

No. 21-3058

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

TANKCRAFT CORPORATION & PLASTICRAFT CORPORATION,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
Respondent

On a Petition for Review of an Emergency Temporary Standard
by the Occupational Safety and Health Administration

**AMICUS CURIAE BRIEF OF WISCONSIN MANUFACTURERS &
COMMERCE IN SUPPORT OF THE PETITIONERS' PETITION FOR
REVIEW AND EMERGENCY MOTION FOR STAY**

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**Application for admission pending*

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-3058Short Caption: Tankcraft Corporation, et al v. OSHA

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Attorney's Signature: /s/ Scott E. Rosenow Date: 11/12/2021Attorney's Printed Name: Scott E. RosenowPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

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INTEREST OF AMICUS CURIAE

Amicus curiae submitting this brief is a Wisconsin-based business trade association whose member businesses are interested in, and impacted by, the issue in this case. *Amicus* and its membership have significant experience with workplace safety and health regulations and submit this brief to add additional context and practical perspectives to this case from the view of Wisconsin's regulated business community.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or part, no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief, and no person other than the *amicus*, its members or its counsel contributed money that was intended to fund preparing or submitting the brief. Counsel for the Petitioners does not object to the filing of this *amicus* brief. Counsel for the Respondent, by email, "consent[ed] to a timely filed amicus brief." Given the uncertainty over whether this *amicus* brief is being timely filed,¹ the undersigned counsel is filing a motion for leave to file this brief. If granted, this leave would give *amicus* the authority to file this brief.

Amicus Wisconsin Manufacturers & Commerce ("WMC") is Wisconsin's chamber of commerce, manufacturers' association, and safety council. WMC is Wisconsin's largest business trade association with member businesses of all sizes, across all sectors of the economy, and located throughout the state. Since its founding

¹ See footnote 1 in the motion accompanying this brief.

in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business. WMC supports free enterprise and opposes efforts by the government to regulate outside of its statutory authority.

INTRODUCTION

This case is about the scope of federal authority over private businesses. The Occupational Safety and Health Administration (“OSHA”) issued an Emergency Temporary Standard (“ETS”) on November 4, 2021, requiring workers at many businesses to get vaccinated against COVID-19 or undergo regular testing. The ETS imposes many obligations on businesses and threatens them with substantial fines for failing to comply. Two Wisconsin businesses—Tankcraft Corp. and Plasticraft Corp.—filed a petition for review of the ETS and an emergency motion for a stay of the ETS. (Doc. 1-1; 2-1.) This Court should grant that petition and motion.

This vaccine mandate will significantly harm Wisconsin businesses if left intact, including mass resignations of workers. Weekly testing is not a viable alternative for several reasons. Congress did not authorize OSHA to issue an ETS requiring tens of millions of workers to get vaccinated. This Court should stay the enforcement of the ETS to avoid irreparable harm to businesses.

ARGUMENT

I. OSHA’s vaccine mandate will significantly and irreparably harm Wisconsin businesses and workers if it takes effect.

The ETS in question has already harmed businesses and will continue harming them before the December 6 deadline to comply. *See* 29 C.F.R. § 1910.501(m)(2)(i) (setting December 6, 2021, as the deadline for compliance with this ETS). By issuing

an ETS instead of a permanent standard, OSHA harmed businesses by denying them the opportunity to participate in the notice-and-comment rulemaking process. (Doc. 2-1:25–26.) And the ETS will require businesses to take many steps to prepare for compliance before the December 6 deadline. (Doc. 11:3 n.2.) Some businesses might need to devote one or more employees to serve as liaisons overseeing the implementation and continued enforcement of this ETS. Businesses will be financially harmed by devoting time and resources to preparing to implement, and then continually implementing, this ETS. Worse yet, this ETS would likely cause a mass exodus of workers from the businesses who are subject to it. As this Court is probably well-aware, a labor shortage in the United States is contributing to supply-chain problems and inflation.² The ETS would likely worsen this labor shortage by causing many workers to resign or be fired.

This ETS is effectively a vaccine mandate because weekly testing requirements are too onerous to be a viable alternative. The U.S. Centers for Disease Control and Prevention has recognized that there is a temporary shortage of point-of-care and over-the-counter test supplies for COVID-19.³ Testing will likely be in shorter supply in rural areas. Indeed, many counties in Wisconsin have zero or one COVID-19

² See, e.g., Craig Austin, *PBS News Hour*, “How the supply chain caused current inflation, and why it might be here to stay,” <https://www.pbs.org/newshour/economy/how-the-supply-chain-caused-current-inflation-and-why-it-might-be-here-to-stay> (Nov. 10, 2021).

