Nos. 21-7000 (lead), 21-4027/4028/4031/4032/4033, 21-4080, 21-4091/4090, 21-4093/4088/4101/4096, 21-4097/4102/4083

MCL No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 4, 2021

PETITION FOR INITIAL *EN BANC* REVIEW FILED BY ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA AND WYOMING

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS
Solicitor General
MAY DAVIS
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
Phone: (614) 466-8980
bflowers@OhioAGO.gov

Counsel for the State of Ohio

DANIEL CAMERON
Attorney General of Kentucky

VICTOR B. MADDOX
CHRISTOPHER L. THACKER
ALEXANDER Y. MAGERA
JEREMY J. SYLVESTER
LINDSEY R. KEISER
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Victor.Maddox@ky.gov

Counsel for the Commonwealth of Kentucky

HERBERT H. SLATERY III
Attorney General of Tennessee

CLARK L. HILDABRAND
BRANDON J. SMITH
Office of the Attorney General
and Reporter
P.O. Box. 20207
Nashville, Tennessee 37202-0207
Phone: (615) 532-4081
clark.hildabrand@ag.tn.gov

Counsel for the State of Tennessee

LAWRENCE G. WASDEN
Attorney General of Idaho

BRIAN KANE
Chief Deputy Attorney General
LESLIE M. HAYES
MEGAN A. LARRONDO
Deputy Attorneys General
700 W. Jefferson Street, Ste. 210
P.O. Box 83720
Boise, Idaho 83720-0010
Phone: (208) 334-2400
brian.kane@ag.idaho.gov

Counsel for the State of Idaho

DEREK SCHMIDT
Attorney General of Kansas

JEFFREY A. CHANAY
Chief Deputy Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
jeff.chanay@ag.ks.gov

Counsel for the State of Kansas

JOHN M. O'CONNOR
Attorney General of Oklahoma

MITHUN MANSINGHANI
Solicitor General
313 N.E. 21st St.
Oklahoma City, OK
Phone: (405) 521-3921
Mithun.Mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

PATRICK MORRISEY
Attorney General of West Virginia

LINDSAY S. SEE
Solicitor General
MICHAEL WILLIAMS *(admitted in Michigan; practicing under supervision of West Virginia attorneys)*
Office of the Attorney General
State Capitol Complex
Bldg. 1, Room E-26
Charleston, West Virginia 25305
Phone: (304) 558-2021
Lindsay.S.See@wvago.gov

Counsel for the State of
West Virginia

STEVE MARSHALL
Attorney General of Alabama

EDMUND G. LACOUR JR.
Solicitor General
THOMAS A. WILSON
Deputy Solicitor General
State of Alabama
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
Phone: (334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for the State of Alabama

TREG R. TAYLOR
Attorney General of Alaska

CHARLES E. BRASINGTON
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-6612
charles.brasington@alaska.gov

Counsel for the State of Alaska

MARK BRNOVICH
Attorney General of Arizona

DREW ENSIGN
Deputy Solicitor General
Arizona Attorney General's Office
2005 N. Central Ave.
Phoenix, AZ 85004
Phone: (602) 542-3333
Drew.ensign@azag.gov

Counsel for the State of Arizona

LYNN FITCH
Attorney General of Mississippi

WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
Deputy Solicitor General
JOHN V. COGHLAN
Deputy Solicitor General
Mississippi Attorney General's Office
P.O. Box 220
Jackson, MS 39205
Phone: (601) 359-3680
scott.stewart@ago.ms.gov

Counsel for the State of Mississippi

AUSTIN KNUDSEN
Attorney General of Montana

KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN B. CORRIGAN
Assistant Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
David.Dewhirst@mt.gov

Counsel for the State of Montana

LESLIE RUTLEDGE
Attorney General of Arkansas

NICHOLAS J. BRONNI
Solicitor General
VINCENT M. WAGNER
Deputy Solicitor General
Office of the Arkansas
Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 682-8090
Nicholas.bronni@arkansasag.gov

