

Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250,  
21A251, 21A252, 21A258, 21A259, 21A260, and 21A267

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***In the Supreme Court of the United States***

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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

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

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**MOTION OF JASON FELICIANO AND THE INTERNATIONAL  
CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS FOR LEAVE  
TO FILE ATTACHED AMICUS BRIEF IN SUPPORT OF EMERGENCY  
APPLICATIONS FOR A STAY OR INJUNCTION PENDING**

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## **MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

Jason Feliciano and The International Conference of Evangelical Chaplain Endorsers (“ICECE”) move for leave to file the attached brief as *amici curiae* supporting the applications to reinstate the stay of the Occupational Safety and Health Administration’s illegal emergency temporary standard without ten days’ notice to the parties of its intent to file as normally required by this Court’s Rule 37.2(a). Given the anticipated expedited briefing schedule, it was not feasible to give the parties ten days’ notice of the filing of this Amici brief.

Counsel for the following parties either consented or did not object to the filing of this brief: Heritage Foundation, et al., Job Creators Network, et al., National Federation of Independent Business, et al., Ohio, et al., The Southern Baptist Theological Seminary, et al., BST Holdings, LLC, et al., Word of God Fellowship, Inc. d/b/a Daystar Television Network, Inc., et al., Associated Builders and Contractors, Inc., et al., Republican National Committee, Betten Chevrolet, Inc., Bentkey Services, LLC d/b/a The Daily Wire, FabArc Steel Supply, Inc., et al.

The following parties did not respond: Phillips Manufacturing & Tower Company, et al., Scott Bedke, et al., The American Federation of Labor and Congress of Industrial Organizations.

The International Conference of Evangelical Chaplain Endorsers (“ICECE”) is a conference of evangelical organizations that endorse Christian clergy to be chaplains in the military and other limited access organizations to provide for the free exercise

of religion.<sup>1</sup> ICECE's primary focus is the protection and advancement of religious liberty for all chaplains and military personnel. ICECE supports challenges to government threats to religious liberty and considers the vaccine mandate such a threat.

These Amici support the Parties and Circuits opposing vaccine mandates, testing mandates, and mask mandates.

The attached Amici Brief includes arguments and citations to authorities that are not included in the pending applications for stay. It focuses on why OSHA's emergency temporary standard ("ETS") does not meet the "grave danger" standard, and that the ETS is invalid because it cannot prevent "exposure" to COVID-19 through vaccination, testing, and masks this mandate goes beyond the scope which is necessary for OSHA to create an ETS. Lastly it concludes that animus is the reason for OSHA's Mandate.

To the extent that leave is required, the proposed amici respectfully move for leave to file the attached brief on 8½- by 11-inch paper rather than in booklet form, given the expedited briefing. Should the Clerk's Office or the Court so require, the

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<sup>1</sup> Endorsement is the process by which a Department of Defense ("DOD") recognized religious organization certifies that its clergy or religious leaders meet the required education, training and experience criteria for appointment as a chaplain and are qualified to provide religious ministry to the endorsing agent's military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel; and care for all service personnel. See DOD Instruction 1304.28 (describing endorsement process and criteria).

proposed amici commit to re-filing expeditiously in booklet format. See S. Ct. Rule 21.2(c).

Respectfully submitted,

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## **QUESTION PRESENTED**

Does the OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (“OSHA”) have the legal authority to require employers to force employees to receive a COVID-19 shot or mask with weekly testing mandate through an emergency temporary standard (“ETS”)?

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amicus* Jason Feliciano is an Ohio Citizen concerned with the COVID-19 vaccine and mask with testing mandates with regard to Individual Freedoms, financial burden, and undue hardship for employees, and employers.

*Amicus* The International Conference of Evangelical Chaplain Endorsers (“ICECE”) is a conference of evangelical organizations that endorse Christian clergy to be chaplains in the military and other limited access organizations to provide for the free exercise of religion.<sup>2</sup> ICECE’s primary focus is the protection and advancement of religious liberty for all chaplains and military personnel. ICECE supports challenges to government religious liberty threats and considers the vaccine mandate such a threat. See § II.A *infra*.

The vaccine mandate especially concerns ICECE because it has military chaplains under threat of discharge with the loss of careers and benefits after asking for a religious accommodation (“RA”). They face possible stigmatization for

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<sup>1</sup> *Amici* have moved for leave to file this brief. No party’s counsel authored this brief, in whole or in part, and no party or party’s counsel, nor anyone other than amicus or their counsel, contributed money intended to fund its preparation or submission.

