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**NCLA *Amicus* Brief Explains Why OSHA’s Employer Vaccine Mandate Violates Nondelegation Doctrine**

*BST Holdings, LLC, et al. v. Occupational Safety and Health Administration, et al.*

**Washington, DC (November 9, 2021)** – The [Emergency Temporary Standard](#) (ETS) issued by the Occupational Safety and Health Administration (OSHA) on November 5, 2021, requires employers with 100 or more employees to either implement a mandatory COVID-19 vaccination policy or force employees to present a weekly negative COVID-19 test. The ETS is unprecedentedly broad, invasive, and an unconstitutional exercise of legislative power vested in Congress. Today, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus brief](#) in *BST Holdings, LLC, et al. v. OSHA, et al.* in the U.S. Court of Appeals for the Fifth Circuit, challenging the mandate.

OSHA’s ETS is expected to force [84 million](#) employees nationwide—over half the U.S. workforce—to either take a novel vaccine against an infectious disease, navigate weekly costly testing, or forfeit their jobs. Nothing in the Occupational Safety and Health (OSH) 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. Congress would first have to explicitly and specifically authorize OSHA to issue such a mandate, but it has not.

In this way, the ETS vaccine mandate bears close resemblance to the U.S. Centers for Disease Control and Prevention’s (CDC) nationwide eviction moratorium, which the Supreme Court [struck down](#) as unconstitutional in August. According to the Court, if Congress meant for CDC to have vast power over evictions, it would have said so instead of, as the CDC argued, hiding that authority in a decades-old public health statute concerning fumigation and pest extermination. OSHA is taking a page out of CDC’s defective playbook, claiming to have discovered never-before-exercised regulatory powers in a decades-old workplace safety statute to impose a nationwide vaccine mandate for a virus that is not confined to workplaces.

President Biden has even [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.” The Supreme Court said in *Utility Air Regulatory Group v. EPA*: “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.” The U.S. Court of Appeals for the Fifth Circuit should do the same here and see through OSHA’s attempt to impose a nationwide vaccine mandate under the guise of workplace safety. Because Congress never explicitly and specifically delegated such authority, the ETS is an unconstitutional exercise of legislative power.

**NCLA released the following statements:**

“Congress does not hide sweeping delegation of regulatory power in the penumbra of statutory text to be discovered by the Executive Branch decades later as a ‘work around’ for whatever policy it deems fit. If OSHA’s

statutory powers say nothing about forcing over half the U.S. workforce to vaccinate or become unemployed, it is because that power does not exist.”

— **Sheng Li, Litigation Counsel, NCLA**

“OSHA rules should regulate the workplace. This new rule nakedly regulates the worker. There is nothing in the statute or the Constitution that imparts power on OSHA to force companies to fire unvaccinated workers. This is especially true as the drugs are not fully approved by the FDA and the statute authorizing their emergency use requires informed consent of the individual being given the vaccine. ‘Take it or you’re fired’ is not informed consent. It is the practice of medicine without a license by a lawless bureaucracy.”

— **John Vecchione, Senior Litigation Counsel, NCLA**

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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