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NCLA *Amicus* Brief Challenges OSHA’s Vaccinate-or-Test Requirement for Private Employees

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

Washington, DC (December 7, 2021) – The Occupational Safety and Health Administration’s (OSHA) attempt to impose an invasive “vaccinate-or-test” requirement on over half the nation’s workforce is an unprecedented and unconstitutional exercise of legislative power—power which the Constitution vests solely in Congress. In an [amicus brief](#) filed today, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil liberties group, argues that the Sixth Circuit should maintain the [stay](#) issued in the Fifth Circuit against enforcement of OSHA’s Emergency Temporary Standard (ETS). NCLA had urged the Fifth Circuit’s stay in a prior [amicus brief](#).

NCLA’s brief reminds the court that an executive agency may not issue regulations to resolve “major questions” of economic and political significance. Even if Congress had explicitly and specifically delegated such authority to OSHA, which it did not, Congress still must provide intelligible principles for the agency to follow. Otherwise, the executive agency would be exercising legislative power vested solely in Congress, which violates citizens’ right to be subject only to laws enacted by their elected representatives. But here the court does not even need to reach the intelligible-principle inquiry, because the lack of any purported delegation of statutory authority for OSHA’s action is blatant.

The breadth and invasiveness of the ETS marks it as a regulation of vast economic and political significance. The Biden administration 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.” Because Congress never explicitly authorized OSHA to enact a nationwide vaccine mandate, OSHA’s attempt to impose one is a forbidden exercise of legislative power.

NCLA argues that the Sixth Circuit must prevent OSHA from wielding legislative power and thus may not defer to OSHA’s factual conclusions and legal interpretations. The facts and law are no different today than they were a month ago when the Fifth Circuit issued its stay. There are no exceptional circumstances to disturb that decision because OSHA’s promulgation of the ETS remains an unconstitutional act. As the brief puts it: “Few circumstances undermine the rule of law more thoroughly than the doctrine of ‘same facts, same law, new court, different outcome’ that the Government seeks here.”

NCLA also represents clients before the United States District Courts for the [Western District of Michigan](#) and the [Southern District of Texas](#), challenging similar government-imposed vaccine mandates as a condition of employment.

NCLA released the following statements:

“The Supreme Court recently warned that even emergency regulations may not exceed the scope of an authorizing statute when it struck down the government’s attempt to impose a nationwide eviction ban through a health statute

concerning fumigation and extermination. The government has apparently learned nothing and is now trying to impose a nationwide vaccine mandate through a statute that concerns workplace hazards. The Fifth Circuit’s stay of that mandate should surprise no one and must be maintained to ensure the rule of law.”

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

“The rule of law would be damaged by the government’s assertion that the same law and the same facts, but a change of court, allows it a different result a few weeks after the preliminary injunction was entered. The OSHA Rule hasn’t become any more lawful in the last month, and the stay should remain in place.”

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

For more information visit the case page [here](#).

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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