<sup>2</sup> Endorsement is the process by which a Department of Defense (“DOD”) recognized religious organization certifies that its clergy or religious leaders meet the required education, training and experience criteria for appointment as a chaplain and are qualified to provide religious ministry to the endorsing agent’s military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel; and care for all service personnel. See DOD Instruction 1304.28 (describing endorsement process and criteria).

life based on the type of discharge. The **zero** RAs granted to date shows this Administration does not consider RAs or natural immunity to be politically correct.

The issue is **not** do real vaccines work. “Vaccine” used to mean a medical procedure that **immunized** the recipient from a specific communicable disease. History shows well-recognized “classic” vaccines meet that definition, *e.g.*, measles.

COVID-19 vaccines do not meet the classic definition of a vaccine. *See* § II.A below (USS Milwaukee and COVID surge and CDC changed vaccine definition). The COVID-19 pseudo-vaccine fails the former “classic” vaccine **immunization** standard and, under that standard this is merely a treatment or prophylactic because it is not sterilizing vaccine against the virus.

These Amici believe legislators who pass laws after balancing competing factors changes should change established medical terms with national standards, *i.e.*, absolute **immunization** versus **stimulation**, that have punitive and legal effects for all citizens, *e.g.*, destroying careers and denying benefits. These Amici support the Parties and Circuits opposing vaccine mandates.

### **SUMMARY OF ARGUMENT**

OSHA’s ETS does not meet the “grave danger” standard. The ETS is invalid because it cannot prevent “exposure” to COVID-19 through vaccination, testing, and masks. The mandate goes beyond the scope which is necessary for OSHA to create an ETS. The mandate depends on changing the definition for a vaccine from a procedure that creates totally immunity against a disease to one that merely treats the disease.

## ARGUMENT

OSHA's actions are arbitrary, capricious, and contrary to law.

SARS-CoV-2 is the virus that is transmissible by air (not in a human body), Covid-19 is the infection once a person has it inside and it becomes a sickness.

([https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it))

### I. OSHA HAS EXCEEDED ITS AUTHORITY

Before issuing an ETS, OSHA must determine: (1) “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) that an “emergency standard is necessary to protect employees from such danger.” *Id.* [29 U.S.C. ] § 655(c)(1).”

*In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, File Name: 21a0283p.06 at 6 (Slip op. 6<sup>th</sup> Cir. 12/15/21) (App. A-6). That “grave danger” standard is not met here.

As of December 29, 2021, over a nearly two year period the CDC recorded 52,809,291 total COVID-19 cases with 816,239 deaths. This equates to a 98.45% survival rate among the general population or a mortality rate of 1.55%; this does not qualify as grave danger.

Adjusted for the working age of 16 to a government retirement age of 65-67 CDC reports 31,442,337 COVID working age (16-65) cases to date with 164,331

deaths. COVID-19's mortality rate, 0.52% (164,331/31,442,337), or a survivability rate of 99.48% cannot qualify as grave danger.

The 6th Circuit claims that “800,000 people have died” from COVID-19, *In re: MCP No. 165* at 6, but OSHA has not measured how many of those COVID-19 deaths were contracted in American businesses, workplaces, or how many of those were work related. This gives a false or misleading representation of the alleged “grave risk” posed that OSHA claims gives it authority for an ETS. OSHA claims it is protecting workplaces, but a 99.48% COVID-19 survival rate among the working age population is hardly justification for the draconian mandate OSHA seeks to impose. OSHA has not attempted to show the global virus specifically puts individuals in the workplace at greater risk than non-workers. Workers do not have equal risk.

Corona Viruses are not agents. Agents are things that can kill someone in hours or minutes and cause immediate danger such as chemical agents. “Since World War I, several types of chemical agents have been developed [.] These include choking agents, blister agents, blood agents, nerve agents, incapacitants, riot-control agents, and herbicides.” <https://www.britannica.com/science/chemical-agent>. This traditional understanding of agents should be separated from COVID-19. “Grave” means exposure to an agent causes death.

