No. 21-4031

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, et al.,

Petitioners,

v.

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

Respondents.

Brief of Amicus Curiae Michigan House of Representatives and Michigan Senate in Support of Petitioners' Emergency Motion for Stay

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan House of Representatives and the Michigan Senate together comprise the Michigan Legislature, the sole lawmaking body for the State of Michigan. Mich. Const. art IV, § 1. The Michigan Constitution charges the Legislature with "pass[ing] suitable laws for the protection and promotion of the public health." Mich. Const. art IV, § 51.

As the repository of Michigan's police powers, the Michigan Legislature has a special interest in OSHA's promulgation of emergency temporary standards under 29 U.S.C. § 655. Michigan is one of 26 States that has retained control over its occupational safety and health laws so long as its standards remain as effective as federal OSHA standards. Usually, States like Michigan (and their employers) could provide input and help shape the OSHA standards through a notice and comment process. But an emergency temporary standard like the one at issue here excludes them entirely from the process, leaving Michigan's primary policy-making branch to the whim of an unelected federal executive official.

The Michigan Legislature's is authorized to file this brief under Article IV, § 16 of Michigan's 1963 Constitution, which states that each

legislative chamber has plenary authority to "determine the rules of its proceedings." Both chambers have adopted standing rules in accord with Article IV, § 16. House Rule 7 appoints the Speaker of the House as "chief administrator." Senate Rule 1.117 appoints the Senate Majority Leader over "administration" of the Senate. The Speaker of the House and the Senate Majority Leader have each retained General Counsel for their chamber and delegated to General Counsel the power to speak for and make legal decisions on behalf of the respective chambers. The Senate General Counsel and the House General Counsel have both authorized the filing of this amicus brief, and they have retained the undersigned counsel to pursue this action.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus states that no party or party's counsel authored any portion of this brief in whole or in part. In addition, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person, other Amicus, their members, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

One man's impatience is not a nation's emergency. President Biden, frustrated with the free choices made by employers and individuals,[2] has invoked a rarely used emergency power to conscript tens of millions of Americans to follow *his* preferred policy on how best to deal with COVID-19. He's done so after months of insisting that he lacked the power and justification for taking this very action—a common against-it-before-I-was-for-it theme of the President's ill-fated policies.[3]

The Administration's COVID-19 Vaccination and Testing Emergency Temporary Standard comes almost two years into the COVID-19 public health crisis, ten months after President Biden first directed OSHA to examine the need for an ETS (which led to a draft standard that was ultimately shelved), and two months after the President declared (again) the need for an immediate emergency

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[2] *See, e.g.*, Katie Rogers and Sheryl Gay Stolberg, *Biden Mandates Vaccines for Workers, Saying, 'Our Patience Is Wearing Thin'*, N.Y. Times (Sept. 9, 2021) (quoting a speech in which President Biden declared that his administration's "patience is wearing thin" because Americans' "refusal" of the vaccine "has cost all of us").

[3] *See, e.g.*, Michael D. Shear et al., *As Democrats Seethed, White House Struggled to Contain Eviction Fallout*, N.Y. Times (Aug. 7, 2021), (describing President Biden's decision to extend the CDC's eviction moratorium after conceding it was unconstitutional).

standard. If allowed to go into effect, the Vaccination and Testing ETS will require employers with 100 or more employees and state and local governments in the 26 States with OSHA state plans to develop and enforce a mandatory policy that requires employees to be vaccinated, unless the employer elects to allow some or all employees to undergo regular COVID-19 testing and wear a face covering at work. 86 Fed. Reg. 61402 (Nov. 5, 2021).

For States, like Michigan, that have an OSHA-approved state plan, they must notify OSHA within 15 days whether they will issue a corresponding state standard and, if so, issue that standard within 30 days of publication, 86 Fed. Reg. at 61506. If a State does not, it risks OSHA decertifying its state plan, triggering complete federal control over its occupational safety and health laws. 29 C.F.R. § 1953.5(b).

