

No. 21A249

In the Supreme Court of the United States

The Heritage Foundation,

Applicant,

v.

Douglas Parker, Assistant Secretary of Labor for Occupational Safety and Health; Occupational Safety and Health Administration; Martin J. Walsh, Secretary of Labor; and United States Department of Labor,

Respondents.

**Heritage Foundation's Reply In Support of Application for Stay
and Petition for a Writ of Certiorari Before Judgment**

Jay Alan Sekulow

Counsel of Record

Jordan A. Sekulow

Andrew J. Ekonomou

Abigail A. Southerland

Laura B. Hernandez

Miles Terry

Harry Hutchison

Christina A. Stierhoff

AMERICAN CENTER FOR LAW & JUSTICE

201 Maryland Avenue, NE

Washington, DC 20002

Tel. (202) 546-8890

sekulow@aclj.org

Edward L. White III

Erik M. Zimmerman

AMERICAN CENTER FOR LAW & JUSTICE

3001 Plymouth Road, Suite 203

Ann Arbor, MI 48105

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INTRODUCTION

The President recently conceded that “there is no federal solution” to the pandemic; rather, the problem should be “solved at the State level.”¹ Nonetheless, the government incorrectly asserts a wide-ranging power to impose a vaccine mandate upon millions of Americans. No branch of the federal government, much less a federal agency, has ever attempted to impose a vaccine mandate. *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *55 (6th Cir. Dec. 15, 2021) (Bush, J., dissenting).

No doubt, if the vaccine mandate is upheld, OSHA will assert an expansive power to address whatever health and safety challenges it desires, including

safety challenges of today (air pollution, violent crime, obesity, a virulent flu, all manner of communicable diseases) or tomorrow (the impact of using the internet on mental health) . . . simply because most Americans who face such endemic risks also have jobs and simply because they face those same risks on the clock.

Id. at *25 (Sutton, J., dissenting). OSHA clearly lacks any such authority.

ARGUMENT

I. Applicants Have Established a Likelihood of Success on the Merits.

A. OSHA’s Vaccine Mandate is an Unlawful Exercise of Statutory Authority.

The OSH Act only gives the Secretary power to address *occupational* health and safety risks. It does not give “the Secretary power to regulate all health risks and all new health hazards, largely through off-site medical procedures, so long as the

¹Tim Hains, *President Biden Tells Governors: ‘There is No Federal Solution’ to Covid*, RealClear Politics, Dec. 27, 2021, available at <https://www.usatoday.com/story/opinion/2021/12/28/covid-biden-no-federal-solution-states-control-pandemic/9034179002/>.

individual goes to work and *may* face the hazard in the course of the workday.” *Id.* at *8.

The government’s attempt to portray the mandate as providing employers flexibility and significant discretion for how they comply is not convincing. The mandate actually “*requires* employers to implement a mandatory vaccination policy *unless* they adopt a policy in which employees may either be fully vaccinated or regularly tested for COVID-19 and wear a face covering in most situations when they work near other individuals.” 86 Fed. Reg. 61,437 (emphasis added). There is no “may” or “can” in this directive. OSHA’s intent is clearly for the regulation to “operate much more like a vaccine mandate than a vaccine option.” *In re: MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *39 (Sutton, J., dissenting) (citing the Secretary’s stated objective and projections that “the strongly encourage[d]’ vaccination option would lead an additional 22.7 million workers to get vaccinated, increasing the vaccination rate in the covered workforce from 62% to 89%. 86 Fed. Reg. at 61,433, 61,472.”).

OSHA’s select citation of definitions from the Merriam Webster dictionary to support its newfound authority is unpersuasive. OSHA’s reliance upon the definition of “agent,” which is defined as “a chemically, physically, or biologically active principle,” alone, is insufficient to suggest that OSHA has authority to regulate a virus, thus it purports that the definition of “virus” coupled with the definition of “agent” grants it the asserted authority. *See Gov’t Resp.*, at 19 (noting that the Merriam-Webster dictionary defines “virus” as a “causative agent of an infectious disease.”). The full definition of “virus” is as follows: “any of a large group of

submicroscopic infectious agents that are usually regarded as nonliving extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, animals, and plants.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/virus> (last visited Dec. 5, 2021). The Merriam-Webster dictionary defines “toxin” as a “poisonous substance.” MERRIAM-WEBSTER, <https://merriamwebster.com/dictionary/toxin> (last visited Dec. 5, 2021).

