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MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402

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On Petitions for Review

_____

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

_____

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has an interest in ensuring that the Constitution is read, consistent with its text and history, to allow Congress to delegate federal administrative agencies the authority and flexibility to craft effective responses to national crises, including the COVID-19 pandemic.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Supreme Court has long interpreted that clause to permit Congress to delegate its legislative authority so long as it "lay[s] down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Time and again, the Supreme Court has reminded us that this standard is "not demanding." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019). Indeed, in the

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Respondents and some Petitioners consent to the filing of this brief, while other Petitioners had not responded at the time of this filing.

entirety of our nation's history, only two times, both in 1935, has the Supreme Court struck down statutes on the ground that they impermissibly delegated legislative authority to the executive branch. *See Pan. Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Furthermore, Founding-era Congresses regularly delegated broad discretionary authority to executive officials in their efforts to tackle some of the most pressing problems facing our young nation, and many of those delegations generated little or no debate.

Despite this history and precedent, the Fifth Circuit concluded that the Occupational Safety and Health Act of 1970 ("the Act") would represent an unconstitutional delegation of legislative power if interpreted to authorize the Emergency Temporary Standard ("ETS"). *BST Holdings, LLC v. OSHA*, No. 21-60845, slip op. 6 (5th Cir. Nov. 12, 2021). This argument has no grounding in the Constitution's text and history, and presents a vision of the nondelegation doctrine that would "cripple the government, and render it unequal to the object for which it is declared to be instituted." *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). The requirement in the Act that an ETS be "necessary to protect employees" from "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" provides meaningful, judicially reviewable

boundaries—*i.e.*, an intelligible principle—to guide OSHA's authority. 29 U.S.C. § 665(c)(1).

ARGUMENT

I. The Founders Permitted Broad Delegations of Legislative Authority to Executive Officials.

The Constitution's Vesting Clauses parcel out legislative, executive, and judicial powers to the three branches of government, but their text is silent as to whether these powers may be shared or delegated. Thus, when it comes to the nondelegation doctrine, the Constitution's text only gets us so far, making the debates and practices of early Congresses critical to a proper understanding of the scope of the nondelegation doctrine at the Founding.

Although the Framers barely discussed the precise issue of delegation at the Constitutional Convention, *see* Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1299 n.42 (2021) ("the pressing issue at that time was legislative self-aggrandizement, not legislative abdication"), they grappled with the challenge of defining legislative power and its relationship to executive power. James Madison expressed concern about the "whole power of one department" being wielded "by the same hands which possess the whole power of another department." *The Federalist* No. 47, at 299 (James Madison) (Clinton Rossiter ed., 2003). Sometimes referred to as an "anti-

alienation principle," *see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 307 (2021), Madison's concern was fundamentally different from Petitioners' vision of the nondelegation doctrine. And arguments for stricter limits on delegation at the Founding arose only "occasionally in early legislative debates" and "clearly did not have much purchase," *see* Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. (forthcoming 2022) (manuscript at 64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802760, as demonstrated by the Founding-era Congresses' broad delegations of legislative authority. Several examples follow.

A. Congress Delegated Broad Legislative Authority to Address the National Debt.

Delegation of legislative authority emerged as the First Congress's solution to one of the most urgent problems facing the nation in the wake of the Revolutionary War: a "potentially insurmountable" national debt. Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, Ga. L. Rev. (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564. Legislators made payment of that debt possible by delegating borrowing and spending power to the executive branch.