The Michigan Legislature joins the Petitioner States in asking this Court to immediately stay the effectiveness of the Vaccination and Testing ETS. It is an unjustified expansion of the federal government's authority to address occupational hazards and, with that expansion, an unprecedented intrusion into the sovereign police power historically reserved to the States.

That intrusion imposes constitutionally significant burdens on the Michigan Legislature. The authority to craft public health measures is part of the States' sovereign police power, which in Michigan is committed to the Legislature. The Biden Administration's unilateral invocation of the emergency temporary standard process circumvents the federal and state governments' normal rule-making process, sidelining the Michigan Legislature and other States' policymakers from a decision that, until today, has rested exclusively with the States. These effects raise grave constitutional doubts about any construction of the authorizing statute that would allow such an unprecedented expansion of the federal government's power over the lives of everyday citizens.

For these reasons, the Michigan Legislature urges this Court to halt the Vaccination and Testing ETS before it can take effect, forever transforming the American peoples' lives, both individually and collectively.

ARGUMENT

I. Mindful of the States' sovereign interest in regulating public health and safety, Congress carefully restricted OSHA's authority to issue emergency temporary standards.

Congress enacted the Occupational Safety and Health Act to ensure, to the extent feasible, "safe and healthful" working conditions. 29 U.S.C. § 651(b). But "[f]ederal regulation of the workplace was not intended to be all encompassing[.]" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96–97 (1992). Mindful that the Act would "br[ing] the Federal Government into a field that traditionally had been occupied by the States," *id.*, Congress installed several constitutionally rooted guardrails to keep the federal government from overstepping its bounds.

First, the Act preserved the right of States to exercise exclusive control over the "development and enforcement . . . of occupational safety and health standards" through what the Act called "state plan[s]." 29 U.S.C. § 667(b). If a State chooses to enact a state plan that is "as effective" as the federal standards, that plan occupies the field of occupational safety and health law in that State. *Gade*, 505 U.S. at 99.

State plans were critical to the Act's passage. As former Assistant Secretary of Labor for OSHA, John Stender, remarked shortly after it became law, "The Act would not have passed Congress if provisions for

state plans had not been included." Occ. Safety & Health L. § 3:1 (2021 ed.), quoting Stender, *An OSHA Perspective and Prospective*, 26 Lab. L.J. 71, 73 (1975). Not only were they "more in keeping with traditional state regulation of safety and health matters," but they would be "(1) better adapted to local needs; (2) more efficient; [and] (3) more fairly enforced." *Id*. It is precisely for that reason that Michigan and dozens of other States have adopted their own state plan. *See* 29 C.F.R. § 1952.13.

Second, Congress strictly limited OSHA's ability to impose safety and health standards without input from States and other important stakeholders through the usual rule-making process. The Act authorized OSHA to promulgate rules and standards for occupational safety and health only after public notice and opportunity for comment by interested persons. 29 U.S.C. § 655(b).

Only in "certain emergency situations" did Congress authorize OSHA to bypass the Act's "panoply of due process procedures" and issue an emergency temporary standard. *Taylor Diving & Salvage Co. v. U.S. Dep't of Lab.*, 537 F.2d 819, 820 (5th Cir. 1976); *see also Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Lab.*,489 F.2d 120, 130 n.16 (5th Cir.

1974) ("Congress intended a carefully restricted use of the emergency temporary standard.").

Under § 655(c)(1), the Secretary of Labor may promulgate a six-month emergency standard if he determines that (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) "that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

Called the "most dramatic weapon in [OSHA's] arsenal," *Asbestos Info.*, 727 F.2d at 426, the emergency temporary standard provision is appreciably more stringent than what is required for a permanent standard issued after notice and comment. The standard must be "*necessary*," rather than merely "reasonably necessary or appropriate," to achieve OSHA's objective. *Cf.* 29 U.S.C. § 652(8).