Counsel for the State of Arkansas

ASHLEY MOODY
Attorney General of Florida

HENRY C. WHITAKER
Solicitor General
DANIEL W. BELL
Chief Deputy Solicitor General
EVAN EZRAY
JASON H. HILBORN
Deputy Solicitors General
JAMES H. PERCIVAL
Deputy Attorney General of
Legal Policy
NATALIE P. CHRISTMAS
Assistant Attorney General of
Legal Policy
State of Florida
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
Phone: (850) 414-3300
Henry.Whitaker@myfloridalegal.com

Counsel for the State of Florida

DOUGLAS J. PETERSON
Attorney General of Nebraska

JAMES A. CAMPBELL
Solicitor General
Office of the Nebraska
Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Phone: (402) 471-2682
jim.campbell@nebraska.gov

Counsel for the State of Nebraska

JOHN M. FORMELLA
Attorney General of New Hampshire

ANTHONY J. GALDIERI
Solicitor General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
Phone: (603) 271-3658
Anthony.J.Galdieri@doj.nh.gov

Counsel for the State of New Hampshire

WAYNE STENEHJEM
Attorney General of North Dakota

MATTHEW A. SAGSVEEN
Solicitor General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Phone: (701) 328-3640
masagsve@nd.gov

Counsel for the State of North Dakota

CHRISTOPHER M. CARR
Attorney General of Georgia

STEPHEN J. PETRANY
Solicitor General
ROSS W. BERGETHON
DREW F. WALDBESER
Deputy Solicitors General
State of Georgia
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia, 30334
Phone: (404) 458-3378

Counsel for the State of Georgia

ALAN WILSON
Attorney General of South Carolina

THOMAS T. HYDRICK
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
thomashydrick@scag.gov

Counsel for the State of South Carolina

THEODORE E. ROKITA
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General
Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Phone: (317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for the State of Indiana

JASON R. RAVNSBORG
South Dakota Attorney General

DAVID M. MCVEY
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us

Counsel for the State of South Dakota

JEFFREY S. THOMPSON
Solicitor General of Iowa

SAMUEL P. LANGHOLZ
Assistant Solicitor General
Office of the Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
Phone: (515) 281-5164
jeffrey.thompson@ag.iowa.gov

Counsel for the State of Iowa

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General
JOSEPH S. ST. JOHN
Deputy Solicitor General
JOSIAH KOLLMEYER
Assistant Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
Phone: (225) 326-6766
emurrill@ag.louisiana.gov

Counsel for the State of Louisiana

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General
AARON F. REITZ
Deputy Attorney General for
Legal Strategy
JUDD E. STONE II
Solicitor General
LANORA C. PETTIT
Principal Deputy Solicitor General
WILLIAM F. COLE
RYAN S. BAASCH
Assistant Solicitors General
LEIF A. OLSON
Special Counsel
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Phone: (512) 936-1700
William.Cole@oag.texas.gov

Counsel for the State of Texas

SEAN REYES
Attorney General

MELISSA A. HOLYOAK
Solicitor General
Office of the Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Phone: (385) 271-2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

BRIDGET HILL
Attorney General of Wyoming

RYAN SCHELHAAS
Chief Deputy Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov

Counsel for the State of Wyoming

TABLE OF CONTENTS

RULE 35(B) STATEMENT AND INTRODUCTION

En banc review is appropriate in cases "involv[ing] a question of exceptional importance." Rule 35(a)(2), (b)(1)(B). This case presents just such a question: Does the "Emergency Provision," 29 U.S.C. §655(c), empower the *Occupational* Safety and Health Administration to decide on its own that tens of millions of Americans must either vaccinate themselves against, or spend significant money testing themselves for, a risk with no special relationship to *work*?