In one of the first laws passed to address the national debt, Congress authorized the president to make "contracts respecting the . . . debt *as shall be found*

for the interest of the said States," Act of Aug. 4, 1790, ch. 34 § 2, 1 Stat. 138, 139 (emphasis added), and to borrow up to $12 million (1.286 *trillion* in today's dollars) in "new loans" to pay off foreign obligations, *id.* The only limit guiding the president's discretion was "[t]hat no engagement nor contract shall be entered into which shall preclude the United States from reimbursing any sum or sums borrowed within fifteen years." *Id.*

The First Congress also passed a law to address the domestic debt, and that law too delegated broad legislative authority to the executive branch. *See* Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186-87. The law vested authority in the president and a body known as the Sinking Fund Commission to purchase debt "in such manner, and under such regulations *as shall appear to them best calculated to fulfill the intent of this act*." *Id.* (emphasis added). The only limits Congress imposed on this authority were that the purchases of securities had to be at market price, "if not exceeding the par or true value thereof," *id.* § 1, and money applied to those purchases was limited to "surplus . . . as shall remain after satisfying the several purposes for which appropriations shall have been made by law," *id.* Significantly, when one legislator raised a constitutional objection to this proposed delegation, his peers decided that capping the amount to be borrowed would suffice to "satisfy its constitutional requirements," reflecting an understanding that is "close to today's intelligible principle requirement." Chabot, *supra*, at 25.

B. Congress Delegated Broad Legislative Authority in Connection with the Direct Tax of 1798.

Several years after the market crash of 1792, the United States again faced the threat of a fiscal shortfall, prompting Congress in 1798 to exercise for the first time its power to levy a "direct tax" on property. Parrillo, *supra*, at 1303. To implement that tax, Congress delegated broad legislative authority to what was the equivalent of a large modern-day administrative agency.

To comply with the constitutional requirement that "direct Taxes shall be apportioned among the several States," U.S. Const. art. I, § 2, cl. 3, the Fifth Congress established an "administrative army" with over 1,600 "foot soldiers" to estimate the value of "literally *all private real estate in every state*, with only minor exemptions," Parrillo, *supra*, at 1331-33, and with the only legislative guidance being to assess the property's "worth in money," *id.* at 1333.

And to ensure that valuations were consistent, Congress established a board of federal tax commissioners in each state and empowered them "to revise, adjust and vary, the [assessor's] valuations of lands and dwelling-houses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, *as shall appear to be just and equitable*." An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves within the United States § 22, 1 Stat. 580, 589 (1798) (emphasis added). The only further limitation the statute imposed on these federal administrators was "that the relative valuations of the

different lots . . . shall not be changed or affected." *Id.* The statute did not define the phrase "just and equitable," and each federal board's revisions were final and not subject to judicial review. Notably, no one objected that this delegation was unconstitutional. *See* Parrillo, *supra*, at 1312.

C. Congress Delegated Broad Legislative Authority in the Nation's First Quarantine Law.

The nation's first quarantine law, enacted in response to a series of yellow fever epidemics in the late eighteenth century, *see* William Hamilton Cowles, *State Quarantine Laws and the Federal Constitution*, 25 Am. L. Rev. 45, 69 (1891), provides yet another example of a Founding-era delegation of legislative authority, empowering the President "to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively, *in such manner as may to him appear necessary*." Act of May 27, 1796, ch. 31, 1 Stat. 474 (emphasis added). The 1796 Act's necessity requirement—closely resembling OSHA's requirement that a measure be "necessary to protect employees" from "grave danger," 29 U.S.C. § 665(c)(1)—was approved "without a hint of delegation-related objections," Mortenson & Bagley, *supra*, at 358.

* * *

These are but a few examples of the many instances in which Congress delegated broad legislative authority without significant nondelegation objections. Furthermore, in the few instances when legislators did raise such objections, they

made clear that legislative guidance—an "intelligible principle" from Congress—could validate a potentially problematic delegation.

II. The Statute at Issue Here, as Understood to Authorize Implementation of the ETS, Does Not Violate the Nondelegation Doctrine.

"Congress does not violate the Constitution merely because it legislates in broad terms." *Touby v. United States*, 500 U.S. 160, 165 (1991); *see Am. Trucking*, 531 U.S. at 474-75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); *Hachem v. Holder*, 656 F.3d 430, 439 (6th Cir. 2011) ("The cases where Congress violates the nondelegation principle are few and far between."). A statute is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73.