## **II. THE ETS DOES NOT PREVENT “EXPOSURE” TO THE VIRUS**

This mandate does not prevent “exposure” to COVID-19 because all three areas imposed: vaccination, testing, and masks cannot and do not prevent “exposure” as required by law and as “necessary” for the creation of an ETS. This standard cannot be met therefore the mandate is illegal.

### **A. THE VACCINE MANDATE PORTION OF THE ETS DOES NOT PREVENT EXPOSURE TO THE COVID-19 VIRUS**

The Covid-19 Vaccine does not immunize the vaccinated from Covid-19. Unlike sterilizing vaccines, which prevent the vaccine recipient from contracting or spreading the disease they are vaccinated against (<https://pubmed.ncbi.nlm.nih.gov/31590667/>), the COVID-19 vaccine recipients are widely known to continue to contract and spread the SARS-COV-2 virus which causes Covid-19 infections. The Associated Press reported on December 27, 2021, the fully vaccinated USS Milwaukee had “[a]bout two dozen sailors or roughly 25% of the crew — have now tested positive for COVID-19[.]” “Officials: Nearly 25% [of fully vaccinated] Navy warship crew has COVID-19” as reported by Lolita C. Baldor. <https://apnews.com/article/coronavirus-pandemic-health-jacksonville-us-navycb7d190b7c1c1c52f5441b56740d44de>.

The Navy said in a statement Friday that the USS Milwaukee’s crew was “100% immunized” and that all of those who tested positive for COVID-19 were being isolated on the ship away from other crew members

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Another warship, meanwhile, had to postpone its movement out to sea earlier this month due to a separate outbreak. Navy Cmdr. Sean Robertson, spokesman for 3rd Fleet, said the USS Halsey, a destroyer, delayed its homeport move from Pearl Harbor, in Hawaii, to San Diego

because a significant number of the crew became infected with COVID-19. Id. The Navy further reported “roughly one-third of the Halsey crew tested positive for the virus.... A destroyer has about 300 crew members [and ] “the crew was nearly 100% vaccinated.

Id.

The fact that the COVID-19 vaccine does not provide classic immunity to those who receive it is because it is not a sterilizing “vaccine” in the classic, pre-COVID-19 sense (<https://www.verywellhealth.com/covid-19-vaccines-and-sterilizing-immunity-5092148#toc-what-is-sterilizing-immunity>). Faced with the realization the COVID-19 vaccine would not provide classical immunity to the vaccinated and has not stopped the contraction or spread among fully vaccinated individuals, CDC changed the “vaccination” definition in 2021 from “The act of introducing a vaccine into the body to produce *immunity* to a specific disease.” (emphasis added) to “The act of introducing a vaccine into the body to produce *protection* from a specific disease.” (emphasis added). The change has made these two formerly different definitions equal. This change has legal implications without input from the public or congress.

In other words, CDC changed the “vaccine” definition in 2021 from a medical procedure that protected the vaccinated against the disease by producing immunity to one that merely stimulates the immune system and provides partial protection.

Before the change [the Centers for Disease Control and Prevention modified ‘its definition of the words “vaccine” and “vaccination” on its website’], the definition for “vaccination” read, “the act of introducing a vaccine into the body to produce immunity to a specific disease.” Now, the word “immunity” has been switched to “protection.” The term “vaccine” also got a makeover. The CDC’s definition changed from “a

product that stimulates a person's immune system to produce immunity to a specific disease" to the current "a preparation that is used to stimulate the body's immune response against diseases." Some people have speculated that the unannounced changes were the CDC's attempt to hide the fact COVID-19 vaccines are not 100% effective at preventing coronavirus infection.

<https://www.miamiherald.com/news/coronavirus/article254111268.html>. CDC has effectively made two formerly completely different terms the same, destroying the old understanding of "vaccine", one that protected a person from disease.

Under the pre-COVID-19 standard, the COVID-19 treatment would be called a prophylactic or a treatment, not a vaccine because it does not provide immunity. If the vaccine makers were not currently protected from liability, they could be sued for misleading advertising, offering and selling a faulty product, and damages. The same fraud and deception. remedies should apply to the CDC.

CDC used its administrative process to change the meaning of the well-known term "vaccine" and establish what is now a legal standard that is used to punish and retaliate against those who object to something that does not work as originally promised. The Fifth Amendment requires administrative changes and definitions that become a legal standard and the basis for punitive actions against citizens, as CDC, OSHA and the government have done here, must go through notice and comment.

