Nos. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61,402

On Petitions for Review

BRIEF OF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY ON RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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CORPORATE DISCLOSURE STATEMENT

The National Employment Lawyers Association (NELA) has no parent corporation, nor has it issued shares or securities. The Internal Revenue Service has determined that NELA is organized and operated exclusively for advancing employee interests and serving lawyers who advocate for workers, pursuant to Section 501(c)(6) of the Internal Revenue Code and is exempt from income tax. NELA is organized and operated as a not-for-profit corporation under the laws of the state of Ohio.

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INTEREST OF *AMICI CURIAE*

Amici Curiae[1] National Employment Lawyers Association (NELA) and Jobs With Justice Education Fund (JWJ) are worker advocacy organizations that seek to empower workers who demand fair treatment in the workplace and dignity on the job. *Amici* have an interest in the application of regulatory mandates in American workplaces, and thus urge clarity from this Court concerning the reach of its decision in this case to other restrictions that courts have upheld over worker challenges for decades.

NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers, including low-wage workers engaged in on-premises work, in employment, wage and hour, labor, and civil rights disputes. NELA has a particular interest in ensuring that workers are treated fairly in the workplace response to the COVID-19 pandemic.

JWJ is a § 501(c)(3) non-profit organization, which believes that all workers should have collective bargaining rights, employment security, and a decent standard of living within an economy that works for everyone. JWJ brings together

[1] *Amici* have moved for leave to file this brief. No counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than the amici curiae, contributed money intended to fund preparing or submitting this brief.

labor, community, student, and faith voices nationally and locally to win improvements in people's lives and shape public discourse on workers' rights and the economy. During the COVID-19 pandemic, JWJ has advocated on behalf of essential workers, focusing on health, safety, voice, and dignity in the workplace.

INTRODUCTION AND SUMMARY

Petitioners urge the Court to strike down OSHA's COVID-19 mandate, by asking the Court to make an independent judicial assessment that the costs to individual worker choice outweigh its benefits. If that argument is accepted, a substantial number of workplace requirements, both regulatory and privately-mandated, will be subject to similar challenges.

In Part I, we outline the many regulatory requirements that would become fair game for relitigation if Petitioners' theory were adopted. For example, the Department of Transportation (DOT) mandates drug-testing for all employees in aviation, rail, motor carrier, mass transit, maritime and pipeline industries. If Petitioners' argument is accepted, individual workers would be entitled to revisit whether DOT-mandated drug testing is truly worth the cost to individual workers' personal choices.

In Part II, we discuss the right to refuse unsafe working conditions, a right that vaccinated workers who fear the spread of COVID-19 may choose to exercise if Petitioners' theory is adopted.

In Part III, we examine the difficulties presented by Petitioners' suggestion that courts invent their own policy rationale to distinguish which specific industries may be properly subject to COVID-19 regulation.

In Part IV, we show that even privately imposed employer mandates would now be subject to challenge under Petitioners' theory.

ARGUMENT

I. Petitioners' Theory Will Open the Door to "Personal Liberty" Challenges to Employment Regulation Generally.

Petitioners claim that OSHA's vaccine or testing requirement imposes more burden on individual choices than it yields tangible economic benefits. Petitioners' core position is that courts may second guess OSHA's determination that a vaccine requirement is warranted. Until now, courts have rejected such arguments, by according deference to OSHA's cost-benefit judgments. *See, e.g., American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 510 (1981).

If courts accept Petitioners' arguments, the consequences cannot be limited to COVID-19 vaccination. For decades, unions and individual workers have challenged many workplace regulations on the same theory, but were unsuccessful. The Court needs to be clear that a decision for Petitioners would revive challenges that until now the courts have uniformly rejected.

A. Mandatory drug testing as unwarranted interference with individual worker choice

As it has with OSHA, Congress has delegated authority to the Department of Transportation to require mandatory drug-testing of airline employees, 49 U.S.C. § 45102(a)(1), commercial motor carrier operators, 49 U.S.C. § 31306(b), merchant mariners, 46 U.S.C. §§ 2103, 7101, mass-transit workers, 49 U.S.C. § 5331, and railroad employees, 49 U.S.C. § 20140. This includes direct observation of some employees' urine testing to prevent cheating. *See BNSF Ry. Co. v. Dep't of Transp.*, 566 F.3d 200, 208 (D.C. Cir. 2009), *citing* 49 C.F.R. § 40.67, *approved in Norris v. Premier Integrity Solutions*, 641 F.3d 695, 701-702 (6th Cir. 2011).

These regulations are not enforced as a paternalistic measure to reform the personal lifestyles of American workers. The Agency's stated purpose is to protect fellow workers and the public who may be harmed by impaired workers. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989); 49 C.F.R. § 382.101 (commercial trucking); 46 C.F.R. § 16.101 (shipping). The Supreme Court has until now held that such agency mandates for invasive testing are permissible because (like COVID-19 infection) the signs of impairment are not always obvious. *Skinner*, 489 U.S. at 621.

