No. 21-60845

In the United States Court of Appeals for the Fifth Circuit

BST HOLDINGS, LLC, ET AL.,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ET AL.,

Respondents.

Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of Petitioners

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, which requires a "supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to the persons identified by Petitioners, the following have an interest in this brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1. *amicus curiae* New Civil Liberties Alliance states that it is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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Amicus Curiae the New Civil Liberties Alliance is a nonpartisan, nonprofit organization devoted to defending civil liberties. NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy. No party opposes the filing of this brief. Petitioners affirmatively consent and the Respondents take no position. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Emergency Temporary Standard ("ETS")[1] issued by the Occupational Safety and Health Administration ("OSHA") on November 5, 2021, is an unconstitutional exercise of legislative power vested in Congress. An agency may issue regulations to resolve major questions of economic and political significance only if Congress has explicitly and specifically delegated such authority—and even then, Congress still must provide intelligible principles for the agency to follow. The breadth and invasiveness of the ETS marks it as a regulation of vast economic and political significance. There is no need to determine whether Congress supplied an intelligible principle to guide OSHA's authority to resolve such major questions because Congress never explicitly and specifically delegated such authority in the first place. As such, the ETS is the product of an unconstitutional exercise of legislative power by an executive agency, and the Court should enjoin its enforcement.

ARGUMENT

I. AN EXECUTIVE AGENCY MAY NOT WIELD LEGISLATIVE POWER VESTED IN CONGRESS

"Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001) (cleaned up). In *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), the Supreme Court

[1] Dep't of Labor, *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

unanimously and emphatically rejected a statutory scheme that empowered the President to impose "codes of fair competition" whenever he made formal findings that the industry-proposed codes would not "promote monopolies" and that the organizations proposing such codes were "truly representative" of the affected trade or industry. *Id.* at 522–23; *see also id.* at 534 ("[T]he approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.'"). The Court declared that Article I's Vesting Clause forbids Congress to "abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. In the words of the Court: "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *Id.* at 537-38.

The Supreme Court "has not overruled or even questioned its decision in the *Schechter Poultry* case" on the divestment of legislative power. Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1407 (2008). *Schechter*'s prohibition against divesting of legislative power in an executive agency is not only necessary to preserve the Constitution's separation-of-powers structure, but it also safeguards bicameralism and presentment, which ensures that the two chambers of Congress make laws that are subject to the presidential veto. Under that arrangement, lawmaking responsibilities reside in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people. But when Congress divests itself of its legislative power, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington v.*

FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). In effect, voters lose control over the laws that govern them, while elected officials no longer bear personal responsibility for laws. Instead, presidential appointees who are neither chosen by the public nor accountable to them become responsible for lawmaking.

II. THE COURT MUST BE ESPECIALLY VIGILANT IN PREVENTING OSHA FROM WIELDING LEGISLATIVE POWER

Courts since *Schechter* have generally failed to diligently enforce the prohibition against vesting of legislative power in federal agencies, to the detriment of constitutional structure and democratic accountability. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 77 (2015) (Thomas, J. concurring) ("it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition."). One stark exception to this trend is OSHA's rulemaking authority, which courts have repeatedly interpreted to prevent that agency from exercising legislative power. *See Indus Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 646 (1980) (striking down OSHA's workplace health standard in part to avoid violation of nondelegation doctrine); *Int'l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991) (remanding OSHA's safety standard to avoid "a serious nondelegation issue"). That is because the broad delegation of regulatory power in the Occupational Safety and Health Act ("the Act") invites abuse of the nondelegation doctrine. In his article, *Is OSHA Unconstitutional?,* Professor Sunstein asked readers to:

> Imagine that Congress creates a federal agency to deal with a large problem, one that involves a significant part of the national economy. Suppose that Congress instructs the agency: Do what you believe is best. Act reasonably and appropriately. Adopt the legal standard that you prefer, all things considered. Suppose, finally, that these instructions lack

> clear contextual referents, such as previous enactments or judicial understandings, on which the agency might build.