The answer will affect the personal health decisions of tens of millions of Americans, coast to coast. It will determine whether private companies—many of which are still struggling to survive the economic carnage inflicted by COVID-19—must invest resources helping the federal government run a mass-vaccination program. It will determine whether States with OSHA plans applicable to their workers must do the same. And the answer will determine whether "the concept of a government of separate and coordinate powers no longer has meaning." *Morrison v. Olson*, 487 U.S. 654, 703 (1988) (Scalia, J., dissenting). The States cannot serve as laboratories of democracy to address the pandemic's challenges if OSHA turns the entire country into one "single laboratory of experimentation." *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States & the Making of American Constitutional Law* 216 (2018). If the vaguely worded Emergency Provision really does empower OSHA to

regulate every American worker's personal healthcare decisions, and if the courts are willing to say that Congress can enact such a law, the Commerce Clause will have been transformed into "a general license to regulate an individual from cradle to grave." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) (op. of Roberts, C.J.).

Especially in light of this last concern, this case may well present one of the most extraordinarily important questions that the Court has ever faced. Most Americans, if asked to identify the constitutional provisions most important to their freedom, would likely point to the Bill of Rights. But a "bill of rights has value only if the other part of the constitution—the part that really 'constitutes' the organs of government—establishes a structure that is likely to preserve, against the ineradicable human lust for power, the liberties that the bill of rights expresses." Antonin Scalia, *In Praise of the Humdrum*, in THE ESSENTIAL SCALIA at 35 (2020). "[W]here that structure does not exist, the mere recitation of the liberties will certainly not preserve them." *Id.* If the courts uphold the administrative decree at issue here, our federalist structure will be nothing more than an "ink-and-paper guarantee." *See* Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 3 (2021).

STATEMENT

1. The Occupational Safety and Health Act was passed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b). The Act created OSHA and empowered the Secretary of Labor to standardize, through OSHA, health and safety standards in worksites across the country. The standard-setting process is deliberate and technical. As of 2012, it took on average 93 months for OSHA to develop, consider, and finalize each of its standards. U.S. Government Accountability Office, *Workplace Safety and Health*, GAO-12-330, at 8 (Apr. 2012), https://perma.cc/J4Q8-FXWW.

In extremely limited circumstances, the Secretary can issue an "emergency temporary standard" without going through this process. 29 U.S.C. §655(c). The "Emergency Provision" allows OSHA to do so only if: (1) "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) the "emergency standard is necessary to protect employees from such danger." *Id.* This is a demanding test that OSHA has rarely satisfied: before issuing the standard at issue here, it had issued only ten emergency standards; six were challenged; just one of those six survived judicial review. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, —F.4th—, 2021 WL 5279381, at *1 (5th Cir. Nov. 12, 2021).

2. On November 5, 2021, OSHA issued an emergency temporary standard entitled *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). This standard, the "Vaccine Mandate," applies to most employers with 100 or more employees. *Id.* at 61551. Kentucky, Tennessee, and every other State that administers its own State OSHA Plan must enforce the Vaccine Mandate against public employees and private businesses in their States. *Id.* at 61462, 61506.

The burdens imposed are extraordinary. Every covered employer must: "determine the vaccination status of each employee"; "require each vaccinated employee to provide acceptable proof of vaccination status"; "maintain records of each employee's vaccination status"; and "preserve acceptable proof of vaccination." *Id.* at 61552. Employers must also require employees who refuse to vaccinate to obtain an approved test once every seven days—a test that employers may require employees to pay for. *Id.* at 61530, 61532. Employers must "keep" unvaccinated employees who do not produce test results "removed from the workplace." *Id.* at 61532. And they must maintain a record of test results. *Id.* Unvaccinated employees must be required to wear masks at work, except when they are "alone in a room with floor to ceiling walls and a closed door," "[f]or a limited time … eating or drinking at the workplace or for identification purposes," "wearing a respirator or facemask," or

when "the employer can show that the use of face coverings is infeasible or creates a greater hazard." *Id.* at 61553.

Employers have until December 6 to comply with most of the standard's requirements. *Id.* at 61554. They have until January 4 to comply with weekly testing requirements for not-fully-vaccinated employees. *Id.*

ARGUMENT

The weakness of OSHA's legal position, combined with the breadth of the Vaccine Mandate's application, shows that this is a case of "exceptional importance." Fed. R. App. P. 35(a)(2).

