No. 21A259

In the United States Supreme Court

IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021

BETTEN CHEVROLET, INC.'S REPLY IN SUPPORT OF ITS EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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I. HISTORY, THE OSH ACT AND LIMITED FEDERAL POWERS ALL AFFIRM THAT OSHA DOES NOT HAVE THE AUTHORITY TO ADOPT THE ETS

The Government envisions a world in which an omnipotent federal overlord has the power and authority to regulate the smallest details of everyday American life, wielding a virtually unlimited general police power, all premised on the economic activity of employment –something that, for the vast majority of Americans, is a prerequisite of providing the necessities of life for themselves and their families.

To accept the Government's arguments in this case, as explained below, is to permit the federal government to regulate American's diets, their medications, and their medical procedures – at least if they want to be gainfully employed.

The Government offers nothing in the way of a limiting principle in terms of the scope of federal power in its Response in Opposition ("RIO") to the various Applications for Stay. Instead, it begins by giving an expansive reading to the language contained in 29 U.S.C. § 655(C)(1). That language provides that for an emergency temporary standard to be issued there must be: "(A) … employees … exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and "(B) that [the] emergency standard is necessary to protect employees from such danger."

The Government reads "grave danger" to mean *anything* that potentially injures workers, no matter whether the same danger exists outside the workplace and without respect to the degree of risk; it reads "substances or agents" to include virtually *anything*; it reads "physically harmful" as being virtually *anything* that

could have any potential effect on a person, and it reads "new" to mean (at least) several years. (*See*, *e.g.* RIO). According to the Government, the term "employees" creates no great limiting principle either: if what OSHA considers a grave danger exists at all, and can in any manner be connected to work, that is sufficient to warrant a nationwide ETS under the Government's proposed standard. The Government creates this incredibly broad standard in a quest to shoehorn into the OSH Act a federal mandate to, as the Government puts it, "encourage" employees to receive a medical procedure that the Government believes pushes forward its public policy goals. (RIO at 53.)

The Government claims that its proposed expansive reading of the OSH Act would not lead to OSHA's ability to regulate a physically harmful substance, like fat or sugar in foods, in an attempt to curb the grave danger of obesity or heart disease in the workplace, going so far as to call the very proposition a "strawman." However, again the Government offers no limiting principle to its expansive reading of the ETS standard that would prohibit such a regulation. (RIO at 48). To the contrary, the interpretation of its powers it asks this Court to adopt would clearly give OSHA the authority to enact such a regulation. It is well established, for instance, that heart disease is the number one killer of Americans yearly, beating out COVID-19.[1] Likewise, studies have shown that obesity, excess body fat and excess sugar intake

[1] https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm?s_cid=mm7014e1_w (last visited 12/30/2021).

have a proven and direct correlation to heart disease.[2] Under the Government's theory, workers during lunch breaks frequently consume fatty foods or perhaps grab a soda, which are (i) substances or agents, (ii) that workers are exposed to on the job, (iii) which are physically harmful in that they are linked to increase incidence of (iv) the grave danger of heart disease. Based on this, the Government could issue an OSH ETS that might: (i) demand caloric intake regulations for American workers, enforced through their employers; (ii) place dietary restrictions on American workers, enforced through their employers; (iii) prohibit soda intake, again enforced through their employers. Contrary to the Government's claims, this is no strawman: such a regulation fit comfortably within its expansive reading of the ETS standard. The federal government has indeed had an ongoing campaign to limit sugary drink intake, explaining that "drinking sugar-sweetened beverages is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis."[3] Therefore, if the Government can justify the current ETS targeted at COVID-19, why could it not justify the foregoing limiting sugary drink intake by employees as a means to deter heart disease, which for years has been the number one killer of Americans, including Americans in the workforce, and killed two times as many people in 2020 as did COVID-19?[4]

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[2] https://my.clevelandclinic.org/health/articles/17308-obesity--heart-disease (last visited 12/30/2021); https://www.health.harvard.edu/heart-health/the-sweet-danger-of-sugar (last visited 12/30/2021).

[3] https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html.

[4] https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm?s_cid=mm7014e1_w (last visited 1/1/2022).