A. The Vaccination and Testing ETS is not "necessary" to address *occupational* exposure to COVID-19.

The Vaccination and Testing ETS is an unlawful exercise of the authority granted by Congress because it is not *necessary* to address *occupational* exposure to COVID-19. Rather, it is part of the federal government's larger campaign to force vaccination on as many Americans

as possible. It is, in other words, a poorly disguised public health initiative.

Under § 655, emergency temporary standards must be "necessary" to protect employees from grave danger posed by a physically harmful agent or new hazard. 29 U.S.C. § 655(c). But OSHA is concerned with not just *any* physically harmful agent or new hazard. It is only concerned with those agents or hazards as they exist in the *workplace*. *See id.* § 655(b). This much is clear from the text of the Act as a whole, which establishes that Congress's purpose in enacting OSHA was "to reduce the number of occupational safety and health hazards *at their places of employment*." *Id.* § 651(b)(1) (emphasis added).

Thus, "necessity" in this context must be evaluated by whether the emergency temporary standard's chosen means are necessary or essential to address the asserted *occupational* or *workplace* danger. *See* 29 U.S.C. § 655(c)(1) (requiring that an ETS be "necessary to protect *employees* from such danger"). In other words, it must be tailored to the workplace. In this context, identifying OSHA's objective requires first identifying the physically harmful agent or new hazard to which the emergency temporary standard is addressed. That requires OSHA to

weigh other measures that could address the proposed harm and determine that such potential rules are inadequate. *See Asbestos Info. Ass'n/North Am.*, 727 F.2d at 426.

OSHA utterly failed to do that here. The clearest evidence of that is OSHA's recent Healthcare ETS, which purported to address the danger of COVID-19 where employees "are exposed to COVID–19 at a much higher frequency than the general population while providing direct care for both sick and dying COVID–19 patients during their most infectious moments." 86 Fed. Reg. 32376, 32384 (June 21, 2021). That ETS did not include a vaccine mandate, *see* 29 C.F.R. § 1910.502(m), likely because vaccination is not an occupational accoutrement that employees can don and doff as they come and go from the workplace, *cf.* 29 C.F.R. § 1910.132, but is a choice that, once made, will follow the employee in all facets of life outside the workplace. That OSHA's recent ETS did not find the need for a vaccine mandate even for healthcare workers, *who treat actively infectious COVID-19 patients*, shows that the current vaccination mandate is not tailored to address general occupational exposure to COVID-19. *See also* 29 C.F.R. § 1910.1030(f)(2)(iv) (Bloodborne Pathogen Standard allowing workers not to be vaccinated for Hepatitis B and

requiring only that they acknowledge that they were offered the shot and decline).[4]

The fact is, as OSHA concedes, COVID-19 "is not a uniquely work-related hazard." *Id.* at 61407. Indeed, OSHA acknowledges the unprecedented nature of its ETS when it observes that "[t]he majority of OSHA's previous ETSs addressed toxic substances that had been familiar to the agency for many years prior to issuance of the ETS," with the "one notable exception" being the June 21, 2021 Healthcare ETS (which also relies on COVID-19 as the workplace hazard). *Id.* at 61408.

There is a reason for that. The spread of COVID-19 is a *public health* issue. Unlike the "toxic substances that had been familiar to the agency for many years" because of their prevalence in industry, *id.*,

[4] The alternative—weekly testing done at the time and place of the employees' choosing—suffers from the opposite flaw. As an occupational measure, at best, it ensures COVID-19 cases do not go undetected in the workplace for longer than seven days. But it will not prevent the occupational spread of COVID-19 during the one- to six-day period before an employee's positive test result. It is hardly *essential* for preventing or reducing occupational COVID-19. OSHA's decision to exempt vaccinated employees from the testing regiments is similarly irrational, as OSHA admits that "[v]accination status d[oes] not appear to affect the estimated viral loads, suggesting that infected individuals who are vaccinated may be just as likely to transmit the virus." 86 Fed. Reg. at 61418–19.