I. The Emergency Provision did not empower OSHA to issue the Vaccine Mandate.

The Emergency Provision empowers the Secretary to issue emergency temporary standards without notice and comment in limited circumstances. It says, in relevant part:

> The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) 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 (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. §655(c)(1). This language does not empower OSHA to promulgate the Vaccine Mandate. There are at least four reasons why.

1. Because the danger presented by COVID-19 is endemic to society—because it is not a danger presented by "work or work-related activities," *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984)—exposure to COVID-19 is not the sort of risk about which the Emergency Provision speaks.

The goal of statutory interpretation is to give effect to "the ordinary public meaning of the statute's language at the time of the law's adoption." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020). Ordinary English speakers do not read words in a vacuum. To the contrary, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno v. Koray*, 515 U.S. 50, 56 (1995) (quotation omitted).

There is little doubt how ordinary members of the public would understand the phrase "grave danger from exposure to substances or agents … or from new hazards" as it appears in a sentence about risks to which "*employees* are exposed." A typical English speaker would understand the phrase as referring to dangers presented by work, as opposed to those endemic in society and human life generally. After all, a statute permitting regulations of dangers to which "employees are exposed" is most naturally read to cover dangers posed as a result of employee status—

work-related dangers, like mercury exposure in a manufacturing plant—not to dangers (like COVID-19 or violent crime or polluted air or UV sunlight) endemic to society and presented by the mere fact of existence. Consider, for example, the dangers posed by violent crime and dirty air. The former is a hazard, the latter a danger that arises from a substance or agent. Employees may well confront those risks at work. And the fact they go to work may even marginally alter the odds of being exposed to these risks on any particular day. But these risks, for most employees, do not arise from the work itself, and would not naturally be described as risks to which "employees are exposed." (The analysis might be different, of course, for those employees who face these dangers *because of* work; dirty air, for example, would be a risk to which "employees" who work with a pollution-spewing machine "are exposed.") The Emergency Provision, in short, applies only to occupational risks.

Additional context bolsters the point. The Act often refers to "substances," "agents," and "hazards," but in each case it is addressing dangers faced *because of work*. Consider, for example, the provision mandating the agency to make a report "listing … all toxic *substances in industrial usage*." 29 U.S.C. §675 (emphasis added). Along the same lines, 29 U.S.C. §669(a)(3) directs OSHA to develop "criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are *safe for various periods of employment*, including but not

limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy *as a result of his work experience*." (Emphasis added). Another provision, 29 U.S.C. §671a(c)(1)(A), requires the government to conduct studies on "the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, *transported from the workplaces* of such workers." (Emphasis added).

In the past, even OSHA recognized that its authority extends only to work-related risks. For example, OSHA has long understood the Act's use of "exposure" to include not *all* exposures, but exposures caused by work. OSHA requires employers to provide their employees and the agency access to "relevant exposure and medical records" to detect, treat, and prevent "occupational disease." 29 C.F.R. §1910.1020(a). And employers must preserve records that "monitor[] the amount of a toxic substance or harmful physical agent to which the employee is or has been exposed." *Id.* §1910.1020(e)(2)(i)(A)(1). Critically, however, exposure excludes "situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace *in any manner different from typical non-occupational situations.*" *Id.* §1910.1020(c)(8) (emphasis added).

All this accords with the judiciary's limited statements on the matter. The D.C. Circuit, for example, has recognized that when the Act speaks of "hazard[s]," it is referring to dangers that workers encounter while engaged in "work or work-related activities." *Oil, Chem. & Atomic Workers Int'l Union*, 741 F.2d at 449. Along the same lines, the Eleventh Circuit has observed that, "for coverage under the Act to be properly extended to a particular area, the conditions to be regulated must fairly be considered *working* conditions, the safety and health hazards to be remedied *occupational*, and the injuries to be avoided *work-related*." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

In light of these principles, the Vaccine Mandate cannot be upheld. For nearly all employees, the COVID-19-related risk presented by work is the same risk that arises from human interaction more broadly: one might speak or work with an infected individual, who will pass on the virus. To be sure, there may be some jobs that expose workers to a different risk: doctors who treat COVID-19 and researchers who work with SARS-CoV-2 (the virus that causes COVID-19) may well face a workplace-specific "exposure." But the Vaccine Mandate sweeps much more broadly than that. And because the vast majority of those it covers are not subject to "exposure" in the relevant sense, the Secretary cannot justify the Vaccine Mandate under his authority to regulate the dangers and hazards faced by "employees."