The Government's current desire to expand the ETS standard is nothing new, as it has tried to do so before. The current attempt is simply an example of the maxim oft attributed to Niccolò Machiavelli: "never waste an opportunity offered by a good crisis." When faced with past attempts to expand the ETS Standard, this Court, in interpreting the OSH Act, has never held that it has the scope or breadth that the Government suggests. Instead, this Court has enforced a limit on OSHA's power (one the Government here appears unwilling to acknowledge). Specifically:

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating **any standard**, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day -- such as driving a car or even breathing city air -- that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 642 (1980). Further, in interpreting the OSH Act, this Court observed that it was appropriate to avoid interpretations that "would in turn justify pervasive regulation limited only by the constraint of feasibility." *Id.* at 645. Likewise, the Court also observed that providing the expansive view that the Government offers here of the OSH Act, "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 [(1935)], and *Panama Refining Co. v. Ryan*, 293 U.S. 388 [(1935)]." *Id.*

at 646. Thus, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.*

In the RIO, the Government makes analogies that also are not appropriate, arguing that its unprecedented mandate here is akin to mandating safe toilets or safe water on the jobsite. (RIO at 48). But these things, like the other analogies it draws to fire suppressants, electrical safety, ingress and egress, etc. (RIO at 46-47) are all distinguishable. They all deal with the physical plant and improvements at the worksite – things the employer can physically do or improve on the job site, to make conditions safer for employees. They do not deal with decisions made by individual employees outside of the workplace; such as whether an employee has undertaken a medical procedure (almost certainly off the job) to prevent an illness that is everywhere in society, or if the employee declined to eat at the local fast-food restaurant to reduce the chances of heart disease. Making such decisions a condition of continued employment is little more than an end run around limitations placed on the Federal government by the structure of our federal system.

The Government claims that the "OSHA standards routinely require the use of protective controls even if employees would prefer not to be subject to particular health or safety measures." (RIO at 52.) But the Government never cites an example where OSHA required an employee to obtain a medical procedure irrespective of whether the employee consents. Nor has the Government cited an example of where OSHA required employees to undertake a medical procedure that could have serious side effects as a condition of employment. Nor has it cited an example where OSHA

required an employee to take, in this case injected with, a product whose manufacturer could not be sued for harm. (85 FR 15198.) There is simply no comparison between the other safety measures that OSHA has implemented over the years and its current attempt to require an invasive medical procedure that has known serious risks, and who's manufacturer is immune from liability.

Once before, under the guise of a national emergency, the executive branch claimed it needed to control the country's steel mills as a "necessary" measure "to avert a national catastrophe." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). There, as here, this Court held that the executive cannot be permitted to act alone without a clear mandate from Congress to do so. *Id.* at 588-89. Here, Congress has chosen not to act. With a two-year-old pandemic and vaccine available for more than a year, Congress has not created a national vaccine mandate (assuming it could even do so, which it likely could not), and now the Executive cannot usurp for itself the authority to create such a mandate by twisting the ETS standard into something it was never intended to be.

The Government attempts to sidestep this issue by claiming that vaccination requirements are common, but all the authority it cites to is derived from state power, not the powers of the National Government. For example, the Government's citation to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) is not helpful. That case involved a vaccination mandate on individuals from the legal authority of the States, not the National Government. Similarly, the Government cites Judge Easterbrook in *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) for the

proposition that vaccine mandates "have been common in this nation." (RIO at 52.) But, the *Klaassen* decision addressed a *state* university mandate, not a federal mandate. The fact that some private employers have chosen to enact vaccine requirements cannot help the Government either, as this Court has never held that just because an employer can regulate its employees' behavior so too can the government.

The OSH Act and its narrow exception for emergency rulemaking both apply only to dangers arising out of "work or work-related activities," *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449, 239 U.S. App. D.C. 222 (D.C. Cir. 1984), and not all hazards working people may face in their daily lives. That explains why the D.C. Circuit found another medical procedure – the sterilization of women who otherwise would encounter chemicals at work dangerous to the unborn – to be beyond the Act's scope. *Id.*; *see also Steel Joist Inst. v. Occupational Safety & Health Admin.*, 287 F.3d 1165, 1167, 351 U.S. App. D.C. 162 (D.C. Cir. 2002) (noting that "the Act authorizes OSHA to regulate only the employer's conduct at the worksite"). "[F]or coverage under the Act to be properly extended to a particular area," seconds the Eleventh Circuit, "the conditions to be regulated must fairly be considered working conditions, the safety and health hazards to be remedied occupational, and the injuries to be avoided work-related." *Frank Diehl Farms v. Sec'y of Lab.*, 696 F.2d 1325, 1332 (11th Cir. 1983).

