OSHA. It declared that the ETS "regulates employers with more than 100 employees, not individuals." App. A-32; Resp. at 68. The Sixth Circuit then found that *NFIB* only addressed individual (health insurance) mandates, not business entity mandates, rendering *NFIB* inapposite. *Id*. at A-33. But it is the individual employee that is ultimately coerced by the ETS's coercion of the individual's employer. OSHA says as much elsewhere in its Response. Resp. at 2 ("The Standard generally requires employers … to implement a written policy that requires [employee vaccination or testing and masks].") The net result for the individual employee of a large employer is a choice among (1) vaccination, (2) masking and testing, (3) working remotely if possible, or (4) quitting. The entire purpose of the OSHA ETS is not to vaccinate corporations; it is to vaccinate individuals. The Sixth Circuit was too quick to scuttle the lessons of *NFIB*.

The Court's decision in *NFIB* drives home the importance of federalism and historical state primacy over health and safety. The opinion opens with a tutorial on the "basic principles" of federal and state sovereignty under the U.S. Constitution. *NFIB*, 567 U.S. at 538. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Id*. at 533. "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *Id*. at 535. "'The powers not delegated to the United States by the Constitution…are reserved to the States respectively, or to the people.'" *Id*. (quoting U.S. Const., amend. 10). "But where [federal constitutional] prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government…." *Id*. "Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the

'police power.'" *Id*. at 536. "The independent power of the States also serves as a check on the power of the Federal Government." *Id*. Powers granted to the federal government by the U.S. Constitution "must be read carefully to avoid creating a general federal authority akin to the police power." *Id*.

Chief Justice Roberts explicated the scope of the Commerce Clause in the context of the Affordable Care Act's mandate that individuals must buy health insurance. He wrote, "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." *Id*. at 550. Here, the OSHA ETS compels covered, unvaccinated employees to take some action: vaccinate, mask and test, work remotely, or quit. In the words of *NFIB*, it "compels individuals to *become* active." *Id*. at 552. Indeed, *NFIB* predicted the ETS's abuse of the Commerce Clause. Allowing "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." *Id*. The Court posited that under this theory of Commerce Clause power, the Federal Government could address Americans' imbalanced diets by ordering everyone to buy vegetables. *Id*. at 554. "Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned." *Id*. "Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *Id.* at 557; *see also United States v. Lopez,* 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (the Court has "*always*" rejected readings of the Commerce Clause that would permit Congress to exercise a police power).

OSHA purports, with the support of the Sixth Circuit, to compel citizens to act as OSHA would have them act – get vaccinated. That is not within the Federal Government's purview

under the Commerce Clause. It is squarely within the purview of the states and, in Idaho, within the purview of the Legislature. The Legislature may decide, for example, to add a twelfth immunization requirement for school kids. Or it may not. But that is the Legislature's decision, not OSHA's. To his credit, President Biden has come to the same conclusion, recently telling the Nation's governors on December 27, 2021 that "there is no federal solution" to the coronavirus pandemic; "This gets solved at the state level."[6] OSHA has not responded to the President's statements by withdrawing the ETS. To preserve the careful balance the Constitution struck between Federal and state power, the Court should grant the application and prohibit OSHA from implementing the ETS.

CONCLUSION

For these reasons, the Court should stay the ETS or alternatively grant certiorari before judgment.

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Respectfully submitted,

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[6] The White House, President Biden Joins the COVID-19 Response Team's Call with the National Governors Association, https://www.youtube.com/watch?v=rQRMtChgoA8&t=1271s (last visited January 1, 2022).