If this Court rejects OSHA's COVID-19 vaccination/testing requirements as "unduly" invasive, then workers affected by mandatory drug-testing would have a fresh opportunity to challenge DOT drug-testing regulations on the same ground.

B. Physical requirements for employment

DOT regulations also impose requirements that workers satisfy vision, hearing, blood pressure, and other physical standards. *See, e.g.,* 49 C.F.R. § 391.41. Absent such regulations, affected workers might have a claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 (a) and (b)(5), for a more lenient accommodation. Until now, courts have been firm that compliance with DOT regulations supersede any ADA right. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 518 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 519, 522-23 (1999). Nor have courts allowed individual workers to bring collateral attacks on the reasonableness of government regulations, any more than those workers may ask judges and juries to reconsider judgments by medical professionals. *See Murphy*, 527 U.S. at 522.

Petitioners' theory, if accepted, would change this decisional law. If courts have the authority to second guess the wisdom of minimum workplace safety standards, then compliance with those regulations cannot remain a complete defense to an ADA claim for accommodation.

C. Mandatory retirement age

Federal agencies like the Federal Aviation Administration often impose mandatory retirement ages as a regulatory condition for employment. *See, e.g.*, 14 C.F.R. § 121.383(e) (air carrier pilots must retire after their 65th birthday); 5

C.F.R. § 842.806 (mandatory retirement for air traffic controllers, law enforcement officers, and firefighters); *Vance v. Bradley*, 440 U.S. 93, 100 (1979) (mandatory retirement age for foreign service officers). It is not illegal age discrimination for employers or unions to comply with such regulations. *Bondurant v. Air Line Pilots Ass'n, Intern.*, 679 F.3d 386, 396 (6th Cir. 2012).

Mandatory retirement-age regulations would be subject to the same objections that Petitioners urge here. Courts would have to entertain collateral attacks on the wisdom of mandatory retirement mandates under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

D. Hard-hat and beard restrictions

OSHA regulations also require employees in many industries, like construction and longshore, to wear hard hats. *See* 29 C.F.R. §§ 1926.100, 1910.135. Until now, this has been thought an unexceptional exercise of OSHA's authority delegated by Congress under the Commerce Clause, even as to small employers. *See CMC Elec. Inc. v. OSHA*, 221 F.3d 861, 868-69 (6th Cir. 2000) (small electrical contractor cited for failing to enforce hard-hat policy).

Hard hats may be uncomfortable. They may interfere with the wearing of religious headgear by observant Sikhs or Orthodox workers. The risk of head injury is arguably confined to the person choosing to forgo the protection. But few until now would have challenged mandatory hard-hat regulations in the name of

each worker's freedom to work bare-headed. *See Kalsi v. New York City Transit Auth*., 62 F.Supp.2d 745, 760 (E.D.N.Y. 1998) (rejecting Sikh employee's claim for religious accommodation from employer's hard-hat policy, *inter alia*, because of the potential for injury to other workers), *aff'd*, 189 F.3d 461 (2d Cir. 1999).

Similarly, government regulations forbid certain workers like firefighters from wearing beards that some religions require, since beards may create a hazard for people who may need to wear respirators. *See, e.g., Bey v. City of New York*, 999 F.3d 157, 167–169 (2d Cir. 2021). Even where the aggrieved workers offer to prove that the risk is too minimal to justify the restriction against their religious observance, courts until now have deferred to the agencies' regulatory judgment.

Yet Petitioners' theory, if adopted, would open the door to lawsuits by workers who claim their personal freedom outweighs the benefit of the occasional head injury or respiratory malfunction. At a minimum, courts would have to legislate "safe harbor" exemptions from general mandates in every case. If this is available to Petitioners here, it must be available to all other workers whose personal and religious freedoms are affected by workplace mandates.

II. Pro-Vaccine Workers' Right to Refuse Unsafe Work Among Unvaccinated Colleagues

Petitioners' theory also asks courts to prevent the Government from resolving the conflicting rights of anti-vaccine dissenters and all other workers who fear infection. As Petitioners' Brief in Case No. 21-4080 points out, a vaccinated

worker is still at risk of a breakthrough infection if he or she works in close contact with unvaccinated co-workers. Pet'rs' Mot. for Stay at 17, *BST Holdings LLC v. OSHA,* Case No. 21-60845 (5th Cir. Nov. 5, 2021).

Those vaccinated workers who fear contracting COVID also have rights under OSHA. Absent a uniform mandate, vaccinated workers who reasonably fear breakthrough infections from their unvaccinated colleagues would have a legally protected right to refuse to work. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980) (upholding OSHA regulation allowing employees to choose not to perform assigned tasks because of a reasonable apprehension of injury); *see also* 29 U.S.C. § 143 ("[T]he quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike.").

