Nos. 21A244 and 21A247

IN THE

# Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *et al.*,
*Applicants,*

—*v.*—

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
*Respondents.*

---

STATE OF OHIO, *et al.*,
*Applicants,*

—*v.* —

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
*Respondents.*

*On Emergency Applications for Stay Pending Certiorari Review*

## MOTION OF LOCAL UNIONS 1249 AND 97 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS FOR LEAVE TO FILE ATTACHED AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATIONS FOR A STAY PENDING CERTIORARI REVIEW AND FOR LEAVE TO FILE IN PAPER FORMAT WITHOUT 10 DAYS' NOTICE

Brian J. LaClair*
**Counsel of record*
BLITMAN & KING LLP
Franklin Center, Suite 300
443 N. Franklin Street
Syracuse, NY 13204
(315) 422-7111
bjlaclair@bklawyers.com

*Counsel for Movants/Amici Local Unions 1249 and 97 of the IBEW*

December 30, 2021

Local Union 1249 of the International Brotherhood of Electrical Workers ("Local 1249") and Local Union 97 of the International Brotherhood of Electrical Workers ("Local 97") (collectively, "*amici*") respectfully move, under Supreme Court Rule 37.2, for leave to file the attached brief as *amici curiae* in support of the emergency applications filed on December 17-21, 2021, seeking a stay of the Occupational Safety and Health Administration's Emergency Temporary Standard on COVID-19 vaccination and testing ("ETS") pending certiorari review. *Amici* also seek leave to file the aforementioned amicus brief in unbound format on 8.5-by-11-inch paper and without 10 days' advance notice to the parties of *amici*'s intent to file.

By email on December 29, 2021, *amici* sought consent from the parties to file an *amicus curiae* brief in support to the emergency applications. The Business Association Applicants in No. 21A244 do not oppose the filing of the attached *amicus* brief. The State Applicants in No. 21A247 consent to the filing of the brief. The Federal Respondents take no position on the filing of the brief. No party expressly opposed the filing of the attached amicus brief.

Unions are democratic and pluralistic organizations and *amici* are no exception. By *amici*'s estimation, most of their members have chosen to receive a vaccination against COVID-19 and many are supportive of the national vaccination effort. But a substantial number of *amici*'s members have chosen not to receive a COVID-19 vaccine. The reasons for these members' decision not to receive the vaccine are myriad and, in many cases, deeply personal. To be sure, *amici* have a

strong interest in promoting a safe and healthy work environment for their members and supporting appropriate governmental efforts to that end—and, in that respect, *amici* are fully aligned with their fellow unions who oppose the stay (*see* Response of The American Federation of Labor and Congress of Industrial Organizations *et al.*, filed Dec. 30, 2021). However, *amici* are concerned that unvaccinated members will have to choose between receiving a COVID-19 vaccine and no longer being able to provide for themselves and their families.

It is from this perspective—that of the workers who will bear the primary burden of compliance with the ETS—that *amici* offer the attached brief. The attached brief seeks to demonstrate that the ETS, which is unlike any existing workplace regulation, improperly seeks to regulate off-duty conduct in response to largely non-occupational hazards, shift the associated costs to employees, and compel them to choose between losing their jobs and receiving a vaccination they do not desire to receive. Moreover, in some respects the ETS usurps the role of collective bargaining representatives like *amici*, who are well equipped to negotiate workplace policies to combat the spread of COVID-19. Finally, the ever-changing nature of the virus and the conventional wisdom on how best to combat it militates in favor of a stay.

Given the expedited nature of the present proceeding, the preparation of the attached amicus brief in printed booklet form will not be practicable. Accordingly, *amici* respectfully request leave to file their brief in unbound format on 8½-by-11-inch paper and without 10 days' advance notice to the parties of their intent to file.

## CONCLUSION

*Amici* respectfully request that the Court grant this motion for leave to file the attached amicus brief and accept the same in unbound format on 8½-by-11-inch paper without 10 days' advance notice to the parties.