2. In any event, COVID-19 does not present the type of "grave" risk that the statute requires. "For starters, the Mandate itself concedes that the effects of COVID-19 may range from 'mild' to 'critical.'" *BST Holdings, L.L.C.*, 2021 WL 5279381, at *5. Indeed, the very data on which the Mandate rests shows that unvaccinated individuals age 16 or older—a group that includes elderly retirees—face a .6 percent chance of death if they contract COVID-19, and a 1.5 percent chance of being admitted to an intensive care unit. *See* Jennifer B. Griffin, et al., *SARS-CoV-2 Infections and Hospitalizations Among Persons Aged ≥16 Years, by Vaccination Status—Los Angeles County, California, May 1–July 25, 2021*, MMWR Morb Mortal Wkly Rep 2021; 70(34): 1172, https://perma.cc/4ZV3-94SA (relied upon at Vaccine Mandate, 86 Fed. Reg. at 61418). These risks are not significantly greater than the risks faced by *vaccinated* individuals who contract COVID-19; those individuals have a .2 percent chance of death and a .5 percent chance of being admitted to an intensive-care unit. *Id.* While unvaccinated workers are more likely to die or be hospitalized, a multiple of a small risk is still a small risk. OSHA, however, *concedes* that the risk faced by fully vaccinated workers is not "grave." 86 Fed. Reg. at 61434. OSHA's concession regarding vaccinated individuals thus dooms its case with respect to unvaccinated individuals.

Regardless, OSHA cannot measure the existence of a "grave" danger by focusing exclusively on the subset of workers (the unvaccinated) most at risk from COVID-19. If it could, then almost any "substance" or "agent" could pose a grave danger. Peanut butter, for example, creates immense danger for individuals with severe allergies. But surely OSHA could not justify an emergency standard regarding the workplace use of peanut butter on the ground that it creates a grave risk for this small subset of individuals. (Conversely, OSHA cannot rely on purported harms from the virus to society at large—instead, it must home in on the risk presented *in the workplace*. As many elderly individuals are at the highest risk but also retired, focus on population-wide statistics will not suffice here.)

In the end, OSHA has not found a "grave" danger. The Mandate is nothing more than a pretext for increasing the number of vaccinated Americans. The White House Chief of Staff certainly thinks so; he publicly endorsed, on Twitter, the view that OSHA's "vaxx mandate … is the ultimate work-around for the Federal govt to require vaccinations." *BST*, 2021 WL 5279381, at *4 n.13 (citation and emphasis omitted). "In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements." *Id.* at *5; *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019).

3. The overbroad Vaccine Mandate is also not "necessary." 29 U.S.C. §655(c)(1). To the contrary, the broad, one-size-fits-most mandate is unnecessary. For one thing, because vaccines are freely available to all workers who want them, the government need not mandate vaccines to make workers safe—workers can elect to take them or not, and those who do will, by OSHA's own analysis, be free from any "grave" danger. More important, the Vaccine Mandate irrationally requires the same thing of *every* covered workplace. This means that workers who are significantly spaced out whenever they are inside (in a warehouse or a barn, for example) are treated the same as employees bunched together in close, poorly ventilated quarters. *BST*, 2021 WL 5279381, at *6. And it means that individuals whose indoor work requires the use of facial coverings (some welders, perhaps) are required to either vaccinate or spend significant money on a weekly test. So broad a ukase is not "necessary" to mitigate the risk of COVID-19.

In the end, OSHA seems to repeatedly confuse necessity with efficacy. It trumpets the effectiveness of vaccines and masks, but it does little to explain why these specific measures are *required* to address the threat. Wearing a hazmat suit, for instance, might be an effective way to stem the spread of COVID-19. But no one would reasonably suggest that such a step is necessary to establish a safe workplace. The agency needs to tie the gravity of the threat to the aggressiveness of the required

measures and establish that no other less restrictive means would do the job. It has not.