The Government claims that regulating infectious diseases through vaccines is not as unusual as the applicants maintain, pointing to a bloodborne pathogen

regulation from 1991. See 29 C.F.R. § 1910.1030. However, that regulation is readily distinguishable. As opposed to a vaccine mandate (or a vaccine "encouragement" as the Government prefers to call its mandate), the 1991 regulation only required employers to make the hepatitis B vaccine "available" to employees "who have occupational exposure" to bloodborne pathogens at no cost to the employee and at a reasonable time and place. *Id.* § 1910.1030(f)(1)(i)-(ii). That mandate narrowly targeted "health care workers" with regard to certain "viruses, particularly those causing Hepatitis B and AIDS, that can be transmitted in the blood of patients." *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 824 (7th Cir. 1993). Unlike the situation here, the bloodborne pathogen regulation did not regulate all American businesses, no matter the nature of the industry, product, or service, so long as 100 employees or more work there. It was "[p]romulgated after a protracted notice-and-comment rulemaking proceeding." *Id.* It did not sidestep that process. And it appreciated the personal nature of the decision whether to get a vaccine—that a truly voluntary program, in OSHA's words, would "foster greater employee cooperation and trust in the system." 56 Fed. Reg. 64,004, 64,155 (Dec. 6, 1991). It did not penalize, pressure or coerce unvaccinated employees by imposing significant costs and burdens on them alone, including masking and testing. Thus, instead of helping the Government's cause, a comparison between the 1991 rule and the 2021 rule undermines it.

The Government also points to a statute applicable to the Secretary of Health and Human Services to suggest that Congress contemplated immunization when delegating its authority to the Secretary of Labor. In a section on "Research and

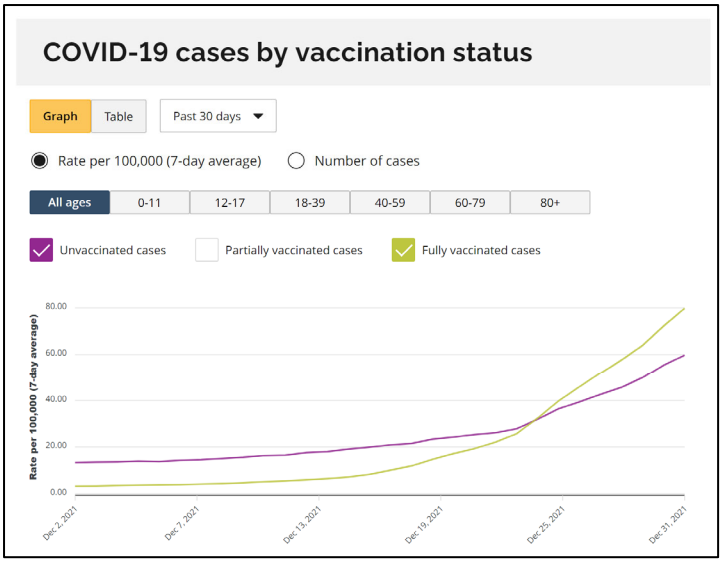
Related Activities," Congress gives the Secretary of Health and Human Services authority to establish programs to examine and test the workplace to "determin[e] the incidence of occupational illnesses." 29 U.S.C. § 669(a)(5). The authorization comes with a caveat: "Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." *Id.* But this language, and its context, hardly supports the Government's position. It involves a single reference to immunizations, one that explains when they are prohibited. It comes from a different part of the statute and concerns the Secretary of Health and Human Services, not OSHA and not the Secretary of Labor. This is plainly not a "clear statement" of congressional authority that OSHA may impose a vaccinate-or-test mandate on the American workforce as it is at best silent with regard to OSHA's authority, and if anything reflects a lack of authority since OSHA's mandate does not even include the extremely limited authority given to the Secretary of HHS with regard to immunizations.

