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MCP No. 165

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In the United States Court of Appeals  
for the Sixth Circuit

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In re: OSHA Rule on COVID-19 Vaccination  
and Testing, 86 Fed Reg. 61402

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On Petitions for Review

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**Amicus Brief of  
Texans for Responsible Government,  
Speaker of the House Dade Phelan and  
83 Members of the Texas House of Representatives in  
Opposition to Respondents' Emergency Motion to Dissolve Stay**

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## Table of Contents

Table of Contents.....	i
Table of Authorities.....	ii
Interest of <i>Amici Curiae</i> .....	iii
Summary of the Argument .....	1
Argument .....	3
I. The vaccine mandate exceeds the President’s statutory power.....	3
II. The vaccine mandate violates the Constitution’s Commerce Clause.....	5
III. The vaccine mandate violates the Constitution’s nondelegation doctrine. ....	6
Conclusion .....	7
Certificate of Compliance.....	8
Certificate of Service .....	8

## Table of Authorities

### Cases

<i>Ala Ass’n of Realtors v. HHS</i> , 141 S. Ct. 2485 (2021) .....	7
<i>BST Holdings, L.L.C. v. OSHA</i> , 17 F.4th 604 (5th Cir. 2021).....	3
<i>Fla. Peach Growers Ass’n v. Dep’t of Labor</i> , 489 F.2d 120 (5th Cir. 1974).....	4
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019) .....	6
<i>Indus. Union Dep’t, AFL-CIO v. API</i> , 448 U.S. 607 (1980) .....	4, 6
<i>Int’l Union v. OSHA</i> , 938 F.2d 1310 (D.C. Cir. 1991).....	4
<i>NFIB v. Sebelius</i> , 567 U.S. 519 (2012) .....	5, 6
<i>Util. Air Regulatory Group v. E.P.A.</i> , 573 U.S. 302 (2014) .....	4, 5

### Statutes

29 U.S.C. § 655.....	3, 6, 7
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### Other Authorities

Dep’t of Labor’s Response to Emergency Pet. for a Writ of Mandamus, <i>In re Am. Fed’n of Labor &amp; Cong. of Indus. Orgs.</i> , No. 20-1158 (D.C. Cir. May 29, 2020). .....	4
Toxic, Black’s Law Dictionary (11th ed. 2019).....	4

## Interest of *Amici Curiae*<sup>1</sup>

Texans for Responsible Government is a political action committee headquartered in Austin, Texas. Speaker of the House Dade Phelan and the following additional *amici* are members of the Texas House of Representatives representing 84 diverse districts across the State of Texas:

Representative Steve Allison	Representative Ryan Guillen
Representative Charles “Doc” Anderson	Representative James Frank
Representative Trent Ashby	Representative John Frullo
Representative Ernest Bailes	Representative Sam Harless
Representative Cecil Bell	Representative Cody Harris
Representative Keith Bell	Representative Brian Harrison
Representative Greg Bonnen	Representative Cole Hefner
Representative Brad Buckley	Representative Justin Holland
Representative DeWayne Burns	Representative Dan Huberty
Representative Dustin Burrows	Representative Lacey Hull
Representative Angie Chen Button	Representative Todd Hunter
Representative Briscoe Cain	Representative Jacey Jetton
Representative Giovanni Capriglione	Representative Kyle Kacal
Representative Jeff Cason	Representative Ken King
Representative Travis Clardy	Representative Phil King
Representative Tom Craddick	Representative Stephanie Klick
Representative David Cook	Representative Matt Krause
Representative John Cyrier	Representative John Kuempel
Representative Drew Darby	Representative Stan Lambert
Representative Jay Dean	Representative Brooks Landgraf
Representative Gary Gates	Representative Lyle Larson
Representative Charlie Geren	Representative Jeff Leach
Representative Craig Goldman	

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<sup>1</sup> This brief is being filed for the reasons set forth in the accompanying motion for leave. *See* Fed. R. App. P. 29. *Amici* certify that no party’s counsel authored this brief in whole or in part, that no party or party’s counsel contributed money intended to fund this brief, and that no one other than certain *amici* contributed money intended to fund this brief.