Respectfully submitted,

Brian J. LaClair*
*Counsel of record
BLITMAN & KING LLP
Franklin Center, Suite 300
443 N. Franklin Street
Syracuse, NY 13204
(315) 422-7111
bjlaclair@bklawyers.com

*Counsel for Movants/Amici Local Unions 1249 and 97 of the IBEW*

Nos. 21A244 and 21A247

IN THE

# Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *et al.*,
*Applicants,*

—*v.*—

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
*Respondents.*

---

STATE OF OHIO, *et al.*,
*Applicants,*

—*v.* —

DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
*Respondents.*

*On Emergency Applications for Stay Pending Certiorari Review*

## [PROPOSED] BRIEF OF *AMICI CURIAE* LOCAL UNIONS 1249 AND 97 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IN SUPPORT OF EMERGENCY APPLICATIONS FOR A STAY PENDING CERTIORARI REVIEW

Brian J. LaClair*
*Counsel of record
BLITMAN & KING LLP
Franklin Center, Suite 300
443 N. Franklin Street
Syracuse, NY 13204
(315) 422-7111
bjlaclair@bklawyers.com

*Counsel for Amici Local Unions 1249 and 97 of the IBEW*

December 30, 2021

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities



### Regulations

## INTEREST OF *AMICI CURIAE*[1]

*Amici Curiae* Local Union 1249 of the International Brotherhood of Electrical Workers ("Local 1249") and Local Union 97 of the International Brotherhood of Electrical Workers ("Local 97") (collectively, "*amici*") are labor organizations as defined by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* *Amici* collectively represent over 7,000 electricians and other utility workers throughout the State of New York and beyond. *Amici*'s members work tirelessly to ensure the safe and efficient distribution of electricity and natural gas to residential, commercial, industrial, and governmental customers. They are essential workers who have selflessly worked throughout the pandemic.

Unions are democratic and pluralistic organizations and *amici* are no exception. By *amici*'s estimation, most of their members have chosen to receive a vaccination against COVID-19 and many are supportive of the national vaccination effort. But a substantial number of *amici*'s members have chosen not to receive a COVID-19 vaccine. The reasons for these members' decision not to receive the vaccine are myriad and, in many cases, deeply personal.

Because many employers of *amici*'s members would—absent a stay—be subject to OSHA's Emergency Temporary Standard concerning COVID-19 vaccination ("ETS"), it is a near certainty that a significant number of *amici*'s members will lose their jobs or feel compelled to receive a vaccination they do not desire to receive. To

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

be sure, *amici* have a strong interest in promoting a safe and healthy work environment for their members and supporting appropriate governmental efforts to that end—and, in that respect, *amici* are fully aligned with their fellow unions who oppose the stay (*see* Response of The American Federation of Labor and Congress of Industrial Organizations *et al.*, filed Dec. 30, 2021). But *amici* also have an interest in protecting their members from suffering adverse employment actions arising from personal decisions related to the COVID-19 vaccinations. In short, *amici*'s unvaccinated members should not have to choose between receiving a COVID-19 vaccine and no longer being able to provide for themselves and their families.

## SUMMARY OF THE ARGUMENT

*Amici* believe that the emergency applications for a stay pending certiorari review should be granted. First, the ETS is wholly unlike existing OSHA regulations and is inconsistent with its congressionally created purpose. In that regard, the Fifth Circuit was correct that, in promulgating the ETS, OSHA tried to "derive[] its authority from an old statute employed in a novel manner." *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 2021 U.S. App. LEXIS 33698, *23 (5th Cir. 2021). The unfamiliarity and uniqueness of the area OSHA now seeks to regulate renders its authority to do so dubious, at best. *See id.* at *23 n.20 ("[I]t is simply unlikely that Congress assigned authority over such a monumental policy decision to OSHA—hard hats and safety goggles, this is not."). The ETS also deviates from OSHA's congressionally created purpose by shifting the burden of compliance

and costs (i.e., for weekly testing) from employers to employees and in many respects improperly seeks to regulate off-duty conduct and non-occupational hazards.

Second, labor organizations like *amici* are well equipped to work with management to develop tailored, workplace-specific safety policies that have the support of workers. *Amici*'s members work in historically dangerous industries. Through the organized power of their unions and the statutory process of collective bargaining, these workers have been able to secure important safety-related rules and practices for themselves and for their successors. After nearly two years of the pandemic, unions have acquired significant experience negotiating and implementing COVID-19-related safety policies that have successfully reduced virus transmission with worker buy-in.

Third, the rapidly changing nature of COVID-19 counsels against an inflexible ETS. The recent and dramatic rise of the Omicron variant has reintroduced the American public to rising transmission, even among those once considered "fully vaccinated." Moreover, the CDC recently announced its preference for the Pfizer and Moderna's vaccines over Johnson & Johnson's, amid concerns about safety and efficacy. *Amici* respectfully submit that these constantly changing factors and the ensuing uncertainty surrounding COVID-19 and the vaccines undermine the legitimacy of the inflexible, one-size-fits-all ETS.