94 Va. L. Rev. at 1407 (footnote omitted). "If the nondelegation doctrine exists, as the Supreme Court proclaims, then this hypothesized statute would seem to violate it." *Id.* (footnote omitted). Yet, "the core provision of one of the nation's most important regulatory statutes—the Occupational Safety and Health Act …—is not easy to distinguish from the hypothesized [unconstitutional] statute." *Id.*

In short, the Act on its face purports to vest OSHA with virtually standardless regulatory authority over not a single industry but *every* industry. *See* 29 U.S.C. §§ 652(8), 655(b). It is thus unsurprising that, despite their insouciant approach toward the Vesting Clause, courts have stepped in repeatedly to prevent OSHA from exercising legislative power. In *American Petroleum*, the Supreme Court explicitly relied on *Schechter* to stop the Secretary of Labor from interpretating the Act to authorize any feasible workplace health standard that he deemed "reasonably necessary or appropriate to provide safe or healthful employment." 448 U.S. at 612, 646 (1980) (quoting 29 U.S.C. § 652(8)). Such unbounded power amounted to a "sweeping delegation of legislative power" that must be rejected. *Id.* at 646 (quoting *Schechter*, 295 U.S. at 539).

OSHA ran into another "serious nondelegation issue" in *International Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991), where it attempted to wield authority to promulgate any workplace safety standard it deemed "reasonably necessary or appropriate." Especially concerning was the breadth of OSHA's regulatory power: "As was true of the standard upset in *Schechter*, the scope of regulatory program is immense, encompassing all American enterprise." *Id.* "Cases upholding delegations governing a

single industry are thus inapposite" and did not cure the nondelegation problem. *Id.* (collecting cases).

To be sure, the statutory provision authoring the ETS at issue is different from provisions authorizing the non-emergency health and safety standards in *American Petroleum* and *International Union*. In particular, 29 U.S.C. § 655(c)(1) authorizes the Secretary of Labor to promulgate an emergency temporary standard "if he determines (A) that employees are exposed to grave danger … and (B) that such emergency standard is necessary to protect employees from such danger." But this provision presents the same breadth and vagueness nondelegation risks. As in *International Union*, the breadth of the ETS "encompass[es] all American enterprise," and therefore "[c]ases upholding delegations governing a single industry are inapposite." 938 F.2d at 1317. Moreover, there are no discernible bounds on the Secretary's authority regarding what is a "grave danger" in the workplace and what protective measures are "necessary." As such, without careful policing by courts, this authority is prone to becoming the type of "sweeping delegation of legislative power" held to be unconstitutional in *American Petroleum*, 448 U.S. at 646. This Court must therefore be especially vigilant in this case to interpret 29 U.S.C. § 655(c)(1) in a manner that avoids empowering OSHA to exercise legislative power in violation of the Vesting Clause. *See id.*

III. AN AGENCY EXERCISES UNCONSTITUTIONAL LEGISLATIVE POWER WHEN IT RESOLVES 'MAJOR QUESTIONS' WITHOUT EXPRESS CONGRESSIONAL AUTHORIZATION

Courts have traditionally enforced the Vesting Clause through the intelligible-principle test, which states that where Congress delegates regulatory power to an

agency, it must supply "an intelligible principle to guide the [agency]'s use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). But the Supreme Court is split regarding the precise parameters of that test. *Compare id.* at 2139. (Gorsuch, J. dissenting) ("'intelligible principle' was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details") *with id.* at 2131 (Alito, J. concurring) (recognizing the Court has in the past favored more "capacious standards" while expressing willingness "to reconsider the approach … taken for the past 84 years").

"When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines." *Id.* at 2139. (Gorsuch, J. dissenting). In particular, the Supreme Court has endorsed applying "the major question doctrine in service of the constitutional rule that Congress may not divest itself of legislative powers by transferring that power to an executive agency." *Id.* Under that doctrine, an agency lacks authority to resolve questions of deep "economic and political significance" unless Congress provides a clear statement delegating that authority. *See FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000). While sometimes framed as a question of Congressional intent, the crux is really divesting: a clear statement is needed to authorize agency resolution of "major questions" not simply to evince intent but also because such a statement would contain administrable (and thus judicially enforceable) guidelines to prevent the delegation from crossing into unconstitutional divesting of legislative power.

Justice Kavanaugh's statement respecting the denial of certiorari in *Paul v. United States*, 140 S. Ct. 342 (2019), connected the major questions and nondelegation doctrines. "In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Id.* In the latter scenario, the next inquiry is whether Congress's delegation included intelligible principles to guide the agency's discretion. *Gundy*, 139 S. Ct. at 2123. The intelligible-principle test is unnecessary where there is not explicitly delegation of authority to decide major questions in the first place.