The law at issue here comfortably passes that test. It gives the Secretary of Labor, acting through OSHA, broad authority to establish "standards" for health and safety in the workplace, and instructs the agency to employ the "standard which assures the greatest protection of the safety or health of the affected employees." *See* 29 U.S.C. § 655. It also authorizes OSHA to issue standards on an emergency basis when "necessary to protect employees" from "grave danger from exposure to

substances or agents determined to be toxic or physically harmful or from new hazards." *Id.* § 655(c).

Notably, the Supreme Court has approved significantly broader "delegations to various agencies to regulate in the 'public interest.'" *Gundy*, 139 S. Ct. at 2129 (collecting cases). And the Court has recognized on multiple occasions that the protection of public health and safety is an intelligible principle sufficient to make a delegation constitutional. *See, e.g.*, *Touby*, 500 U.S. at 165; *Am. Trucking*, 531 U.S. at 475-76. For example, in *Touby*, the Court held that a provision of the Controlled Substances Act delegating authority to the Attorney General to temporarily designate a drug as a controlled substance "to avoid an imminent hazard to the public safety," 21 U.S.C. § 811(h)(1), laid down a sufficient intelligible principle, *see Touby*, 500 U.S. at 165. Similarly, in *American Trucking*, the Court held that a statute permitting the Environmental Protection Agency to set primary ambient air-quality standards "requisite to protect the public health" with "an adequate margin of safety," 42 U.S.C. § 7409(b)(1), was constitutional, *see Am. Trucking*, 531 U.S. at 475-76.

In their motion to stay in the Fifth Circuit, Petitioners relied heavily on *Schechter Poultry*, *see, e.g.*, Mot. For Stay, *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 5, 2021), but that case actually affirmed Congress's ability to broadly delegate power, so long as the delegation was accompanied by standards to

guide administrative discretion. Significantly, despite Petitioners' contentions, the Court's ruling in *Schechter Poultry* did not hinge on the fact that "fair competition" was undefined. *Id.* at 14. Rather, as the Supreme Court has summarized, the statute ran afoul of the Constitution because "'Congress had failed to articulate *any* policy or standard' to confine discretion," *Gundy*, 139 S. Ct. at 2129 (internal quotation marks omitted); *accord Am. Trucking*, 531 U.S. at 474, leaving the president with "virtually unfettered" authority, *Schechter Poultry*, 295 U.S. at 530. Indeed, the Court contrasted that statute with other laws using broad phrases to guide executive authority, emphasizing that the latter statutes provided "standards to guide determination," required "findings" and "evidence" before executive action, and guided administrative decision-making with "statutory restrictions adapted to the particular activity." *See id.* at 540 (citing cases that permitted Congress to delegate the power to act "in the public interest" and "if public convenience, interest or necessity requires").

The Act here provides sufficient guidance. OSHA can promulgate an ETS only if it concludes that the ETS is "necessary to protect employees" from "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c). And the Act provides standards to guide this determination, ensuring that OSHA's authority is not "unfettered." *Schechter Poultry*, 295 U.S. at 542. Indeed, it instructs OSHA to issue standards

that ensure "safe and healthful working conditions," 29 U.S.C. 651(b), requires the agency to publish a statement of reasons for an ETS, *id.* § 655(e), and mandates that OSHA provide "[a]ny affected employer" the opportunity to apply for a variance from any standard, *id.* § 655(d). By promulgating an ETS that is estimated to "save over 6,500 worker lives and prevent over 250,000 hospitalizations" due to COVID-19 in the workplace, COVID-19 Vaccination and Testing, 86 Fed. Reg. 61402, 61408 (Nov. 5, 2021), OSHA is simply fulfilling its mandate to ensure "safe and healthful working conditions," consistent with the guidance Congress has provided.

CONCLUSION

For the foregoing reasons, the motion to dissolve the stay should be granted.

Respectfully submitted,

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Dated: November 23, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 2,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 23rd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on November 23, 2021.

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Executed this 23rd day of November, 2021.

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