While *amici* acknowledge the noble workplace-safety goals of the ETS, if the stay applications are denied and the ETS is allowed to remain in effect, many

workers—including *amici*'s members—will unnecessarily lose their jobs or feel compelled to receive a vaccination that they do not desire to receive.

## ARGUMENT

### I. The ETS is Unlike OSHA's Existing Regulations and Inconsistent With its Congressionally Created Purpose

The statutory purpose of the OSH Act is "to assure so far as possible every man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b). The Secretary of Labor is authorized to promulgate "occupational safety or health standard[s]" for this purpose, *id.* § 655(b), which "means a standard which requires 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," *id.* § 652(8). In the context of an emergency temporary standard, the Secretary must determine that "substances or agents determined to be toxic or physically harmful" or "new hazards" pose a "grave danger" to employees, and that an "emergency standard is necessary to protect employees from such danger." *Id.* § 655(c)(1).

In order to effectuate these standards—whether emergency or permanent—the OSH Act places duties of compliance both on employers, *id.* § 654(a), and on employees, § 654(b). But the primary burden of regulatory compliance has always been on employers, who have been required to provide a safe and healthful working environment. Employees have a duty to use the safety equipment provided while they are working, and to cooperate with recordkeeping procedures. OSHA has never before imposed a duty on an employee to undergo an irreversible medical procedure

that affects them both on and off duty, nor to obtain weekly testing at significant personal expense.

### A. The ETS is Overbroad in That it Seeks to Regulate Off-Duty Conduct and Non-Occupational Hazards

Consider—as suggested by the Fifth Circuit—the now-ubiquitous hard hat. Hard hats are required "when working in areas where there is a potential for injury to the head from falling objects." 29 C.F.R. § 1910.135 (a)(1). Of particular relevance to *amici*'s members, workers must also wear "a protective helmet designed to reduce electrical shock hazard . . . when near exposed electrical conductors which could contact the head." *Id.* subd. (a)(2). Those dangers are omnipresent in some workplaces and courts have properly held that employees may be required to wear hard hats (or insulating hats) all day while working.

But the danger abates when employees go home. Subsection (a)(1), which governs hard hats in general, expressly recognizes this fact by expressly limiting its scope to time "*when working*." *Id.* subd. (a)(1) (emphasis added). While subsection (a)(2) does not contain the same textual limitation, common sense and universal practice show that this limitation should be implied to all OSHA regulations. An employer simply has no power to control whether an employee wears a "protective helmet designed to reduce electrical shock hazard . . . when near exposed electrical conductors" in the employee's own home, or otherwise outside of working hours.

Vaccines are obviously not like hard hats or insulating helmets. As Chief Judge Sutton of the Sixth Circuit recognized, "[i]t is one thing to tell a worker to don a mask [or a hard hat] at the start of a hazard-filled shift and doff it at the end." *In*

*re MCP No. 165* ("*MCP I*"), 2021 U.S. App. LEXIS 37024, *8 (6th Cir. Dec. 15, 2021) (Sutton, C.J., dissenting). Unlike a hard hat, a vaccine cannot be "doff[ed] . . . at the end" of a shift. Before this ETS, OSHA had never required an employer to force an employee to take permanent and irreversible action in the name of workplace safety. To illustrate the point, an employer can require an employee to wear reflective "warning garments," *see* 29 C.F.R. § 1926.201, but no one has ever suggested that an employer could require an employee to get a reflective tattoo.

It is true that in some cases OSHA may issue regulations to protect employees from occupational exposure to a hazard that is not solely occupational. But when OSHA does so, it must focus on the occupational exposure. Some have cited *Forging Industry Association v. Secretary of Labor,* 773 F.2d 1436 (4th Cir. 1985), for the proposition that OSHA may regulate extra-occupational hazards, but that decision does not vindicate the overbroad ETS in this case. In *Forging Industry*, the Fourth Circuit noted that "OSHA's authority is limited to ameliorating conditions that exist in the workplace," and went on to hold that the challenged rule was valid only because it "does nothing more than ensure that a hearing-endangered worker is provided with protection *in the workplace* in order to decrease the risk of a hearing impairment." 773 F.2d at 1442-43 (emphasis in original). The Fourth Circuit specifically noted that the particular hazard regulated was "sustained noise of great intensity" that was "hard to imagine" outside of industrial workplaces. *Id.* at 1444.