The "major questions" doctrine is particularly useful in resolving delegation questions raised by an agency's sudden "discovery" of having been delegated new regulatory authority when authorizing statutory text has remained unchanged for decades. The Supreme Court applied this doctrine in *Utility Air Regulatory Group v. EPA*, to reject the agency's greenhouse gas emission standard as "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 573 U.S. 302, 324 (2014). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.*

IV. OSHA LACKS AUTHORITY TO ISSUE THE ETS UNDER THE 'MAJOR QUESTIONS' DOCTRINE

"Given [its] economic and political significance," Congress could not have delegated upon OSHA unbounded powers to impose a vaccine mandate without a clear statement providing discernible guidelines about how to exercise that power. *Brown & Williamson*, 529 U.S. at 147. Because no such clear statement from Congress exists, the ETS falls outside OSHA's regulatory authority. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

The ETS is unprecedently broad and invasive. It is expected to force 84 million employees nationwide[2]—over half the U.S. workforce[3]—to either take a novel vaccine against an infectious disease or forfeit their jobs. For OSHA to exercise regulatory authority over such a major policy question of great economic and political importance, Congress must have explicitly and specifically authorized it to do so. Nothing in the Act, however, suggests that OSHA has authority to issue the ETS, which stands completely outside of OSHA's expertise in work-related health and safety. Whereas OSHA's prior standards have concerned risks at workplaces because of work, the ETS

[2] Dep't of Labor Issues Emergency Temporary Standard to Protect Workers from Coronavirus, Nov. 4, 2021, available at https://www.dol.gov/newsroom/releases/osha/osha20211104 (last visited November 9, 2021).

[3] Bureau of Labor Statistics, Employment status of civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm (last modified November 5, 2021) (estimating total U.S. labor force at 161 million).

attempts to regulate a risk that has no special connection with work.[4] This is not, for instance, a requirement that employers install certain ventilation in the workplace. The ETS requires certain kinds of workers—vaccinated ones. OSHA is tasked with regulating the workplace, not discriminating between categories of workers. The President has openly admitted that the ETS has nothing to do with workplace risks. Rather, it was promulgated "to reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace."[5] In the half-century since Congress passed the Act, OSHA has tellingly never claimed authority to promulgate any type of vaccine mandate,[6] let alone a nationwide mandate that has no specific connection to workplace risks. Even federal agencies specifically tasked with combating infectious diseases have never made such an attempt. It was only when the President found his "patient is wearing thin" with unvaccinated Americans[7] that the White House discovered OSHA's regulatory

[4] The preamble to the ETS conceded that "COVID-19 is not a uniquely work-related hazard." 86 Fed. Reg. 61,407.

[5] The White House, *Path out of the Pandemic*, https://www.whitehouse.gov/covidplan/ (last visited November. 9, 2021).

[6] The only vaccination-related rule OSHA has ever promulgated, the Bloodborne Pathogens standard, required employers to *offer* Hepatitis B vaccination to workers who faced workplace exposure to bloodborne diseases. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993).

[7] Kevin Liptak & Kaitlan Collins, Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans, CNN (Sept. 9, 2021), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html (last visited November 9, 2021).

authority as the "ultimate work-around for the Federal [government] to require vaccinations."[8]

Against this backdrop, the Court must look askance at OSHA's claim to having discovered within a "long-extant statute an unheralded power to regulate a significant portion of the American economy." *Utility Air Regulatory Group*, 573 U.S. at 324. The Supreme Court recently invoked the "major questions" doctrine in the context of COVID-19 policies to lift a stay on a lower court order that had set aside the nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention ("CDC"). *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. The CDC claimed to have discovered never-before-exercised authority to impose a nationwide eviction moratorium within a decades-old public health statute that delegated power to implement measures like fumigation and pest extermination. *Id.* The Supreme Court balked and explained that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* The same logic obtains here. OSHA has likewise discovered within a decades-old statute concerning workplace health and safety the never-before-exercised "work-around" to force employees nationwide to vaccinate against an infectious disease that is not primarily transmitted in the workplace. Because Congress never explicitly and

[8] Callie Patteson, Biden Chief Apparently Admits Vaccine Mandate 'Ultimate Work-Around,' The New York Post (Sept. 10, 2021), https://nypost.com/2021/09/10/ronald-klain-retweets-vaccine-mandate-ultimate-work-around/ (last visited November 9, 2021).

specifically delegated such authority, the ETS is an unconstitutional exercise of legislative power.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' request to enjoin enforcement of the ETS.

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Respectfully submitted,

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I hereby certify that (i) the required privacy redactions have been made pursuant to CA5 R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to CA5 R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to CA5 R. 25.2.2.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this Brief contains 2,855 words, excluding the parts of the brief exempted by FRAP 32(f), and within the word limit of 6,500 under FRAP 29(a)(5). This Brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

/s/ Sheng Li

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2021, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished via email using the appellate CM/ECF system.

/s/ Sheng Li