³ CDC, “Lab Advisory: Shortage of COVID-19 Rapid Tests May Increase Demand for Laboratory Testing,” https://www.cdc.gov/csels/dls/locs/2021/09-02-2021-lab-advisory-Shortage_COVID-19_Rapid_Tests_Increase_Demand_Laboratory_Testing_1.html (last accessed Nov. 12, 2021).

community testing sites.⁴ Even if an unvaccinated worker is able to acquire over-the-counter tests, the ETS does not allow a test that is “both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.” 29 C.F.R. § 1910.501(c)(iii). This observation requirement will cost time and money, and it might not be feasible if telehealth providers are flooded with requests to observe self-tests or if workers are travelling out of state. Some workers might be able to undergo weekly laboratory testing, but they may need to miss one or more days of work while awaiting their test results. *See* 29 C.F.R. §§ 1910.501(g)(1)(i)(B), 1910.501(g)(1)(ii)(B), 1910.501(g)(2). Missed work can harm an employee and employer. Many workers will likely need to pay for testing because the ETS does not require employers to pay for testing. *See* 29 C.F.R. § 1910.501(g)(1), Note 1 to paragraph (g)(1). Finally, testing imposes administrative costs on businesses, such as the requirement to “maintain a record of each test result provided by each employee” who is not fully vaccinated. 29 C.F.R. § 1910.501(g)(4).

Given these testing burdens, many businesses expect to lose a substantial number of workers if they are required to get vaccinated or submit to weekly testing for COVID-19. The vast majority of WMC member businesses who responded to a recent WMC survey—88 percent of respondents—expect to lose workers if the ETS takes effect. (Ex. F.) Just over one-third of these survey respondents expect to lose up to ten percent of their workforce because of the ETS. (Ex. F.) More than half of the respondents—53 percent—expect to lose between 11 and 40 percent. (Ex. F.)

⁴ Wis. DHS, “COVID-19: Community Testing Sites,” <https://www.dhs.wisconsin.gov/covid-19/community-testing.htm> (last accessed Nov. 12, 2021).

Executives from eight businesses have provided declarations explaining the harmful effects that the ETS would have on their businesses. These declarations are included as exhibits with this *amicus* brief.

Stoughton Trailers, LLC, for example, expects to lose 15 percent of its 1,320-employee workforce if this ETS takes effect. (Ex. A.) This company’s president and chief executive officer states that “[t]his loss of employees will severely limit the ability of Stoughton Trailers, LLC to operate as a business, and meet the demands of [its] customers.” (Ex. A.)

Another manufacturer, Seats, Inc., “expects to lose 25–30% of [its] workforce if the ETS is allowed to take effect.” (Ex. B:1.) This company’s president states that “weekly testing of non-vaccinated employees is not feasible due to the lack of available testing materials.” (Ex. B:1.)

Prent Corp., a Wisconsin-based medical device packaging company that already requires unvaccinated workers to wear masks, “expects to lose 45% of [its] workforce if the ETS is allowed to take effect.” (Ex. G:1.) Regularly testing unvaccinated workers would “significantly decrease [Prent’s] productivity and production efficiencies.” (Ex. G:1.) Prent would further experience “detrimental costs” related to “testing, administrative resources as well as paying for employees’ absences during testing and for any side effects.” (Ex. G:1.)

If the ETS takes effect, it would have a “widespread and devastating” impact on Drexel Building Supply, Inc., a company with eight locations throughout Wisconsin. (Ex. H:2.) This company is suffering from “the pandemic shortage of labor

and supply chain issues,” and the ETS would exacerbate these problems by causing “a significant number” of employees to resign or retire. (Ex. H:1–2.) The costs of compliance with the ETS would “also be very burdensome” for Drexel, including the anticipated “need to have at least one more full-time employee at each location in order to check on Covid tests weekly and verify the results in order to ensure compliance with the ETS.” (Ex. H:2.)

Twin Disc, Inc., would also suffer tremendous harm if the ETS takes effect. This company, which already requires its vaccinated and unvaccinated workers to wear masks, would “likely” close its operations if the ETS takes effect due to the number of “skilled trade and professional employees” who are expected to resign because of the ETS. (Ex. I:2.) If this Racine-based company closes its operations, the impact on the Racine community “would be devastating.” (Ex. I:2.) Even if Twin Disc could survive widespread resignations, the compliance costs associated with the ETS “would be astronomical” and “could potentially force Twin Disc into financial distress.” (Ex. I:2–3.) The annual cost of testing for COVID-19 would be approximately \$5,000 per employee. (Ex. I:3.) “Neither Twin Disc nor the individual employees could absorb this cost.” (Ex. I:3.)

