

No. \_\_\_\_\_

**In the United States Court of Appeals  
for the Fifth Circuit**

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GREG ABBOTT, GOVERNOR OF TEXAS,  
*Petitioner,*

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION;  
UNITED STATES DEPARTMENT OF LABOR;  
MARTIN J. WALSH, UNITED STATES SECRETARY OF LABOR;  
DOUGLAS PARKER, ASSISTANT SECRETARY OF LABOR  
FOR OCCUPATIONAL SAFETY AND HEALTH,  
*Respondents.*

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**PETITION FOR REVIEW**

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To defend the sovereignty of Texas and the liberty of Texans, Governor Greg Abbott files this petition challenging an unprecedented COVID-19 vaccine “Mandate” from the Occupational Safety and Health Administration. *See Stay Op.* at 3, No. 21-60845 (5th Cir. Nov. 12, 2021) (describing this “Mandate”). Governor Abbott is uniquely entitled to judicial review under 29 U.S.C. § 655(f) as a “person who may be adversely affected by” OSHA’s Mandate, because the federal agency purports to preempt his own Executive Order GA-40. This Court should vacate OSHA’s Mandate, which “runs afoul of the statute from which it

draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.” Stay Op., *supra*, at 20.

Executive Order GA-40 provides, as a matter of Texas law, that “[n]o entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” 46 Tex. Reg. 7295, 7296 (Oct. 11, 2021); *cf.* TEX. GOV’T CODE § 418.012 (“[T]he governor may issue executive orders . . . hav[ing] the force and effect of law.”). Governor Abbott put this protection in place because “the Biden Administration [was] bullying many private entities into imposing COVID-19 vaccine mandates, causing workforce disruptions that threaten Texas’s continued recovery from the COVID-19 disaster.” 46 Tex. Reg. at 7295.

Two months later, that bullying has culminated in OSHA’s Mandate, which effectively forces every private employer with 100 or more workers to impose a COVID-19 vaccine mandate on its employees. *See* 86 Fed. Reg. 61,402. Of note here, OSHA calls out Governor Abbott’s Executive Order GA-40 by name and purports to preempt it.

*See, e.g., id.* at 61,432, 61,505–10, 61,551. In this way, OSHA is trying to deliver on President Biden’s empty threat that “if these governors won’t help us beat the pandemic, I’ll use my power as President to get them out of the way.” *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), <https://tinyurl.com/55jkhcn>.

Tough talk, sure, but preemption doctrine doesn’t work that way: Presidential pique is not “the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. Executive Order GA-40 is a valid exercise of police powers reserved to the State of Texas by the Tenth Amendment. Meanwhile, the Supremacy Clause reserves preemptive effect for federal laws that are “made in Pursuance” of “[t]his Constitution.” U.S. CONST. art. VI, cl. 2; *see also Wyeth v. Levine*, 555 U.S. 555, 585–87 (2009) (Thomas, J., concurring in judgment). In this case, OSHA cannot preempt Texas law without stretching its organic statute well beyond a constitutional breaking point. *See Stay Op., supra*, at 6, 16–18, 19 & n.21 (flagging problems under the Tenth Amendment, the Commerce Clause, the nondelegation doctrine, the major-questions doctrine, and the Free Exercise Clause). Governor Abbott’s Executive Order GA-40 need not yield to President Biden’s unconstitutional power grab.

Accordingly, pursuant to 29 U.S.C. § 655(f) and Rule 15(a) of the Federal Rules of Appellate Procedure, Governor Abbott hereby petitions the Court for review of OSHA's *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021), a copy of which is enclosed with this filing. This petition should be consolidated in this Court under Cause No. 21-60845. *See Order at 2 n.1, No. 21-60845 (5th Cir. Nov. 6, 2021) (per curiam).*

Respectfully submitted.

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Governor of Texas

s/ James P. Sullivan  
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## CERTIFICATE OF SERVICE

On November 15, 2021, I certify that I served respondents via CM/ECF and e-mailed a true and correct copy of this petition for review to the following:

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