II. GOVERNMENT STATEMENTS AND UNASSAILABLE DATA REFUTE THE PURPORTED BENEFITS OF THE ETS, AND OSHA HAS TAKEN DELIBERATE ACTIONS TO SUPPRESS DOWNSIDES OF THE ETS

Beyond these problems with the lack of authority for the current ETS, the Government's argument in support of the ETS rests on another fundamental flaw: the idea that vaccines will reduce transmission of the COVID-19 virus. The Government's hyperbolic opening concludes by stating that "OSHA issued an … ETS

… to address the grave danger posed by the transmission of SARS-CoV-2 in the workplace." (RIO at 2.) Claiming that a vaccination mandate is intended to address "transmission of SARS-CoV-2 in the workplace" ignores the fact that the current vaccines do not prevent transmission. As the Director of the Centers for Disease Control and Prevention ("CDC") made crystal clear, with the rise of Delta and other variants "what they [vaccines] can't do anymore is prevent transmission." (Betten Petitioner's Emergency Application for an Administrative Stay pp. 31-35, "Betten Brief"). That is confirmed by every single large cohort study looking at this issue and cited in the Betten Petitioner's opening brief, none of which the Government addressed in its RIO. (*Id.*)

Further bringing this fact into sharp focus is the most recent official government data from Canada, which now shows that vaccinated individuals are *more likely* to be infected with the COVID-19 virus than unvaccinated individuals. The CDC has not published recent data on infection rates between vaccinated and unvaccinated individuals, and hence the need to rely on our neighbor to the north. For example, the official government data from Ontario, Canada, establishes that as of December 31, 2021, there were 80 Covid infections per 100,000 fully vaccinated individuals versus only 60 Covid infections per 100,000 unvaccinated individuals:



https://covid-19.ontario.ca/data. Similarly, in British Columbia, Canada, as of December 29, 2021, there are now 58 Covid infections per 100,000 double-vaccinated individuals versus only 40 Covid infections per 100,000 unvaccinated individuals.[5] The fact that the vaccinated spread the virus alone undercuts the premise of the ETS but if the vaccinated, as reflected by this data, are the primary drivers of the virus, it renders the ETS completely illogical.

Moreover, since vaccinated individuals can transmit the virus, and are more likely to be asymptomatic – since according to the government, vaccines reduce symptoms – wouldn't there be a *greater* need for the government to impose a mask and test mandate on the vaccinated? This simple question belies that the ETS is about a federal policy of raising the overall national vaccination rate rather than, as claimed in the ETS, a workplace safety driven measure.

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[5] *See* https://public.tableau.com/app/profile/bccdc/viz/BCCDCCOVID-19SurveillanceDashboard/Introduction (last visited 01/02/2022).

If the ETS was about workplace safety and not a "vaccinate everyone" policy objective, and taking the government at its word that masking and testing reduce the spread, then OSHA would require vaccinated individuals, who are undisputedly a driver (if not the current primary driver) in spreading the virus to also wear masks and test weekly. As the Government insists, "'fifteen minutes' of exposure is more than sufficient for transmission," "employees who do not work at home, alone or outdoors face a grave danger of workplace transmission regardless of the particulars of the workplace," and the CDC has made clear that vaccination reduces symptoms but does not prevent transmission. (Betten Brief pp. 31-35). But instead of enacting mitigation measures on the vaccinated, measures like the ETS lead those individuals to believe they cannot spread the virus. This may explain why, according to the Canadian data, the vaccinated, who believe they cannot spread the virus, are now the primary drivers for spreading the virus.

As for natural immunity, the Government concedes, as it must, that such immunity provides protection, but it claims that not all those who were previously infected may be immune because "'it is difficult to tell, on an individual level, which individuals' have attained that level of protection." (p.38 (quoting 86 Fed. Reg. at 61,421).) First, cohort studies of millions of individuals consistently find that previously infected individuals have a reinfection rate that is effectively negligible (Betten Brief pp. 39-40), while breakthrough cases after vaccination are common

(Betten Brief pp. 33, 40).[6] However, even putting that aside and taking the government's argument at face value, when it comes to people who are vaccinated, *it is also unknown which vaccinated individuals will have a breakthrough infection*. Hence, the Government's logic behind its decision to force naturally immune individuals to mask and test, but not vaccinated individuals, makes no sense and supports the conclusion that the current ETS is about achieving its vaccination coverage policy goal (*i.e.*, full vaccination of the entire population, under the threat of loss of employment for millions of Americans), not about addressing a grave danger posed by a new hazard in the workplace.