Until now, government authorities had the police power to enforce mandatory vaccination in response to pandemics, without having to litigate the wisdom against those who doubt the Government's scientific judgment. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). Even in 1905, the *Jacobson* Court acknowledged that some questioned the efficacy and safety of smallpox vaccination. But the presence of dissenters could not disable the Government from taking decisive action based on the majority consensus. *Id*., 191 U.S. at 34.

But if courts now assert the authority to doubt the value of COVID-19 vaccination, they cannot deny the pro-vaccine majority of workers the right to believe, with OSHA and the Center for Disease Control, that unvaccinated co-workers pose a clear and present danger to their health.

III. The Problem of Judicial Line-Drawing

Petitioners imply that a vaccination mandate might be permissible if it were limited to specific industries. *See, e.g.,* Pet'rs' Mot. to Stay, ECF 148 at 12. But here it is hard for unelected courts to define which workplaces are uniquely at risk of COVID-19 outbreaks compared to others. Healthcare institutions serve especially vulnerable patients, *see We The Patriots USA Inc. v. Hochul*, __ F.4th __, 2021 WL 5121983 (2d Cir., Nov. 4, 2021) (denying injunction against New York law requiring vaccination for healthcare workers), as do institutions that serve the elderly or children, *see Does 1-6 v. Mills*, 16 F.4th 20, 33 (1st Cir. 2021) (denying injunction against Maine regulation mandating vaccination for nursing and residential care facilities); *Doe v. San Diego Unified Sch. Dist.*, No. 21-CV-1809-CAB-LL, 2021 WL 5396136, at *6 (S.D. Cal. Nov. 18, 2021) (denying temporary restraining order against school vaccination plan). But ultimately all occupations that serve the public create the risk of infection to and from customers, and even workplaces without public contact involve close proximity between co-workers.

Petitioners do not give any clear rationale for unelected judges to decide which industries might be legitimately subject to such a mandate, but not others. If hospitals may be subject to such a mandate, why not schools, meatpacking plants or offices? OSHA has stated that COVID-19 does not discriminate in the public venues where the virus may be transmitted, so it is hard to see how any court may legitimately draw lines where the Executive Branch may not. *See West Coast Hotel v. Parrish*, 300 U.S. 379, 398-399 (1935) (elected officials, not courts, should make policy decisions whether worker-protection statutes should be limited to specific industries or classes). If courts return to the pre-*West Coast Hotel* regime by making judicial policy choices among industries where vaccination may or may not be required, they cannot preclude any dissenting worker of any viewpoint the full right to litigate against workplace mandates they find burdensome.

IV. Petitioners' Theory Implicates State, Local and Private Employer Mandates as Well as Federal Government Mandates.

A. If federal mandates are invalid, then so are State mandates.

Petitioners suggest that the vice of the OSHA mandate is that it is federal, suggesting that this is a matter for State and local regulation. Pet'rs' Mot. for Stay, ECF. 172 at 61-63.

But if individual workers' personal choices are the reason the OSHA mandate is invalid, State safety regulations will meet the same fate. Indeed, absent a uniform federal standard, individual workers asserting ADA and Title VII

rights will have an even stronger argument against State regulation, since their federal ADA and Title VII rights will arguably supersede any contrary State laws that would permit employers to do what federal law prohibits. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Conflicting State laws will always be ammunition for dissident plaintiffs in any challenge. For example, any worker in New York who feels burdened by state COVID-19 mandates need only point to the least restrictive rules in any other State. If Idaho or Arkansas do not impose the same mandate, the least-restrictive State laws will presumptively become the national standard when invoked by workers objecting to vaccination.

B. Private employer mandates will not survive challenge if Petitioners' theory is accepted.

Petitioners also imply that vaccine mandates would be better left to the management decisions of individual employers. *See, e.g.,* Pet'rs' Mot. for Stay, ECF 145-2 at 6. But this ignores the rights of individual workers against private employers under the ADA and Title VII. If OSHA regulation is not a complete defense, then even private employers that choose to mandate vaccination will have to justify that mandate against employees who assert accommodation under the ADA and Title VII. This would impose a novel burden on private employers without "comparable example in our law." *Albertson's,* 527 U.S. at 577 (finding it unreasonable "to read the ADA as requiring a[private] employer … to shoulder the general statutory burden to justify a job qualification that would tend

to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory [safety] standard … issued by the Government itself."). If the Court imposes such a burden here, it must impose that burden on private employers in every other case where safety mandates affect individual worker freedom.

CONCLUSION

If the Court accepts Petitioners' arguments, the Court should recognize that individual workers and their unions will have the same opportunity to revive similar challenges to regulatory workplace restrictions that courts have rejected for decades until now. Petitioners may not win relief here without opening the courthouse doors to all other dissenting workers.

Date: November 30, 2021

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/s/ Michael T. Anderson

Date: November 30, 2021

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I hereby certify that a true and accurate copy of the foregoing brief was electronically filed with the Court on November 30, 2021, using the CM/ECF system, which will automatically send electronic notification of filing to all counsel of record.

/s/ Michael T. Anderson

Date: November 30, 2021