[https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf). OSHA



has not done that. That's the definition of arbitrary and capricious and contrary to law.

OSHA should not be allowed to use a secret administrative process to effectively criminalize the exercise of well-established rights or the rejection of a medical process that does not do what it was expected and designed to do.

In the military context, the CDC established a standard that is now the legal basis for the imposition of significant criminal liability, *e.g.*, court-martial and possible loss of VA benefits, and ruined penalties by refusing to be “vaccinated” which is not vaccination under the old standard. In doing so the CDC has created law without going through the required necessary notice and comment provisions.

It's one thing for a person to choose to take a vaccine because it provides almost 100% immunity against a disease, it's another to order a person to take what in effect is an experimental vaccine that does not reduce the risk of catching or re-catching the disease to almost zero. The Covid-19 vaccine is not a sterilizing vaccine as that term is understood by the public. That is why the disease continues to spread among vaccinated. On November 11, 2021 Yahoo News revealed that, “Thousands of double jabbed over 50s have died from COVID in the last 4 weeks[.] In a report published by the UK Health Security Agency, analysis revealed 2,683 double vaccinated over 50s have died within 28 days of positive COVID test in the last four weeks.”

<https://news.yahoo.com/revealed-thousands-of-double-jabbed-over-50-s-have-died-in-the-last-4weeks-190548036.html>.

Fully vaccinated individuals are still contracting and spreading the SARS-CoV-2. "Fully vaccinated people who get a Covid-19 breakthrough infection can transmit the virus, CDC chief says", <https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html>. Also, "Overall, 274 (79%) vaccinated patients with breakthrough infection were symptomatic. Among five COVID-19 patients who were hospitalized, four were fully vaccinated[.]"

[https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s\\_cid=mm7031e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w).

This shows vaccinated individuals can receive, transmit, and spread the COVID-19 virus. The CDC has revealed fully vaccinated individuals can carry the same viral load as unvaccinated when infected with SARS-CoV-2.

[https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s\\_cid=mm7031e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w).

On December 21, 2021,

Massachusetts public health officials reported 13,919 new COVID-19 cases *among fully vaccinated residents* over the last week, nearly 2,500 more breakthrough cases than the prior week. [and] Through the week ending Dec. 18, [2021] there were 114,318 cumulative [Covid-19] cases *in vaccinated people* — representing... 2.3% of Massachusetts' fully vaccinated residents. (emphasis added).

<https://www.masslive.com/coronavirus/2021/12/massachusetts-reports-13919-new-breakthrough-covid-cases-over-last-week-as-state-ramps-up-testing-deploys-national-guard-to-bolster-hospitals-and-ambulance-service.html>).

Vaccinated people infected with COVID-19 can infect both unvaccinated or vaccinated, therefore the vaccine portion of the OSHA mandate does not prevent “exposure” to COVID-19 and cannot meet the “necessary” clause of the ETA requirement. Only testing unvaccinated while not testing vaccinated does not prevent “exposure” because the vaccinated can receive, spread, infect, and transmit the SARS-CoV-2 virus. If only half the population is required to test, the other half can still spread the virus in the workplace. OSHA’s mandate does not stop the spread of SARS-CoV-2 in the workplace, nor stop the “exposure” to SARS-CoV-2. Therefore, OSHA has not met its ETS requirement set forth in the law as “necessary” to stop “exposure”.

**B. THE TESTING MANDATE PORTION OF THE ETS DOES NOT PREVENT EXPOSURE TO THE COVID-19 VIRUS**

Tests don’t work.

Many have asked why the CDC reduced isolation times for some people with Covid-19 – but didn’t recommend taking a test to confirm whether they were still infected. PCR and antigen tests aren’t always good indicators of whether someone is still contagious, CDC Director Dr.

Rochelle Walensky told news outlets Wednesday. (December 29, 2021):

What we do know is that the PCR test after infection can be positive for up to 12 weeks, so that is not going to be helpful. You’re not going to be transmitting during all of that period of time,” Walensky told NBC.

PCR and antigen tests aren't always good indicators of whether someone is still contagious, CDC Director Dr. Rochelle Walensky told news outlets Wednesday. "So, then the question is, well why not do an antigen test at five days? We do know some people at five days will be negative and still

be able to transmit. We also know that some people will be positive and still be able to transmit," she said.