The ETS would also harm OEM Fabricators, Inc., a custom metal fabrication business. This company “expects to lose 25% of [its] workforce if the ETS is allowed to take effect.” (Ex. C:1.) This company’s president states that “[t]he administrative and financial burden this [ETS] will place on OEM is immense.” (Ex. C:1.) OEM is already facing a labor shortage and “cannot afford to lose” more workers. (Ex. C:1.)

Weekly testing would also be a burden on this business. OEM's president states that it would be "unreasonable" to expect OEM's unvaccinated workers to pay for weekly testing. (Ex. C:1.) OEM thus expects to pay \$3,000 per week in testing its unvaccinated workers, with the ETS costing this company about \$180,000 annually for tests and ETS-related administrative tasks. (Ex. C:1.) This annual cost "is a substantial undertaking for a company of [OEM's] size." (Ex. C:1.) OEM's president worries that the ETS's mask requirement for unvaccinated workers will further divide his workforce. (Ex. C:1–2.)

ITU AbsorbTech, Inc.—an industrial laundry that provides services to manufacturers to help protect the environment—expects "to lose 10% of [its] unvaccinated workforce." (Ex. D:1.) In some of its 14 facilities, the company "may lose half or more of [its] employees. That may make it impossible to service [its] customers." (Ex. D:1.) This amount of employee resignations would render ITU AbsorbTech "unable to process materials that are essential to manufacturing companies in some regions of the country." (Ex. D:2.) The ETS would create a "barrier for recruiting and hiring in the most difficult labor market." (Ex. D:2.) The ETS would "impact [ITU AbsorbTech's] capability to recruit, to hire and ultimately fulfill [its] contracts and services to customers." (Ex. D:2.)

Another Wisconsin-based company, QPS Employment Group, "expects to lose 15% of [its] workforce if the ETS is allowed to take effect." (Ex. E.) This loss of workers would "severely limit" the company's ability to meet customer demand and operate as a business. (Ex. E.) Testing its unvaccinated workers would be "financially

impactful” due to the logistics of testing thousands of workers in 55 locations throughout the Midwest. (Ex. E.)

II. OSHA lacks statutory authority to mandate vaccinations.

Tankcraft and Plasticraft correctly argue that OSHA lacks the statutory authority to issue the ETS in question. (Doc. 2-1:7–13.) Three canons of statutory construction support this view.

First is the doctrine of constitutional avoidance, under which “ambiguous statutory language [should] be construed to avoid serious constitutional doubts.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). As Tankcraft and Plasticraft explain in their emergency motion, the relevant federal statute would raise serious constitutional questions under the Commerce Clause and non-delegation doctrine if this Court were to interpret the statute as allowing OSHA to mandate vaccinations. (Doc. 2-1:14–20.)

The second relevant canon of construction is the major-questions doctrine, which “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.”’” *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). Vaccine mandates are a politically significant issue in the United States right now. And OSHA’s vaccine mandate would have vast economic consequences by causing mass resignations and other financial harm on businesses, as explained *supra*. The relevant federal statute has not clearly authorized OSHA to impose a vastly significant vaccine mandate.

The third relevant canon, which is related to the major-questions doctrine, “require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489 (citation omitted). OSHA’s vaccine mandate would do both of those things. On the latter score, it would greatly expand the federal government’s authority over private businesses. If the federal government has the power to mandate private-sector workers to get vaccinated, then there is no logical stopping point to this power. Under a logical extension of this vast power, OSHA could mandate private-sector workers to get vaccinated for a host of ailments, refrain from using tobacco products and alcohol, and get tested regularly for a variety of health issues. Congress did not give OSHA such far-reaching power over private industry in exceedingly clear statutory language.

OSHA’s vaccine mandate would also “significantly alter the balance between federal and state power.” *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489 (citation omitted). The Supreme Court long ago held that “it is within the police power of *a state* to provide for compulsory vaccination.” *Zucht v. King*, 260 U.S. 174, 176 (1922) (emphasis added) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). States, not the federal government, have so-called police power “to enact legislation for the public good.” *Bond v. United States*, 572 U.S. 844, 854 (2014). OSHA has no police power to mandate vaccinations, and Congress lacks any constitutional authority to delegate such power to OSHA.

This case is about the scope of the federal government’s power more than it is about COVID-19 or vaccinations. “It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Alabama Ass’n of Realtors*, 141 S. Ct. at 2490. OSHA’s vaccine-mandate ETS is unlawful.

CONCLUSION

This Court should grant the petition for review and the emergency motion for a stay.

Respectfully submitted this 15th day of November 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:
This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 2,406 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font.

Dated this 15th day of November 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I filed the foregoing Amicus Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated this 15th day of November 2021.

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