Representative Ben Leman  
Representative J.M. Lozano  
Representative John Lujan  
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Representative Morgan Meyer  
Representative Mayes Middleton  
Representative Geanie Morrison  
Representative Jim Murphy  
Representative Andrew Murr  
Representative Candy Noble  
Representative Tom Oliverson  
Representative Chris Paddie  
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Representative David Spiller  
Representative Phil Stephenson  
Representative Lynn Stucky  
Representative Valoree Swanson  
Representative Tony Tinderholt  
Representative Ed Thompson  
Representative Steve Toth  
Representative Gary VanDeaver  
Representative Cody Vasut  
Representative Terry Wilson  
Representative James White

## Summary of the Argument

Throughout the last 18 months, COVID-19 has raised questions across this country that are both unprecedented and very familiar. Reasonable people can and have disagreed over the proper way for governments at all levels to address this 21st century pandemic and the challenges it has presented. But the Constitution has not changed, and neither have the structural protections it provides the American people.

Federal officials should never impose sweeping vaccine mandates on Americans—not directly, not indirectly, not as a term of employment, and especially not without sufficient exemptions. The American way is to have such decisions made by the citizens that understand their needs better than any federal bureaucrat ever will. The Constitution’s structural protections enshrine this for good reason. Keeping these decisions out of DC is both the right thing to do and the most effective.

In Texas, all of this is especially true for the hardworking businesses served by *amici* Texans for Responsible Government and the Texas House Representatives. They know that the heavy yoke of existing federal overregulation makes it hard enough to achieve entrepreneurial success. Now comes President Biden’s OSHA vaccine mandate, an illegal federal overreach that tramples the decisional freedom Texans know is essential to advancing health and prosperity. The President’s vaccine mandate should be held illegal and choice returned to the people.

Nothing in the Constitution gives the President the authority—either acting alone or through a federal agency—to unilaterally mandate that certain Americans receive a vaccine as a condition of employment. For the President to do so is blatantly unconstitutional, and this Court should be clear and quick in telling him so.

Congress has not granted this authority either. OSHA’s statute covers only employee hazards that are truly borne of the workplace. It cannot possibly be read to cover a virus that can be communicated anywhere in the world. Every tool of statutory construction forecloses the strained reading President Biden is promoting.

Furthermore, even if Congress had given the President statutory authority to issue his mandate, such a law would be both an unconstitutional use of the Commerce Clause power under the U.S. Supreme Court’s rulings regarding the Affordable Care Act and an unconstitutional delegation of legislative power.

Finally, and to be clear, the point of this case is not to decide whether vaccines are good or bad. The central point is whether the President or Congress can violate the Constitution when they consider it necessary, proper, or expedient. The Constitution does not protect Americans exclusively in times of normalcy; indeed, it is in difficult times that the protections enshrined by our founding documents become most crucial. The Court has an unflagging obligation to uphold those protections when they have been disregarded by another branch of government. This case provides that opportunity, and the Court should respond accordingly.

## Argument

The stay entered by the Fifth Circuit in *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), is correct and should be maintained, and the respondents' emergency motion to dissolve the stay should be denied. The key inquiry is about the petitioners' likelihood of success on the merits, which warrants a stay because the President's vaccine mandate is illegal for at least three fundamental reasons.

### **I. The vaccine mandate exceeds the President's statutory power.**

The President's OSHA vaccine mandate exceeds multiple constitutional boundaries, but the Court need not reach those issues because of a clearer fault. OSHA is a pure creature of statute, and in the enactments at issue, Congress did not give OSHA the authority to impose President Biden's vaccine mandate.

29 U.S.C. § 655 is what supposedly authorizes OSHA's vaccine mandate. But that statute lets OSHA address only a very narrow set of issues: a workplace's "grave danger from exposure to *substances* or *agents* determined to be toxic or physically harmful or from *new hazards*." 29 U.S.C. § 655(c) (emphasis added). That power covers dangers like workplace pesticides, asbestos, and the like.<sup>2</sup> But what Section 655's limited text certainly does *not* cover is the current COVID-19 situation.