"So that antigen test was actually not authorized for this purpose, and its information will not be useful. Regardless of what the antigen test said,"

(<https://www.cnn.com/2021/12/29/health/us-coronavirus-wednesday/index.html>). If a PCR test can test positive for up to 12 weeks according to the CDC Director, then an employee required by OSHA's Mandate to test weekly would be forced to stay out of work for up to four months due to faulty testing. Also, PCR tests are not authorized to tell if a person is virus free. According to the CDC Director, the testing as required by OSHA does not work to reveal sickness, and or viral load. Again, a person can test negative and still spread the disease. This is the definition of a not working test.

CNN medical analyst Dr. Jonathan Reiner claimed PCR tests can sometimes "detect the virus when a person is no longer infectious,"

(<https://www.cnn.com/2021/12/29/health/us-coronavirus-wednesday/index.html>)

The Testing portion of the OSHA mandate does not prevent "exposure" to SARS-CoV-2.

### **III. THE TESTING MANDATE CAN IMPOSE AN UNJUSTIFIED ECONOMIC BURDEN THAT OPERATES AS A FINE OR PENALTY**

The Testing Mandate can drive full time federal minimum wage workers into poverty. For example, an Alabama resident receiving the federal minimum wage of \$7.25 per hour with no state minimum wage and working 37 work hours a

week<sup>3</sup> would earn \$13,949 per year. That is above the 2021 Federal poverty level (FPL) of \$12,880 for individuals. See:

<https://www.healthcare.gov/glossary/federalpoverty-level-FPL/>. A testing cost of \$20.00 a week would cost the employee \$1,040.00 for 52 weeks. The OSHA test mandate would therefore put that full time worker making federal minimum wage below the federal poverty rate.

The cost of tests. While some rapid tests are on the market for \$20, others cost more. Mira is a non-insurance membership that helps members get affordable healthcare. See <https://www.talktomira.com/about>. Mira wrote an extensive analysis on the COVID-19 test costs of the very type the OSHA Rule requires. “The price of COVID-19 diagnostic testing at urgent care typically ranges from \$100 to \$200. However, it is possible to be charged additional fees to see a provider, administration of the test, or additional lab work. With these fees, you may be charged upwards of \$600.” <https://www.talktomira.com/post/howmuch-does-coronavirus-COVID-19-testing-cost-with-or-without-insurance>.

For At-Home Tests, “Several companies are now offering FDA-approved self-administered at-home COVID tests. The out-of-pocket cost for an at-home COVID test is typically between \$109 and \$155.” *Id.* For Emergency Room Tests, “Based on data collected by Peterson-KFF, the median price of a COVID test done at a hospital is

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<sup>3</sup> The federal government has determined 30 hours a week is full time. <https://www.irs.gov/affordablecare-act/employers/identifying-full-time-employees>.

\$127, and most tests cost between \$100 and \$199. However, you will likely be charged additional fees for being tested and treated in a hospital. These fees may exceed \$3,100 in some circumstances.” *Id.*

Some locations currently provide free testing options, however the availability of centers by location, and availability of tests are always changing factors. Therefore there is no guarantee that a center will be available by geographical location or will have tests available. Without zero cost testing widely and perpetually available, this will cause undue burden on the most economically disadvantaged, and those already struggling with pandemic wage loss. This is a recipe for disaster with rising inflation recently hitting a reported 30 year high. <https://abcnews.go.com/Business/americans-inflation-hits-30-yearhigh/story?id=81110162>.

This will cause irreparable economic harm for workers who have to pay \$100 to \$3,100 per test per week out of pocket. There is no authority or rationale for this test mandate.

#### **IV. THE MASKING MANDATE PORTION OF THE ETS DOES NOT PREVENT EXPOSURE TO THE COVID-19 VIRUS**

The masks do not prevent “exposure” because cloth masks are unable to stop the spread of the virus. Masks required by ETS cannot and do not stop the spread of the virus. Evidence of this is the rising number of cases in locations where masking is required.

Non-surgical face masks are authorized only under Emergency Use Authorization (EUA), they are not FDA approved and therefore are experimental. Thus, the federal Government cannot require or force people to take part in medical experimentation. This is a violation of well-established human rights recognized by courts.

Pursuant to Title 21 of the United States Code, products and devices authorized under an EUA must be optional to the user as the basic standards for testing, evaluation, and approval have been bypassed by the FDA due to an emergency. Title 21 United States Code, Section 360bbb-3C(1)(A)(ii).