4. Finally, two interpretive principles require the Court to resolve any ambiguity in the States' favor.

For one thing, statutes should be construed so as to avoid placing their constitutionality in doubt. *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012) (quotation omitted). As we explain below, the Emergency Provision is unconstitutional if it allows for the issuance of the Vaccine Mandate.

Even putting the constitutional issues aside, the major-questions doctrine would compel the States' reading. *BST*, 2021 WL 5279381, at *8; *id.* at *9 (Duncan, J., concurring). Applying this doctrine, courts require "Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted). The question whether Congress can enlist employers as the muscle behind a mandate aimed at private healthcare decisions certainly fits the bill. That is especially true in light of the unprecedented nature of this standard. *See* Congressional Research Service, *Mandatory Vaccinations: Precedent and Current Laws* 9 (May 21, 2014), https://perma.cc/B4HK-JT8J. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts]

typically greet its announcement with a measure of skepticism." *Util. Air*, 573 U.S. at 324 (quotation omitted). Because the Emergency Provision does not *unambiguously* allow for the Vaccine Mandate, it does not allow for the Mandate at all.

II. The Vaccine Mandate is unconstitutional.

If the Vaccine Mandate complies with the Emergency Provision, then the Emergency Provision violates the Constitution.

1. Consider first the Commerce Clause—the only enumerated power that even arguably empowered Congress to pass the Emergency Provision. Under that clause, Congress has the authority "[t]o regulate Commerce … among the several States." U.S. Const. art I, §8, cl. 3. While this language has been construed (too) broadly, it is supposed to have limits—two of which are particularly relevant here. First, the Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (quotation omitted). Because Congress has no police power, and because the power to regulate public health and safety is part of the police power, *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905), the Commerce Clause gives Congress no power to regulate public health and safety. Second, the Commerce Clause does not permit the regulation of private *inactivity*,

such as the decision not to purchase healthcare. *NFIB*, 567 U.S. at 557–8 (op. of Roberts, C.J.).

If the Emergency Provision authorizes the Vaccine Mandate, it runs afoul of both limits. First, the Vaccine Mandate is a regulation of public health, plain and simple; it has the purpose and effect of regulating private healthcare decisions by making life harder for citizens who refuse to care for themselves in the federally approved manner. Second, the Vaccine Mandate regulates private inactivity: those who fail to vaccinate will either be fired or forced to invest in expensive weekly testing. Indeed, OSHA has (so far) not disputed that refusing to vaccinate is inactivity of the sort Congress lacks power to regulate under the Commerce Clause. Instead, it has argued that the Vaccine Mandate *does not reach* private inactivity. According to OSHA, because the Vaccine Mandate requires *employers* to enforce its terms, the Vaccine Mandate simply "regulates the economic operations of employers that are already engaged in interstate commerce." Respondents' Opposition to Stay Motions at 31, *Bentkey Servs., LLC v. OSHA*, Nos. 21-4027, 4028, 4031, 4033, Doc. 27 (6th Cir., Nov. 15, 2021). That gloss on the Mandate's operation is creative, but wrong. The Vaccine Mandate regulates private inactivity—the decision not to vaccinate—by requiring employers to either fire or mandate the testing and masking of employees who refuse to engage in the federal government's desired activity. The fact that

OSHA enlists private companies to do the enforcing is irrelevant, because it does not change the fact that the Mandate operates on private inactivity.

Consider an analogy. Congress cannot, under the Commerce Clause, force individuals to buy health insurance. *See NFIB*, 567 U.S. at 558 (op. of Roberts, C.J.). Could it evade that rule by passing a law that forbids employers to hire or retain anyone who refused to buy health insurance at some point during the past year? Of course not. That hypothetical law, just like the requirement to buy health insurance at issue in *NFIB*, would regulate private inactivity. So does the Vaccine Mandate.

2. Now consider the nondelegation doctrine, which the Emergency Provision would violate if the Secretary's construction were correct.