Likewise, OSHA’s self-serving definition of “hazard” as a “source of danger” fails to make the leap OSHA attempts here,² especially where, as here, all prior OSHA regulations indicate a limited definition confined to the regulation of drugs, chemicals, and gases. *See* 29 C.F.R. § 1910 Subpart H; § 1910.101-111 (identifying as hazards various “materials” such as compressed gases, acetylene, hydrogen, flammable liquids, spray finishing, explosive and blasting agents).

Finally, OSHA’s attempts to liken the vaccine mandate to its prior regulations are unpersuasive. All nine of OSHA’s prior emergency temporary standards reflected the understanding that its authority is limited to “exposures solely because of, not in spite of or in addition to, the workplace.” *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *29 (Sutton, J., dissenting). Further, permanent standards issued by OSHA to address hazards that may occur both inside and outside the workplace contain

² Other definitions of “hazard” indicate that the danger must be “unavoidable.” See DICTIONARY.COM, <https://dictionary.com/browse/hazard> (last visited Jan. 2, 2022).

definitive limits. *See* 86 Fed. Reg. 61,407. For example, with regard to OSHA’s regulation of bloodborne pathogens, an employer’s obligation of compliance is triggered by a specific, identifiable event of occupational exposure defined as an “exposure incident,” *i.e.* “a specific eye, mouth, other mucous membrane, non-intact skin, or parenteral contact with blood or other potentially infectious materials that results from the performance of an employee’s duties.” 29 C.F.R. § 1910.1030(b). Likewise, employers must provide protection against the effects of noise exposure only where the noise exceeds specified levels. 29 C.F.R. § 1910.95.

In sum, when, as here, potential exposure to a particular harm exists both inside and outside the workplace, there are important limits to OSHA’s regulatory power: certainty of exposure, and identification of specific levels exceeding those typically encountered outside the workplace. The mandate exceeds these limits.

B. OSHA’s Assertion of Grave Danger and Necessity is Severely Undermined by the Actual Standards Promulgated and Reasoning Provided in the Mandate.

The concessions made by the Secretary that (1) the main objective is to strongly encourage vaccination, *see* 86 Fed. Reg. 61,402, 61,614, 61,435-37, and (2) vaccinated workers do not face grave risk, *id.* at 61,434, “make it exceedingly difficult to maintain under any standard of review” that the mandate is necessary to address a grave danger. *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *33 (Sutton, J., dissenting). Further review of other provisions in the mandate foreclose any remaining possibility for OSHA to meet its burden.

For one, the mandate – in unprecedented fashion – penalizes and puts the burden to limit the grave danger squarely on the very employees OSHA purports it must protect. In the past, OSHA has sought to “remove barriers to employee participation” to further its interest in preventing hazards and maintaining workplace safety. *Id.* at *28 (citing 86 Fed. Reg. at 61,407). “In general, OSHA requires employers to compensate employees for protective gear and tests needed for work safety” unless those costs are not “specific to the workplace, say sunscreen or steel-reinforced boots.” *Id.* at *27 (citing 29 C.F.R. §§ 1910.132(h)-(h)(2), (4)(iii)). That is not the case here. For example, the government pays for the vaccine, but it saddles employees with the cost of weekly testing. 86 Fed. Reg. 61,434. In addition, “[e]mployers must provide time off for employees to get vaccinated and to recover from any side effects, *id.* at 61,457, while the rule does not require them to do so for employees who must undergo weekly tests, even if that requires considerable travel in rural areas, *see id.* at 61,484.” *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *19-20 (Sutton, J., dissenting). Employees are also responsible for purchasing their safety gear: masks. *Id.* In sum, OSHA has itself erected barriers to compliance, rather than removing them.

Additionally, OSHA’s selective application of testing and mask requirements to only unvaccinated workers also clashes with OSHA’s assertion of grave danger and necessity. OSHA asserts that testing and masks are only necessary for unvaccinated workers because an “unvaccinated worker” *could* expose others at the workplace if the worker becomes infected in between weekly tests and is not wearing a face

covering. Gov't Resp. at 32. The same possibility exists, however, for asymptomatic or pre-symptomatic vaccinated workers because vaccination does not *eliminate*, the possibility of contracting the virus.