COVID-19 is a communicable disease that touches every facet of American life, not solely or even primarily our workplaces. It exists to the same extent across all sectors of our social, commercial, and community life. And in that way, it is qualitatively different than any other hazard OSHA has tried to regulate.

COVID-19 is a public health matter, and the Vaccination and Testing ETS regulates it as such, trying to curb the spread of COVID-19 both in *and out* of the workplace. Take the centerpiece of the ETS: its strongly encouraged vaccination mandate, which OSHA lauds as "a vital tool to reduce the presence and severity of COVID-19 cases in the workplace, *in communities, and in the nation as a whole*." 86 Fed. Reg. at 61520 (emphasis added). OSHA's goal of increased vaccination is driven by a purported increase in "community transmission" (i.e., non-workplace transmission) of COVID-19. 86 Fed. Reg. at 61435. This increased community transmission, OSHA reasons, presents "a clear risk of the virus being introduced into and circulating in workplaces." *Id.* Stated another way, the primary target of OSHA's vaccination policy is *community transmission*; occupational exposure to COVID-19 is a side effect. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*,

141 S. Ct. 2485, 2488 (2021) (criticizing a similar "downstream connection" between the CDC's eviction moratorium and the direct targeting of disease contemplated by the authorizing statute).

That this is a *public* health, rather than an *occupational* health, measure is also evidenced by OSHA's focus on larger employers with 100 or more employees. OSHA explains that "[t]he ETS's focus on employers with more than 100 employees will also help prevent *large-scale outbreaks*." *Id.* at 61512 (emphasis added). If, as OSHA insists, COVID-19 is a *grave* occupational danger, *any* workplace outbreak should merit remedial attention. The scale of potential outbreaks only matters if OSHA is concerned with the collateral effects of such outbreaks, such as the likelihood of community transmission.

As laudable as these public-health goals are, Congress did not authorize OSHA to issue occupational standards, especially emergency temporary standards, designed to eradicate harms outside the workplace. In fact, the Labor Department *disclaimed* such authority last year in response to a labor union's attempt to force its hand on this very issue, arguing "[t]he 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). OSHA's unexplained about-face represents a drastic expansion of federal power, one that will be used as a toehold for future increases in federal authority.

In short, OSHA's vaccination and routine testing requirement is far more than what is necessary to mitigate *occupational* exposure to COVID-19. The breadth of the Vaccination and Testing ETS betrays its real purpose, which is to achieve the public health goal of vaccinating the American population. It is imperative this Court stay the effect of the ETS and make clear that the federal government cannot use workplaces as a pretext for regulating broader public health concerns.

B. OSHA's exercise of the States' sovereign police power raises serious constitutional doubts about the necessity of its ETS.

If there is any doubt about whether § 655(c)(1) allows OSHA to promulgate publicly oriented health measures to combat hazards in the workplace, this Court must resolve that doubt in favor of preserving the

"usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up).

The U.S. Constitution "reserves the general police power to the States." *United States v. Morrison*, 529 U.S. 598, 619 (2000). This police power is "inherent" in every State. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983). Michigan has "vested" its "police power . . . in the Legislature," *People v. Sell*, 17 N.W.2d 193, 197 (Mich. 1945), whose authority

> is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself.

Young v. City of Ann Arbor, 255 N.W. 579, 581 (Mich. 1934).

This broad police power encompasses public health. Michigan's Constitution requires the Legislature to "pass suitable laws for the protection and promotion of the public health." Mich. Const. art IV, § 51. And Michigan courts have long understood that "it is for the *legislature* to determine what laws and regulations are needed to protect the public health." *Grocers Dairy Co. v. McIntyre*, 138 N.W.2d 767, 770 (Mich. 1966) (emphasis added). This public health police power explicitly includes the

right to "enact what are known as 'emergency statutes,' designed to promote the *health*, morality, comfort, and peace of the people of the state." *Sell*, 17 N.W.2d at 197 (emphasis added).