If OSHA's mask mandate stands, then the human rights of unvaccinated workers will be violated forcing them to participate in experimental mask wearing that is not FDA approved and not tested or proven to prevent the exposure of COVID-19 in the workplace. Under title "Why did the FDA re-issue the Emergency Use Authorization (EUA) for face masks?" the FDA states,

On April 24, 2020, the FDA updated and re-issued the EUA to clarify that face masks, including cloth face coverings, that are authorized by the EUA are only authorized for use by the general public and health care personnel as source control. These face masks are not authorized to be personal protective equipment, meaning they are not a substitute for filtering face piece respirators or for surgical face masks.

<https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-emergency-use-authorization-face-masks-non-surgical>

Masks have a negative effect, produce harm and cause further diseases. Dr. Anthony Fauci wrote the pandemic of 1918 was not mainly caused by the virus, but by bacterial infections from mask wearing. (Scarano A, Inchingolo F, Lorusso F., Facial Skin Temperature and Discomfort When Wearing Protective Face Masks: Thermal Infrared Imaging Evaluation and Hands Moving the Mask. Int J Environ Res Public Health. 2020;17(13):4624. Published 2020 Jun 27. doi:10.3390/ijerph17134624). Cloth masks can cause harm to the wearer today by the spread of bacterial infections as well.

Masks of cloth material such as the ETA requires, are not possible to prevent the exposure to Covid-19 because the virus is much smaller than the mask fibers. In a federal lawsuit brought to the district court in New York petitioners state,

From a physical standpoint, the properties of masks versus the SARS-CoV-2 virus prove that masks simply cannot prevent the virus from exiting the nose and mouth of infected individuals into the air around them to be breathed in by others. According to current knowledge, the SARS-CoV-2 virus has a diameter of 60 nm to 140 nm [nanometers (a billionth of a meter)]. Medical and non-medical facemasks' thread diameter, on the other hand, ranges from 55  $\mu\text{m}$  to 440  $\mu\text{m}$  [micrometers (one millionth of a meter)], which is more than 1,000 times larger than the diameter of the virus. Due to the difference in sizes between SARS-CoV-2 diameter and facemasks thread diameter (the virus is 1000 times smaller), SARS-CoV-2 can easily pass through any face mask like a mosquito through a chain link fence. Historians and public health scholars similarly describe the known futility of the masks employed during influenza 1918, often referencing the famous quote that 'it is like trying to keep out dust with chicken wire.' [see [https://www-tc.pbs.org/wgbh/americanexperience/media/pdf/transcript/influenza\\_transcript.pdf](https://www-tc.pbs.org/wgbh/americanexperience/media/pdf/transcript/influenza_transcript.pdf)]



*William Ouweleen vs. Howard Zucker* in his official capacity as Commissioner of the New York State Department of Health Case 6:21-cv-06522 (MDNY). Twenty-two days after this lawsuit was filed the, “New York Health Commissioner Repeal[ed the] Mask Mandate for Unvaxxed After Federal Lawsuit Filed.” <https://childrenshealthdefense.org/defender/ny-health-commissioner-mask-mandate-federal-lawchildrenshealthdefense>. The mask portion of the OSHA mandate does not prevent “exposure” to SARS-CoV-2 and is illegal under FDA EUA rule for masks. The Mask Mandate does not meet the “necessary” clause requirements for an ETA because it cannot prevent “exposure”.

**V. OSHA’S MANDATE PUNISHES CITIZENS FOR EXERCISING THEIR RIGHT TO MAINTAIN BODILY INTEGRITY**

If OSHA’s ETS is allowed to proceed, millions will face fines for exercising their constitutional right to body autonomy. There are many reasons for opposing a vaccine that does not protect the way our classic sterilizing vaccines have in the past, *e.g.*, Polio, smallpox, measles. These include religious objections based on various deeply held beliefs and natural immunity which the Administration and CDC continue to ignore despite unchallenged scientific evidence it is superior to the vaccines. The Cleveland Clinic did an extensive study to immunity from previous infections and they concluded,

No vaccine needed for those who’ve had COVID-19, Cleveland Clinic study says ... During the study that was conducted on 52,238 employees in the Cleveland Clinic, the clinic says, ‘not a single incidence

of SARS-CoV-2 infection was observed in previously infected participants with or without vaccination.’