To illustrate, many outbreaks of the virus have occurred in nearly fully vaccinated populations or settings, such as on sports teams and cruise ships. Despite a 94.1% vaccination rate for all players in the NFL and nearly a 100% vaccination rate for all NFL personnel,³ the league continues to experience significant outbreaks of COVID-19.⁴ Similarly, fully vaccinated cruise ships have continued to experience outbreaks among passengers and crew.⁵ The CDC recently issued a new warning for cruise ship travelers urging that “even fully vaccinated travelers may be at risk for getting and spreading COVID19 variants,” and, thus, everyone should “avoid cruise travel, regardless of vaccination status.”⁶

³ National Football League, *NFL COVID-19 Testing Results and Vaccination Rates: Oct. 3-Oct. 16, 2021*, <https://www.nfl.com/playerhealthandsafety/resources/press-releases/nfl-covid-19-testing-results-and-vaccination-rates-oct-3-oct-16-2021> (last visited Dec. 31, 2021).

⁴ Al Lindsey, *NFL COVID-19 tracker: Updated Team-by-team List of Players in Protocol for Week 17* (Dec. 27, 2021), <https://blackchronicle.com/nfl-covid-19-tracker-updated-team-by-team-list-of-players-in-protocol-for-week-17/> (a few weeks ago, the NFL reported that more than 200 of its players were on the COVID reserve list, with 96 positive tests occurring in a single day).

⁵ Mark Lungariello, *Passengers Test Positive for COVID on Fully-Vaxxed Royal Caribbean Cruise*, NY POST (June 10, 2021) <https://nypost.com/2021/06/10/passengers-test-positive-for-covid-on-fully-vaxxed-ship/> (reporting two different incidences involving outbreaks on cruise ships with a nearly fully vaccinated population).

⁶CDC, *COVID-19 and Cruise Ship Travel*, <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-cruise-ship> (last visited Dec. 31, 2021) (noting that “the chance of getting COVID-19 on cruise ships is very high, *even if you are fully vaccinated*” and recommending that all passengers should wear masks regardless of vaccination status).

In addition, although OSHA includes all working age Americans in a single category when citing potential threats of severe illness or hospitalization, *see* Gov't Resp. at 25; 86 Fed. Reg. at 61,410, the majority of the working population – ages 18-49 – faces “healthcare risks . . . at roughly the same level as the Secretary’s own assessment of what is *not* a grave risk.” *In re: MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *34 (Sutton, J., dissenting) (citing 86 Fed. Reg. at 61,434; Ctr. For Disease Control, *Rates of COVID-19 Cases and Deaths by Vaccination Status*, <https://covidcdc.gov/covid-data/tracker/#rates-by-vaccine-status> (last visited Jan. 1, 2022)) (emphasis added).⁷ Numerous less draconian measures (*e.g.*, mask requirements, proper ventilation, physical distancing) are available to mitigate any potential risk of spread of the virus at workplaces.

Finally, aside from a summary dismissal, the agency fails to adequately address the merits of the claim that the vaccine mandate is overly broad and less intrusive measures would achieve the same goal. OSHA readily acknowledges that “distancing, barriers, ventilation and sanitation” are all “workplace controls against SARS-CoV-2 transmission.” 86 Fed. Reg. 61,404. And Section 655(g) provides that the Secretary must “give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.” 29 U.S.C. § 655(g). Nonetheless, the

⁷ *In re: MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *37 (Sutton, J., dissenting) (noting further that “it is not working men and women in the main who face the most serious risks. It is older men and women, most of whom are retired and who no longer are subject to the Secretary’s oversight. The key risks to individuals who do work and who remain unvaccinated are to them, not to their vaccinated colleagues.”).

path chosen by OSHA is a nationwide vaccine mandate that applies to all employers with 100 employees. In determining the number of employees, employers must include all employees across all of their U.S. locations. Part-time employees count towards the company total, but independent contractors do not. 86 Fed. Reg. 61,513. As OSHA acknowledges, “[i]f an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.” *Id.* at 61,514.

OSHA simply cannot demonstrate with substantial evidence that “the many less intrusive options available to the Secretary” are insufficient. *In re: MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *34 (Sutton, J., dissenting) (noting that “the record does not show that full vaccination or weekly testing [only for unvaccinated] is necessary on top of a tailored mask mandate”).