In contrast, here, OSHA effectively seeks to require a vaccination with the intention of providing around-the-clock, undifferentiated, and semi-permanent

protection both in and outside of the workplace. That goes beyond the "protection *in the workplace*" approved in *Forging Industry*, *see id.* at 1443, and exceeds the agency's power. *Cf. MCP I*, 2021 U.S. App. LEXIS 37024, at *25-*26 (Sutton, C.J., dissenting) (noting that a mask mandate at work "would be a workplace requirement at least," whereas a vaccination "cannot be undone at the end of the workday").

### B. The ETS Improperly Shifts Compliance and Cost Burdens to Employees

Returning to the example of hard hats, like most personal protective equipment, they must ordinarily "be provided by the employer at no cost to employees." *See* 29 C.F.R. § 1910.132 (h)(1); *see also* Note to 29 C.F.R. § 1910.269 (g)(1).[2] The employers of *amici*'s members are regularly required to pay for other protective equipment, including fall arrest systems, 29 C.F.R. § 1910.269(g)(2); and flame- and arc-resistant clothing, 29 C.F.R. § 1910.269(l)(8)(iv). Employers are required to pay for these sometimes-costly items as part of their duty to "*furnish to each of [their] employees* employment and a place of employment which are free from recognized hazards . . ." 29 U.S.C. § 654(a)(1) (emphasis added). In contrast, employees are not ordinarily required to "furnish" any material thing to mitigate hazards in the workplace; rather, they are required to "comply" with "standards . . . applicable to [their] own actions and conduct." *Id.* § 654(b). In enacting Section 654, Congress made a value judgment about who should be required to bear the material costs of a safe workplace and put those costs squarely on employers.

[2] There are exceptions for certain "everyday" items that can be used during leisure time as well as for work purposes. *See* 29 C.F.R § 1910.132 (h)(4). While masks arguably are analogous to such items, tests are not. As is commonly known, COVID-19 tests are disposable items that cannot be reused.

Here, OSHA has cast that value judgment aside. Employees who choose not to be vaccinated (and whom the employer allows to remain unvaccinated) must generally absorb the entire cost of testing. 86 Fed. Reg. 61,402, 61,484 (Nov. 5, 2021) ("There is no requirement in the rule that the employer pay for this testing"); *see MCP I*, 2021 U.S. App. LEXIS 37024 at *28 (Sutton, C.J., dissenting) ("the Secretary's decision not to require employers to pay for employees' weekly COVID-19 tests depletes his claim that this emergency rule arises from a work-focused, as opposed to society-focused, imperative"); *In re MCP No. 165 ("MCP II")*, 2021 U.S. App. LEXIS 37349 at *66-*67 (6th Cir. Dec. 17, 2021) (Larsen, J., dissenting) (noting that "OSHA's ordinary regulations," unlike the challenged ETS, "require employers to pay for agency-mandated equipment, tests, and exams"). OSHA's explanation for this deviation is that it wants more people to be vaccinated. *See* 86 Fed. Reg. at 61,437 (decision not to require employer payment for testing "provide[s] a financial incentive for some employees to be fully vaccinated"). But OSHA wants people to wear hard hats, too, and yet OSHA does not have the authority to second-guess Congress's judgment about who should bear the costs of "furnish[ing]" a safe workplace. *See* 29 U.S.C. § 654(a)(1).

While OSHA estimated the costs of employer compliance with the ETS in great detail in the Federal Register, it avoided discussion of the costs that would be passed onto employees who choose the testing option in its main analysis. *See* 86 Fed. Reg. at 61,484 (although OSHA "estimates that 6.3 million weekly tests will need to be given due to this ETS," "[t]here is no requirement in the rule that the employer pay

for this testing so these testing costs are not included in the main analysis"). The ETS does, however, cite as a "reference" a separate analysis OSHA performed regarding those costs, and the numbers are striking: "The average cost for a test off-site, including travel costs, is $75.73," including the cost of the test itself as well as lost productive work time. OSHA, Costs Associated with Reasonable Accommodation: Testing, Face Coverings, and Determinations, at 6 (Nov. 4, 2021), https://www.regulations.gov/document/OSHA-2021-0007-0488. That could mean up to $4,000 per worker per year. While OSHA may have chosen to ignore those costs, *amici*'s members do not have that luxury.[3]

Imposing these costs on employees is inconsistent with OSHA's usual practice, which makes an explanation for the change "especially important." *Southwest Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019). But in promulgating the ETS, OSHA has failed to provide such an explanation. In that respect, OSHA's decision to impose substantial costs on employees without an adequate explanation violated the "fundamental principle[] of administrative law . . . that agencies must give reasons for their actions." *Id.* at 855.