"[A] statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quotation and alterations omitted). Put differently, Congress must offer "specific restrictions" that "meaningfully constrain[]" the agency's exercise of authority. *Touby v. United States*, 500 U.S. 160, 166–67 (1991). Congress cannot "confer[] authority to regulate the entire economy on the basis of" an overly vague standard, just as it cannot provide the agency "literally no guidance." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). And "[i]n applying the

nondelegation doctrine, the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (quotation omitted).

The Emergency Provision contains no intelligible principle if it is read to permit the Vaccine Mandate. On OSHA's reading, all viruses are "agents" or "substances" for purposes of the Emergency Provision, and those viruses cause a "grave" danger whenever they threaten serious health effects to even a small subset of the overall population. Read in that manner, the Emergency Provision empowers OSHA to regulate almost every remotely serious germ known to mankind. And that amounts to a limitless, and thus illegal, delegation.

CONCLUSION

The *en banc* Court should decide this case in the first instance.

November 22, 2021

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/Benjamin M. Flowers
BENJAMIN M. FLOWERS
Solicitor General
MAY DAVIS
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
Phone: (614) 466-8980
bflowers@OhioAGO.gov

Counsel for the State of Ohio

DANIEL CAMERON
Attorney General of Kentucky

VICTOR B. MADDOX
CHRISTOPHER L. THACKER
ALEXANDER Y. MAGERA
JEREMY J. SYLVESTER
LINDSEY R. KEISER
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Victor.Maddox@ky.gov

Counsel for the Commonwealth of Kentucky

HERBERT H. SLATERY III
Attorney General of Tennessee

CLARK L. HILDABRAND
BRANDON J. SMITH
Office of the Attorney General and Reporter
P.O. Box. 20207
Nashville, Tennessee 37202-0207
Phone: (615) 532-4081
clark.hildabrand@ag.tn.gov

Counsel for the State of Tennessee

JOHN M. O'CONNOR
Attorney General of Oklahoma

MITHUN MANSINGHANI
Solicitor General
313 N.E. 21st St.
Oklahoma City, OK
Phone: (405) 521-3921
Mithun.Mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

LAWRENCE G. WASDEN
Attorney General of Idaho

BRIAN KANE
Chief Deputy Attorney General
LESLIE M. HAYES
MEGAN A. LARRONDO
Deputy Attorneys General
700 W. Jefferson Street, Ste. 210
P.O. Box 83720
Boise, Idaho 83720-0010
Phone: (208) 334-2400
brian.kane@ag.idaho.gov

Counsel for the State of Idaho

PATRICK MORRISEY
Attorney General of West Virginia

LINDSAY S. SEE
Solicitor General
MICHAEL WILLIAMS *(admitted in Michigan; practicing under supervision of West Virginia attorneys)*
Office of the Attorney General
State Capitol Complex
Bldg. 1, Room E-26
Charleston, West Virginia 25305
Phone: (304) 558-2021
Lindsay.S.See@wvago.gov

Counsel for the State of West Virginia

DEREK SCHMIDT
Attorney General of Kansas

JEFFREY A. CHANAY
Chief Deputy Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
jeff.chanay@ag.ks.gov

Counsel for the State of Kansas

LYNN FITCH
Attorney General of Mississippi

WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
Deputy Solicitor General
JOHN V. COGHLAN
Deputy Solicitor General
Mississippi Attorney General's Office
P.O. Box 220
Jackson, MS 39205
Phone: (601) 359-3680
scott.stewart@ago.ms.gov

Counsel for the State of Mississippi

STEVE MARSHALL
Attorney General of Alabama

EDMUND G. LACOUR JR.
Solicitor General
THOMAS A. WILSON
Deputy Solicitor General
State of Alabama
Office of the Attorney General
501 Washington Ave.
Montgomery, AL 36130
Phone: (334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for the State of Alabama

AUSTIN KNUDSEN
Attorney General of Montana

KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN B. CORRIGAN
Assistant Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
David.Dewhirst@mt.gov

Counsel for the State of Montana

TREG R. TAYLOR
Attorney General of Alaska

CHARLES E. BRASINGTON
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-6612
charles.brasington@alaska.gov