C. The Government’s Major Questions Doctrine Argument is Unavailing.

OSHA asserts that the “major questions” doctrine is inapplicable because Congress clearly granted OSHA authority to enact the vaccine mandate. Gov’t Resp. at 55-57. Congress did no such thing. OSHA’s attempt to cobble together miscellaneous statutory provisions to form such a clear statement is meritless.

When a proposed interpretation by a regulatory agency involves a “question of deep ‘economic and political significance’ that is central to [a] statutory scheme,” the courts must not accord deference to the agency’s proposed interpretation. *King v. Burwell*, 576 U.S. 473, 486 (2015). Not only must deference be withheld, but judicial skepticism is appropriate when an “agency claims to discover in a long-extant statute

an unheralded power to regulate ‘a significant portion of the American economy.’” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014).

“Congress may not divest itself of its legislative power by transferring that power to an executive agency.” *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). Congress must therefore speak clearly if it intends “to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regulatory Grp.*, 573 U.S. at 324. OSHA’s vaccine mandate is an extraordinary claim of power with vast economic and political significance. “No matter the policy benefits of a well-intended regulation, a court may not enforce it if the agency’s reach exceeds a statute’s grasp.” *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *12 (Sutton, J., dissenting). OSHA, just like the CDC, is barred from acting “unlawfully even in pursuit of desirable ends.” *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

OSHA attempts to leverage 29 U.S.C. § 669(a)(5) to support its claim that Congress granted OSHA authority to establish vaccine policy for two thirds of the nation’s workplaces. Gov’t Resp. at 56. Section 669(a)(5) is a far cry from a “clear statement” that Congress intended OSHA to have the power to establish vaccine policy for the nation’s workforce. *Util. Air Regulatory Grp.*, 573 U.S. at 324. Section 669(a) governs the Secretary of HHS, requiring him to assist OSHA in developing information through medical research. The Secretary of Labor has only a consultative role on such research. 29 U.S.C. § 669(a)(1). Nothing in Section 669(a)(5) can be

construed as clear authorization for OSHA to establish a vaccination policy for the nation's workforce.

OSHA similarly asserts that Congress's appropriation of funds to the agency for "COVID-19 related worker protection activities," including "not less than" \$5 million "for enforcement activities related to COVID-19 at high-risk workplaces," qualifies as a clear grant of authority to impose a vaccine mandate. Gov't Resp. at 56 (citing American Rescue Plan Act of 2021, § 2101(b)(1), 135 Stat. 30). The appropriation contains no language expanding OSHA's authority, and it certainly conferred no broad power to set vaccine policy for the nation's workforce. This is unsurprising because Congress itself does not possess such power.

D. The Vaccine Mandate Violates the Commerce Clause and the Tenth Amendment.

OSHA claims it is regulating *employers*, but in reality it is regulating *individual employees* by requiring them to get vaccinated, to be tested weekly, or to wear masks. 86 Fed. Reg. 61,402-61,403; Gov't Resp. at 65. "Congress likely has no authority under the Commerce Clause to impose, much less to delegate the imposition of, a *de facto* national vaccine mandate upon the American public." *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024 at *56, *61 (Bush, J., dissenting). The cases in which this Court has upheld an assertion of Commerce Clause authority, in light of the regulated activity's substantial effect on interstate commerce, involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *United States v. Morrison*, 529 U.S. 598, 610-11 (2000). Despite OSHA's arguments to the contrary, the ETS regulates none of those. Rather,

it regulates an individual's *non-economic inactivity*: merely existing as an unvaccinated person. *See BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33698, at *21 (5th Cir. Dec. 12, 2021).

Clearly, if “Congress cannot solve [via the Commerce Clause] a perceived commercial problem with a ‘mandatory purchase’ [of health insurance through the Affordable Care Act], then how can it possess the authority, much less delegate it, to solve a perceived commercial problem by mandating that Americans engage in a *non-commercial* activity? The answer, of course, is that it likely cannot.” *Id.* at *64. The Constitution’s creation of a system of dual sovereignty is based upon the premise that “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The States possess a broad police power, not the Federal Government, and certainly not OSHA. *See Bond v. United States*, 572 U.S. 844, 854 (2014). Indeed, “in the specific context of compulsory vaccination, [the Supreme] Court has twice confirmed that the propriety of such mandates is a matter vested to the police power of the states.” *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *59-60 (Bush, J., dissenting). OSHA, like Congress, lacks that specific power. The vaccine mandate is unconstitutional.