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<sup>2</sup> See *Fla. Peach Growers Ass'n v. Dep't of Labor*, 489 F.2d 120 (5th Cir. 1974); *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607 (1980).



All tools of statutory construction support this conclusion—that Section 655 does *not* cover danger from communicable diseases like COVID-19. It flows inexorably from an analysis of the terms’ ordinary meaning, *see, e.g.*, Toxic, Black’s Law Dictionary (11th ed. 2019), and the legislative history, *see Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1315 (D.C. Cir. 1991). And indeed, OSHA itself recently made the correct concession about this statute’s meaning: “The OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis without notice and comment.” Dep’t of Labor’s Response to Emergency Pet. for a Writ of Mandamus, *In re Am. Fed’n of Labor & Cong. of Indus. Orgs.*, No. 20-1158 at 33-34 (D.C. Cir. May 29, 2020). The President should now be held to that prior, correct view of the statute.

If any ambiguity remains, the major questions doctrine resolves it. “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.” *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014). Section 655 does not authorize OSHA’s vaccine mandate at all, and certainly does not do so with the clarity required for such a momentous act.

For these reasons, the Court should hold that Congress did not give OSHA the authority to impose President Biden’s vaccine mandate. On that basis alone, the Fifth Circuit’s stay should be upheld.

## II. The vaccine mandate violates the Constitution’s Commerce Clause.

Even if the statutes at issue purport to authorize the President’s OSHA vaccine mandate, the Court should nonetheless hold the mandate unlawful because Congress lacks the constitutional authority to enact such a statute. Any such law has to be rooted in an enumerated constitutional power, and OSHA says that the Commerce Clause suffices. But modern precedents defeat that notion resoundingly.

*NFIB v. Sebelius*, 567 U.S. 519 (2012), is decisive. Given that the Commerce Clause cannot warrant President Obama’s health insurance mandate, *id.* at 546-558, so too the Commerce Clause cannot warrant President Biden’s vaccine mandate. In both contexts, the government seeks to “compels individuals to *become* active . . . on the ground that their failure to do so affects interstate commerce.” *Id.* The Court’s reasons for rejecting that logic in *NFIB* apply equally here:

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.

. . .

That is not the country the Framers of our Constitution envisioned.

*Id.* Just as with President Obama’s analogous effort, “[t]he commerce power thus does not authorize the mandate” President Biden seeks to impose. *Id.*

### III. The vaccine mandate violates the Constitution’s nondelegation doctrine.

Again assuming that OSHA’s statute authorizes the President’s vaccine mandate, it cannot be sustained because such a delegation of legislative power to the executive branch is unconstitutional. Though Congress is allowed to delegate some power to the President, delegation has limits that have clearly been violated here.

“It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.” *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). Congress can delegate only the power to “implement and enforce the laws”—not the power to *make* the laws—and must dictate “intelligible principles” that keep the President in constitutional check. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

29 U.S.C. § 655 is again what supposedly authorizes the vaccine mandate. But that statute says nothing at all about vaccine mandates, and it lacks any “intelligible principle” for determining whether and how such drastic measures should be imposed.<sup>3</sup> It instead has the President make the “hard choices” that Article I says are Congress’s responsibility. It is too thin a “reed on which to rest such sweeping power.” *Ala Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

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<sup>3</sup> The statute says that the President can impose an “emergency temporary standard” if he deems it “necessary to protect employees” from a “grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” 29 U.S.C. § 655(C). But it never defines key terms like “grave danger,” and never says what makes measures “necessary.”

## Conclusion

The President's vaccine mandate exceeds OSHA's statutory power, violates the Constitution's Commerce Clause, and violates the Constitution's nondelegation doctrine. The Fifth Circuit's stay of the vaccine mandate should be maintained.

December 2, 2021

Respectfully submitted,

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### **Certificate of Compliance**

This filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b), it contains 1,900 words.

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*/s/ Chad Flores*

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Chad Flores

### **Certificate of Service**

On December 2, 2021, this filing was served through the Court's ECF system on counsel for all parties required to be served.

*/s/ Chad Flores*

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Chad Flores