Counsel for the State of Alaska

DOUGLAS J. PETERSON
Attorney General of Nebraska

JAMES A. CAMPBELL
Solicitor General
Office of the Nebraska
Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Phone: (402) 471-2682
jim.campbell@nebraska.gov

Counsel for the State of Nebraska

MARK BRNOVICH
Attorney General of Arizona

DREW ENSIGN
Deputy Solicitor General
Arizona Attorney General's Office
2005 N. Central Ave.
Phoenix, AZ 85004
Phone: (602) 542-3333
Drew.ensign@azag.gov

Counsel for the State of Arizona

JOHN M. FORMELLA
Attorney General of New Hampshire

ANTHONY J. GALDIERI
Solicitor General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
Phone: (603) 271-3658
Anthony.J.Galdieri@doj.nh.gov

Counsel for the State of New Hampshire

LESLIE RUTLEDGE
Attorney General of Arkansas

NICHOLAS J. BRONNI
Solicitor General
VINCENT M. WAGNER
Deputy Solicitor General
Office of the Arkansas
Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 682-8090
Nicholas.bronni@arkansasag.gov

Counsel for the State of Arkansas

WAYNE STENEHJEM
Attorney General of North Dakota

MATTHEW A. SAGSVEEN
Solicitor General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Phone: (701) 328-3640
masagsve@nd.gov

Counsel for the State of North Dakota

ALAN WILSON
Attorney General of South Carolina

THOMAS T. HYDRICK
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
thomashydrick@scag.gov

Counsel for the State of South Carolina

ASHLEY MOODY
Attorney General of Florida

HENRY C. WHITAKER
Solicitor General
DANIEL W. BELL
Chief Deputy Solicitor General
EVAN EZRAY
JASON H. HILBORN
Deputy Solicitors General
JAMES H. PERCIVAL
Deputy Attorney General of Legal Policy
NATALIE P. CHRISTMAS
Assistant Attorney General of Legal Policy
State of Florida
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
Phone: (850) 414-3300
Henry.Whitaker@myfloridalegal.com

Counsel for the State of Florida

CHRISTOPHER M. CARR
Attorney General of Georgia

STEPHEN J. PETRANY
Solicitor General
ROSS W. BERGETHON
DREW F. WALDBESER
Deputy Solicitors General
State of Georgia
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia, 30334
Phone: (404) 458-3378

Counsel for the State of Georgia

JASON R. RAVNSBORG
South Dakota Attorney General

DAVID M. MCVEY
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us

Counsel for the State of South Dakota

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General
AARON F. REITZ
Deputy Attorney General for Legal Strategy
JUDD E. STONE II
Solicitor General
LANORA C. PETTIT
Principal Deputy Solicitor General
WILLIAM F. COLE
RYAN S. BAASCH
Assistant Solicitors General
LEIF A. OLSON
Special Counsel
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Phone: (512) 936-1700
William.Cole@oag.texas.gov

Counsel for the State of Texas

THEODORE E. ROKITA
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General
Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Phone: (317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for the State of Indiana

JEFFREY S. THOMPSON
Solicitor General of Iowa

SAMUEL P. LANGHOLZ
Assistant Solicitor General
Office of the Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
Phone: (515) 281-5164
jeffrey.thompson@ag.iowa.gov

Counsel for the State of Iowa

SEAN REYES
Attorney General

MELISSA A. HOLYOAK
Solicitor General
Office of the Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Phone: (385) 271-2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

BRIDGET HILL
Attorney General of Wyoming

RYAN SCHELHAAS
Chief Deputy Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov

Counsel for the State of Wyoming

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General
JOSEPH S. ST. JOHN
Deputy Solicitor General
JOSIAH KOLLMEYER
Assistant Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
Phone: (225) 326-6766
emurrill@ag.louisiana.gov

Counsel for the State of Louisiana

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this petition complies with the type-volume requirements and contains 3,788 words. *See* Fed. R. App. P. 35(b)(2)(A).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, the foregoing petition was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
Benjamin M. Flowers