II. The Balance of Equities Warrants the Stay.

The government’s summary dismissal of the assertion that irreparable harm can and does result from constitutional violations is problematic. There is no more compelling reason for issuing a stay than when, as here, a regulation violates

constitutional principles and “undermine[s] . . . American vertical and horizontal separation of powers, the true mettle of the U.S. Constitution, the true long-term guardian of liberty.” *Id.* at *12 (Sutton, J., dissenting). Contrary to OSHA’s claim, a deprivation of constitutional rights – not just First Amendment rights – constitutes irreparable injury to justify injunctive relief. *E.g., Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (“[T]he denial of a constitutional right constitutes irreparable harm for the purposes of equitable jurisdiction.”).

Moreover, the government ignores legal precedent establishing that “compl[iance] with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” *BST Holdings LLC*, 2021 U.S. App. LEXIS 33698, at *24 (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment))).

The serious irreversible harms the vaccine mandate will pose to employees is not an improper consideration by this Court in balancing the equities where, as here, the government purports to represent employees’ interests. Gov’t Resp. at 81 (suggesting applicants, including The Heritage Foundation, “improperly attempt to assert harms to third parties”). Indeed, the Secretary of Labor asserts that “the main risk of staying the rule is to unvaccinated American workers.” *In re MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *52 (Sutton, J., dissenting). The government’s asserted interest is in direct conflict with that of unvaccinated employees and ignores the other harms to them. “A reluctant or coerced vaccination cannot be undone if the

Secretary changes course during the notice-and-comment process or if the proposed rule exceeds the Secretary's authority." *Id.* at *7-8; *see also id.* at *22 ("A vaccine injection is not temporary.").

Additionally, for any employees who resist the government's coercion, the costs are hardly speculative. Millions of unvaccinated workers with modest incomes will be required to pay a minimum of \$10-15 per test each week.⁸ OSHA's attempt to "encourage" vaccination has "crossed the line distinguishing encouragement from coercion." *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 580 (significant financial costs imposed on states that do not accept Medicaid expansion are a "gun to the head").

OSHA's asserted injuries are inconsistent and inconclusive; the applicants' injuries are not. Any asserted injury by the government is far outweighed by the injuries resulting from the government's unprecedented power grab coupled with the long-term and irreversible effects and injuries resulting from the ETS.

III. In the Alternative, This Court Should Grant Certiorari Before Judgment and Grant a Stay Pending the Resolution of This Petition.

OSHA questions whether this Court would have jurisdiction to grant Heritage's petition for a writ of certiorari before judgment. Gov't Resp. at 85-86. OSHA ignores Supreme Court Rule 11, which allows this Court to grant certiorari to review a case pending in an appellate court (here, the Sixth Circuit) before that court

⁸ Hannah Norman, *Why do Covid Rapid Tests Cost So Much even after Biden's Push for Lower Prices?*, NBC NEWS (Sept. 12, 2021), <https://www.nbcnews.com/health/health-news/why-do-covid-rapid-tests-cost-so-much-even-after-n1278934>.

enters judgment if the matter is “of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” The current case clearly meets these criteria. This Court should grant Heritage’s petition and stay the implementation of the vaccine mandate pending resolution of the petition.

CONCLUSION

This Court should stay the vaccine mandate pending review, grant certiorari before judgment, or both.

January 3, 2022

Respectfully Submitted,

By: /s/ Jay Alan Sekulow

Jay Alan Sekulow

Counsel of Record

Jordan A. Sekulow

Andrew J. Ekonomou

Abigail A. Southerland

Laura B. Hernandez

Miles Terry

Harry Hutchison

Christina A. Stierhoff

AMERICAN CENTER FOR LAW &
JUSTICE

201 Maryland Avenue, NE

Washington, DC 20002

Tel. (202) 546-8890

sekulow@aclj.org

Edward L. White III

Erik M. Zimmerman

AMERICAN CENTER FOR LAW &
JUSTICE

3001 Plymouth Road, Suite 203

Ann Arbor, MI 48105

Counsel for Applicant

The Heritage Foundation

CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

Elizabeth B. Prelogar
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave NW, Room 5616
Washington, DC 20530-0001
SupremeCtBriefs@USDOJ.gov

Edmund C. Baird
Associate Solicitor of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-4004
Washington, DC 20210
zzSOL-Covid19-ETS@dol.gov

/s/ Jay Alan Sekulow
Jay Alan Sekulow