In sum, the federal government and Michigan have long understood that Michigan—and the Legislature in particular—wields police power on behalf of its citizens. If Congress intends to distort that traditional division of authority, it must make its intention "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. Without such a "clear statement," this Court must adopt a reading of the challenged statute that leads to the least amount of federal incursion. *Id*.

Far from making a "clear statement," Congress has "repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 651 (1980). For that reason, States and their employers have long understood that OSHA's federal intrusion into a field traditionally occupied by the States was limited to *occupational* health and safety hazards, and, even then, States would retain control over such matters if they adopted a federally approved state plan. *See Gade*, 505 U.S. at 97 ("Congress not only reserved certain areas to state

regulation, but it also . . . gave the States the option of pre-empting federal regulation entirely.").

The Vaccination and Testing ETS obliterates that common understanding, trying to regulate activities outside the occupational setting that touch on citizens' daily lives. The use of a federal emergency occupational standard to impose a public health measure that reaches beyond the workplace upsets the delicate balance between state and federal sovereigns, creating grave constitutional doubts about the exercise of OSHA's ETS authority.

Courts "enforce the outer limits of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (cleaned up). As Justice O'Connor explained, "One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* (cleaned up).

That virtue has been on display throughout the pandemic with the States' varied responses to COVID-19. In Michigan, for example, lawmakers have enacted a collection of laws representing the State's policy on combating COVID-19, including in the workplace. *See* 2020 Mich. Legis. Serv. P.A. 239 (prohibiting an employee who tests positive for COVID-19, displays the symptoms of COVID-19, or is in close contact with such a person from reporting to work until certain conditions are met); *see also* 2020 Mich. Legis. Serv. P.A. 236; 2020 Mich. Legis. Serv. P.A. 237; 2020 Mich. Legis. Serv. P.A. 238; 2020 Mich. Legis. Serv. P.A. 240. And they have continued to monitor their COVID-19 policies, enacting amendments to legislation as the pandemic has evolved. *See* 2020 Mich. Legis. Serv. P.A. 339 (amending 2020 Mich. Legis. Serv. P.A. 239). According to Michigan's public health official, that work has been a success—*without* the need for a vaccine and testing mandate or other continued restrictions. *See* Mich. Dep't of Health & Human Servs. Order, *Rescission of Emergency Orders* (June 17, 2021) (rescinding all previous emergency order based on significant decline of COVID-19 in Michigan), available at https://tinyurl.com/y73p2mca.

Moreover, the Michigan Legislature has continued to work on COVID-19 policy, introducing dozens of pieces of legislation aimed at combating COVID-19, including legislative acts that would prohibit employers from "require[ing] or coerc[ing], directly or indirectly, any employee or applicant for employment to disclose his or her vaccination or immunity status[.]" 2021 Mich. House Bill No. 4791; *see also* 2021 Mich. House Bill No. 4792 (creating "COVID-19 vaccination privacy act, which would "prohibit[] a place of public accommodation [from] requir[ing] an individual to present documentation disclosing his or her COVID-19 vaccination or immunity status to gain access to or receive a service from the place of public accommodation"); 2021 Mich. House Bill No. 5458 (exempting individuals from any vaccination requirement if the person "has previously been infected with SARS-CoV-2 as indicated by a positive antibody test result"); 2021 Mich. House Bill No. 4667 (prohibiting a governmental entity from issuing a vaccination passport).

The ETS takes all these policy choices off the table for Michiganders (and all other Americans). It mandates that employers require "vaccination verification" from their employees, 86 Fed. Reg. at 61445, and purports to broadly "preempt[] all State and local requirements,

including in States with State plans, that ban or limit the authority of employers to require vaccination, face covering, or testing," *id*. at 61506.

The Vaccination and Testing ETS's constitutional distortions are felt most acutely by state-plan States like Michigan. In those States, it will not be the federal government that implements OSHA's policy choice on employers; it will be the state agency in charge of occupational safety and health matters (in Michigan, "MIOSHA"). Once an emergency temporary standard is issued, that state agency *must* promulgate a similar emergency standard, or risk having all of its state occupational health laws preempted. 29 C.F.R. § 1953.5(b).