<https://www.wbtw.com/trackingthevaccine/no-vaccine-needed-for-those-whove-had-covid-19-cleveland-clinic-study-says-2/>).

**A real harm to vaccinated individuals can be caused by the vaccine itself.** The FDA has acknowledged a danger to males who take the vaccine and the FDA Press Release dated August 23, 2021 stated that

Additionally, the FDA conducted a rigorous evaluation of the post-authorization safety surveillance data pertaining to myocarditis and pericarditis following administration of the Pfizer-BioNTech COVID-19 Vaccine and has determined that the data demonstrate increased risks, particularly within the seven days following the second dose. The observed risk is higher among males under 40 years of age compared to females and older males. The observed risk is highest in males 12 through 17 years of age. Available data from short-term follow-up suggest that most individuals have had resolution of symptoms. However, some individuals required intensive care support. Information is not yet available about potential long-term health outcomes. The Comirnaty Prescribing Information includes a warning about these risks.

<https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>

Under OSHA’s ETS males under 40 are required to take the Covid-19 vaccine however the FDA acknowledged risk of danger is prevalent among that group. OSHA is therefore putting employees in harm’s way by requiring the vaccine.

The Sixth Circuit Court of Appeals wrongly said that no vaccine is required by the OSHA mandate. However it failed to acknowledge that those who do not get

vaccinated are fined as employers for each unvaccinated, and employees are fined by requiring to pay for tests. These fines are in effect only when a person is not vaccinated, therefor OSHA has created a rule that has the penalty and weight of law without going through the required rule making and legislative process.

“The Senate voted [on December 8, 2021] to block President Joe Biden’s vaccine mandate on private employers.” <https://www.cnbc.com/2021/12/08/biden-vaccine-mandate-senatevotes-to-overturn-OSHA-rule.html>.

## **VI. THE ETS VACCINATION, TESTING, AND FACE MASK MANDATE DO NOT PROVIDE RELIGIOUS EXEMPTIONS**

The OSHA mandate violates the deeply held religious beliefs of millions of Americans without providing religious exemptions to employers or employees. For example those whose religious beliefs prevent them from taking a vaccine that was made with abortion fetal tissue, are not exempt. Also in regards with those with beards and masks, the CDC recommended trimming beards, in violation of many religious beliefs, a violation of the First Amendment. OSHA claims that they have been given legislative authority from Congress to violate the religious beliefs of employees in the workplace, this is a violation of the First Amendment “Free Exercise” Clause. Congress cannot authorize violations of the First Amendment.

## VII. OSHA'S ETS CREATES A "SEPARATE BUT EQUAL" WORK ENVIRONMENT, THROUGH MEDICAL SEGREGATION

OSHA'S ETS creates a "separate but equal" work environment that segregates healthy which cannot be upheld as trying to stop COVID-19. While medical segregation is often used once a person is infected with a disease, the Supreme Court of Pennsylvania has recently determined that segregating people who are otherwise healthy is a violation of the extension to which government interest can apply.

The Pennsylvania Supreme Court overturned a statewide school mask mandate (December 2021).

Reasoning that the Secretary "intended to, and actually [did], dictate citizens' standards of conduct within Pennsylvania's schools" by "requir[ing] all persons physically within a School Entity . . . to wear a face covering regardless of COVID-19 infection...", the Commonwealth Court rejected the notion that the Mask Mandate was "mere guidance" in pursuit of statutory interpretation, rather than a substantive rule with "the force and effect of law." *Id.* at \*8-10.

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The court also noted that Section 27.60(b) requires the Department to "determine the appropriate disease control measure based upon the disease or infection, the patient's circumstances, the type of facility available and any other available information relating to the patient and the disease or infection." *Id.* (quoting 28 Pa. Code § 27.60(b)).

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In referring to "the patient's circumstances," the court found that this language "specifically limits the authority and possible actions of the Department [ ] to those individuals who have already contracted specific diseases, not the general, uninfected population as a whole." *Id.* Likewise, the court reasoned that the subsection's reference to available facilities indicates a focus upon facilities for surveilling, segregating, or quarantining individuals already known to have been exposed to a disease or infection. *Id.*

Accordingly, the court concluded that this subsection could not provide the broad authority asserted by the Secretary in support of ordering “otherwise healthy Pennsylvanians attending, working in, or otherwise visiting Pennsylvania’s” schools to wear masks. *Id.*

SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, J-86-2021, JACOB DOYLE CORMAN v. DISTRICT ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH

A rule that goes beyond the scope of the Health and Human Services (HHS) to stop a communicable disease cannot be enforced. Once the mandate for masks went to people who are healthy the HHS went outside its legal parameters set forth by law to stop the spread of communicable diseases.