## II. Labor Organizations are Well Equipped to Negotiate Workable, Workplace-Specific Policies to Protect Against Covid-19 Transmission

In issuing the ETS, OSHA seems to have ignored the fact that in unionized workplaces, employees' collective bargaining representatives (including *amici*) are

[3] While health insurance may reduce employees' immediate out-of-pocket costs, OSHA did not consider that possibility; rather, it simply concluded that the costs to employees were not relevant. Moreover, it is well known that increased healthcare costs inevitably lead to increased insurance premiums for employees.

well positioned to negotiate workable, targeted policies to address COVID-19-based safety concerns. Under the National Labor Relations Act, employers have an obligation to meet and bargain in good faith with the certified or recognized representatives of their employees. 29 U.S.C. § 157. Labor organizations regularly push employers to adopt new safety rules and have done so for the entire history of their existence. Indeed, protecting workers' physical safety has always been one of the primary purposes of labor organizations. Thanks to the collective bargaining process, unions and employers are able to negotiate policies that reflect the concerns of their employees and that are well adapted to the unique features of each workplace.

Employee voice in the process of creating collectively bargained safety rules is a critical ingredient to ensure effective protection. Although *amici*'s members support the goal of promoting workplace safety, many of them are troubled by the difficult choice presented by OSHA's ETS—vaccinate, pay for weekly testing, or lose your job. Had the administration provided time for labor organizations and employers to work together to develop workplace-specific policies, it would likely have been possible to tailor those policies in a manner that would have ensured more widespread employee support, thus improving safety outcomes.

For example, many of *amici*'s members work for utility companies and perform work mostly outdoors. While the ETS contains an exemption for those who work "exclusively" outdoors (29 C.F.R. § 1910.501 (b)(3)(iii)), it appears that these members will not be entitled to the benefit of that exemption because they perform at least some work indoors. This is so despite OSHA's recognition that it is "unable to

establish a grave danger in outdoor settings from exposure during normal work activities." 86 Fed. Reg. at 61,419.

Given the minimal time that *amici*'s members spend indoors, it would almost certainly have been possible for *amici* and the employers to meet and discuss possibilities for ensuring worker safety, short of an across-the-board mandate, that are tailored to the particular working conditions at each employer. The parties at the bargaining table would have benefitted from the inclusion of those workers' practical experience over the last two years. Instead, OSHA has enacted a one-size-fits-all rule that has effectively preempted unions and employers from developing creative and effective solutions to diverse problems.

## III. The Rapidly Changing Nature of the Pandemic Counsels Against an Inflexible ETS

When the ETS was issued in early November, the prevalence of COVID-19 appeared to be abating, ostensibly due to the national vaccination effort. Since then, infection numbers have skyrocketed, and we are now dealing with the rise of the Omicron variant. The correlation between vaccination rates and these fluctuations/variant-induced surges seems to be less clear by the day.

Not only has the virus itself has changed, our understanding of the available vaccines has changed as well. When the ETS was issued, Americans understood that all three commercially available vaccines (Pfizer, Moderna, and Johnson & Johnson) were effective. But by mid-December, the CDC reversed course and "express[ed] a clinical preference for individuals to receive a [Pfizer or Moderna] COVID-19 vaccine over Johnson & Johnson's COVID-19 vaccine." CDC, Media Statement, *CDC*

*Endorses ACIP's Updated COVID-19 Vaccine Recommendations* (Dec. 16, 2021), https://www.cdc.gov/media/releases/2021/s1216-covid-19-vaccines.html. Yet OSHA did not account for any meaningful difference in effectiveness between the vaccines in issuing the ETS. *See* 86 Fed. Reg. at 61,417-20.

In sum, the ever-changing nature of COVID-19 weighs against an ETS that requires an irreversible action to prevent a temporary threat. None of the hazards that OSHA is familiar with and adept at regulating, are subject to as much change and uncertainty. To be sure, this counsels against allowing the one-size-fits-all ETS to remain in effect pending certiorari review.

## CONCLUSION

*Amici* respectfully request that the Court grant the emergency applications for a stay pending certiorari review. While *amici* acknowledge the noble workplace-safety goals of the ETS, if it is allowed to remain in effect, many workers will lose their jobs or feel compelled to receive a vaccination they do not desire to receive.

Respectfully submitted,

Brian J. LaClair*
**Counsel of record*
BLITMAN & KING LLP
Franklin Center, Suite 300
443 N. Franklin Street
Syracuse, NY 13204
(315) 422-7111
bjlaclair@bklawyers.com

*Counsel for Amici Local Unions 1249 and 97 of the IBEW*