And, at least in Michigan, the state agency will do so without input from the body constitutionally entrusted with the law-making power and the responsibility to protect citizens' health, safety, and welfare, Mich. Const. art IV, § 51, which is a significant break from the normal rule-making process in Michigan, *see* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 Harv. L. Rev. 1561, 1601 (2015) ("When the federal government impedes state processes of authorization—by interfering with their constitutional structures, political norms, or lines

of authority—the resulting actions cannot claim the mantle of state authority.").

In Michigan, administrative rules drafted through the rule making process are sent to a special legislative committee called the Joint Committee on Administrative Rules ("JCAR"). Mich. Comp. Laws § 24.235. JCAR may propose a change to the proposed rule or object to the rule entirely. *Id.* § 24.245a(1). And in the latter instance, the full legislature can vote on legislation that either rescinds the rule on its effective date, repeals the statutory provision under which the rule was authorized, or stays the effective date of the proposed rule up to a year. *Id.* § 24.245a(4).

This process, which applies to permanent OSHA standards, *see* Mich. Comp. Laws § 408.1014(5), has successfully allowed legislators to work with executive officials to adopt consensus-driven rules while protecting their respective core spheres of power. A JCAR member may, for example, share concerns about proposed rule language with the relevant agency representative during a committee hearing. It's not unheard of for the agency to immediately pause the rulemaking process

to address those concerns. *See, e.g.*, JCAR Meeting Minutes for October 16, 2019 (agency withdrawal of Rule No. 19-18), https://bit.ly/3H7LyzF.

But this process does *not* apply to emergency rules. Mich. Comp. Laws § 24.245(6). Thus, OSHA's use of the emergency standard authority here divests the Michigan Legislature of its constitutional responsibility to protect citizens' health, safety, and welfare. Mich. Const. art IV, § 51. It dictates to Michigan's executive branch what standard to impose on Michigan employers without input from the body constitutionally empowered to make important public policy choices for the health and safety of the citizenry.

Whereas the Assistant Secretary of Labor for OSHA, the official responsible for implementing the federal policy, is insulated from meaningful accountability to the American public, those most accountable to the public—state legislators—were excluded from exercising their constitutional policymaking powers. *See* Fahey, *Consent Procedures*, 128 Harv. L. Rev. at 1598 (describing the Supreme Court's federalism jurisprudence's concern "with a procedural harm deeper than interference with the state's accountability structures: interference with the ability of state governments to *represent* the interests of their

constituencies"). It is a constitutionally perverse result of the Vaccination and Testing ETS that a State like Michigan—which affirmatively chose *not* to leave its public policy to the whims of Washington—is more adversely affected than States that delegated its authority to the federal government. *See New York v. United States*, 505 U.S. 144, 167–69 (1992) (discussing political accountability and federalism).

This expansion of federal power is not what Michigan—or anyone—consented to when Congress enacted OSHA. Michigan lawmakers enacted a state plan believing that it would have authority over its workplace safety laws and would only have to follow the federal government's lead as it relates to *workplace* standards. It did not consent to being conscripted into enacting public health measures deemed prudent by the federal government, but which state legislative and executive officials have decided are unnecessary or unwise in Michigan.

If Congress intended to alter so significantly the usual balance between the States and the Federal Government by allowing OSHA to impose emergency temporary standards without vital due process protections, it was imperative to "make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at

460. Because Congress did not make unmistakably clear that it was displacing the States' traditional power over public health, this Court should reject any reading of § 655(c)(1) that would allow such significant intrusion into state sovereignty. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

CONCLUSION AND RELIEF REQUESTED

For these reasons, Amicus urges this Court to grant Petitioners' motion to stay the effect of the Vaccination and Testing ETS.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This amicus brief contains 4,224 countable words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), and therefore exceeds the 2,600-word limit in Rule 27(d). Concurrent with this brief, the Michigan Legislature has filed a motion for leave to exceed the word limit.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on November 10, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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