The data on death rates throughout the Government's brief is also not accurate. (*E.g.,* RIO at 39-40.) There is always a degree of uncertainty as to whether someone died with or from COVID-19, just as there is uncertainty as to the cause of death when someone dies shortly after COVID-19 vaccination.[7] There is, however, a death figure that is not subject to this uncertainty and that is the all-cause-mortality figure: the total number of deaths irrespective of cause. As most adults in the United States became fully vaccinated, the all-cause mortality rate should have declined if the Government's claims about vaccination in the RIO are correct. But that is not what has happened. The all-cause mortality figure in the United States reveals that

[6] It is also noteworthy that in a formal petition exchange between the CDC and a non-profit group that advocates for informed consent, the CDC was not able to provide any study which refuted the over 50 studies finding that infection-induced immunity was more durable, robust, and effective than vaccine-induced immunity. *See* https://www.icandecide.org/wp-content/uploads/2021/12/Reply-to-CDC-Re-Natural-Immunity-v-Vaccine-Immunity.pdf (last visited 01/02/2022).

[7] *See* https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e2.htm#contribAff ("Among 378,048 death certificates listing U07.1 [the ICD-10 code for COVID-19], a total of 357,133 (94.5%) had at least one other ICD-10 code") (last visited 01/02/2022).

once a significant percentage of the American adult population was fully vaccinated, the total deaths in the United States have not declined. The following table provides the CDC's weekly total deaths in the United States for 2019, 2020, and 2021, starting on week 30 when at least 60% of American adults were fully vaccinated; it reflects that despite this high and increasing level of vaccination, total deaths per week did not return to the levels seen before the pandemic in 2019:

	Week 43	Week 42	Week 41	Week 40	Week 39	Week 38	Week 37	Week 36	Week 35	Week 34	Week 33	Week 32	Week 31	Week 30
2019 - Deaths	54,049	54,338	53,090	52,564	52,757	51,757	51,633	51,836	51,162	51,022	51,023	51,747	51,410	51,662
2020 - Deaths	62,068	60,480	61,649	59,685	60,486	59,619	59,529	60,110	60,964	62,423	63,496	63,559	64,109	64,112
2021 - Deaths	63,312	64,243	64,738	66,668	69,213	70,557	71,802	72,113	72,136	70,854	68,887	65,942	62,682	59,828
%18+ Fully Vaccinated	69.5%	68.9%	68.4%	67.8%	67.1%	66.4%	65.7%	64.8%	64.0%	63.1%	62.3%	61.6%	61.0%	60.4%

See https://www.cdc.gov/flu/weekly/weeklyarchives2021-2022/data/NCHSData50.csv and https://data.cdc.gov/Vaccinations/COVID-19-Vaccinations-in-the-United-States-Jurisdi/unsk-b7fc (data more recent than Week 43 of 2021 are incomplete). Hence, according to CDC data, even after over 60% of adults were fully vaccinated in the United States in 2021, the overall mortality did not return to the level seen in 2019 (nor even below the level seen in 2020 when the pandemic was ongoing and there were no vaccines).

The data in the Government's brief regarding COVID cases as between the vaccinated and unvaccinated are also unreliable because those figures can be skewed by the availability of testing, the accuracy of test results, and by increasing requirements on the unvaccinated to be tested.

OSHA additionally walked back guidance that would have required employers to report adverse events from the COVID-19 vaccines in the OSHA recordkeeping log.

On April 20, 2021, OSHA issued new guidance that required employers who mandate COVID-19 vaccines to report an employee's adverse reaction in the OSHA recordkeeping log if the adverse reaction met certain criteria. But just one month later, on May 21, 2021, OSHA retracted this guidance and no longer requires employers to report adverse reactions from the COVID-19 vaccine, even when an employer requires the vaccine as a condition of employment.[8] This requirement would have provided necessary transparency, either to confirm or dispel fears of adverse events, but, as OSHA indicated, they did not want to "discourage" or "disincentivize" employees from receiving a vaccine based on fully informed consent, including adverse event data. This same action also has the effect of leaving OSHA unable to fully assess the benefits and disadvantages of its current ETS, because it has deliberately turned its head the other way when it comes to disadvantages and costs.

CONCLUSION

The Court should stay the ETS pending review, grant certiorari before judgment, or both.

Dated: January 3, 2022

[8] https://www.osha.gov/coronavirus/safework (last visited 1/2/2022) (at #9: "Note on recording adverse reactions to vaccines: OSHA, like many other federal agencies, is working diligently to encourage COVID-19 vaccinations. OSHA does not want to give any suggestion of discouraging workers from receiving COVID-19 vaccination or to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR part 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination at least through May 2022. OSHA will reevaluate the agency's position at that time to determine the best course of action moving forward. Individuals may choose to submit adverse reactions to the federal Vaccine Adverse Event Reporting System.").

Respectfully submitted,

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