Likewise the OSHA mandate must be struck down upon similar grounds.

By using medical segregation to create a barrier between those who are vaccinated and the unvaccinated rather than those who are sick vs healthy OSHA has exceeded its authority.

The civil rights act of 1964 deals with the atrocity of segregation and can be thus reminded that medical segregation among otherwise healthy individuals would pose a similar threat to civil liberties.

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation. [It further clarified that public accommodation includes] (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than

five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Civil Rights Act 1964 § 201 Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964.

This Civil Liberty is at currently under threat of being ignored by the executive branch of government by adding punitive measures that act as law by never ending executive orders and emergency declarations. As a time like this our fundamental human rights must be upheld and this court must uphold the purpose of these liberties and not allow the executive branch to remove these Civil Liberties. As this court recently said, “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” (592 U. S. \_\_\_ (2020) ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK v. ANDREW M. CUOMO, GOVERNOR OF NEW YORK ON APPLICATION FOR INJUNCTIVE RELIEF)

[https://www.supremecourt.gov/opinions/20pdf/20a87\\_4g15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf)

The medical segregation is a result of animus toward unvaccinated individuals because both vaccinated and unvaccinated are able to contract Covid-19. “Animus”

defined as “a usually prejudiced and often spiteful or malevolent ill will harbored”

<https://www.merriam-webster.com/dictionary/animus>

The president’s own speeches show an animus for hatred of unvaccinated individuals.

False claims made by the administration, that say this is “a pandemic of the unvaccinated” ... or that his patience “is running thin.”

<https://www.theatlantic.com/ideas/archive/2021/09/persuade-unvaccinatedprotect-unvaccinated/620091/>.

This Animus is currently being echoed by other members of the executive branch, e.g., Secretary of Defense Austin, and other prominent civic leaders, e.g., New York City’s outgoing mayor, Bill De Blasio in his Dec. 6, 2021, vaccine mandate says employers, “may not allow any unvaccinated workers to come to their workplace,”

<https://nypost.com/2021/12/27/bill-de-blasiosprivate-business-vaccine-mandate-takes-effect-in-nyc/>. This in effect establishes a local medical segregation outside of infection for New York City. This segregation includes not allowing U.S. citizens to eat in public restaurants without vaccine papers shown at the door. “Fines for non-compliant businesses start at \$1,000, and rise upon subsequent infractions, City Hall’s instructions warn.” <https://nypost.com/2021/12/27/bill-deblasios-private-business-vaccine-mandate-takes-effect-in-nyc/>.

It is clear that animus is the cause for these types of measures because unvaccinated individuals are treated separately not because of a current or past

infection but solely because of their vaccine status. This modern day segregation is based on hatred of the unvaccinated.

Recently, some have called on hospitals to take less or slower care of the unvaccinated; others call for their mistreatment. On August 26, the Toronto Star, Canada's largest newspaper, filled its front page with vitriolic and mocking comments collected from social media toward people who have not taken experimental COVID vaccines.

This hatred has continued as some propose removing jobs from the unvaccinated, not because of current infection, or transmission of the virus, but simply because that individual has chosen to exercise legal authority to medical freedom and bodily autonomy.

These types of medical segregation regardless of whether someone has been exposed to a disease or infection go outside of the legal authority given to OSHA from Congress.



## CONCLUSION

The Sixth Circuit's ruling should be overruled. OSHA has exceeded its authority; its mandate is arbitrary, capricious, and unconstitutional. OSHA has not proved a "grave danger" exists, the standard to protect employees from "exposure" to such dangers. The mandate relies on the CDC's administrative change to the "classic" definition of vaccine as **immunity**, so vaccine now means **treatment**. This change which has the impact of law was made without notice and comment. The ETS does not prevent exposure to COVID-19 through vaccination, weekly testing, and mask mandates. Therefore, the OSHA mandate does not meet the necessary clause of the ETA requirements. This Court should approve the emergency applications for a stay or Injunction in connection with OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard.

Respectfully submitted,

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