

September 16, 2021

Letter from the Attorneys General of: **Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming**

President Joseph R. Biden  
The White House  
1600 Pennsylvania Ave NW  
Washington, D.C. 20500

Dear President Biden,

We, the Attorneys General of 24 states, write in opposition to your attempt to mandate the vaccination of private citizens. On September 9, you announced that you would be ordering the Department of Labor to issue an emergency temporary standard, under the Occupational Safety and Health (OSH) Act, which would mandate that private sector employers require most of their employees to either get a COVID-19 shot, submit to weekly testing, or be fired.

Your plan is disastrous and counterproductive. From a policy perspective, this edict is unlikely to win hearts and minds—it will simply drive further skepticism. And at least some Americans will simply leave the job market instead of complying. This will further strain an already-too-tight labor market, burdening companies and (therefore) threatening the jobs of even those who *have* received a vaccine. Worse still, many of those who decide to leave their jobs rather than follow your directive will be essential healthcare workers. This is no idle speculation. A New York hospital recently announced its plans to stop delivering babies after several staff members resigned in the face of New York's mandate.<sup>1</sup> And recent polling suggests those frontline healthcare workers are not outliers.<sup>2</sup> Thus, Mr. President, your vaccination mandate represents not only a threat to individual liberty, but a public health disaster that will displace vulnerable workers and exacerbate a nationwide hospital staffing crisis, with severe consequences for all Americans.<sup>3</sup>

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<sup>1</sup> John Yoon, *A small upstate New York hospital will stop delivering babies after 6 workers quit rather than be vaccinated*, New York Times, Sept. 13, 2021, <https://www.nytimes.com/2021/09/13/nyregion/upstate-ny-hospital-stop-delivering-babies.html>.

<sup>2</sup> Washington Post-ABC News Poll, Aug. 29-Sept. 1, 2021, [https://www.washingtonpost.com/context/aug-29-sept-1-2021-washington-post-abc-news-poll/899d77db-ef60-46c9-b028-8f3298df8659/?itid=lk\\_inline\\_manual\\_42](https://www.washingtonpost.com/context/aug-29-sept-1-2021-washington-post-abc-news-poll/899d77db-ef60-46c9-b028-8f3298df8659/?itid=lk_inline_manual_42) (reporting that of unvaccinated workers not currently required to be vaccinated, if faced with a vaccine mandate, only 16% would get vaccinated, 35% would ask for an exemption, and 42% would quit).

<sup>3</sup> Andrew Jacobs, *'Nursing Is in Crisis': Staff Shortages Put Patients at Risk*, New York Times, Aug. 21, 2021, <https://www.nytimes.com/2021/08/21/health/covid-nursing-shortage-delta.html>.

This government edict is also likely to increase skepticism of vaccines. You emphasized at your September 9 announcement “that the vaccines provide very strong protection from severe illness from COVID-19 ... [and] the world’s leading scientists confirm that if you are fully vaccinated, your risk of severe illness from COVID-19 is very low.” You further stated that “only one of out of every 160,000 fully vaccinated Americans was hospitalized for COVID per day.” And you said “the science makes clear” that “if you’re fully vaccinated, you’re highly protected from severe illness, even if you get COVID-19.” The mandate, however, sends exactly the opposite signal: it suggests that *the vaccinated* need protection from those who, for whatever personal reason, choose not to or cannot receive a COVID-19 shot. That is hardly a statement of confidence in the efficacy of vaccines.

The policy also fails to account for differences between employees that may justify more nuanced treatment by employers. Most glaringly, your policy inexplicably fails to recognize natural immunity. Indeed, the CDC estimated that by late May 2021, over 120 million Americans had already been infected, and that number is likely tens of millions higher today.<sup>4</sup> And your sweeping mandate fails to account for the fact that many workers—for example, those who work from home or work outdoors—are at almost no risk of exposure from their co-workers *regardless* of vaccine status. A one-size-fits-all policy is not reasoned decision-making. It is power for power’s sake.

Your edict is also illegal. You propose to enforce your mandate through the rarely used emergency temporary standard provision in the OSH Act. According to the Congressional Research Service, the Department has attempted to adopt an emergency temporary standard only one other time since 1983 (and that one exception came in June of this year and is being challenged). An emergency temporary standard does not have to go through notice and comment and can be made effective immediately upon publication. Because of this lack of process and oversight, courts have viewed these standards with suspicion. Between 1971 and 1983, the Occupational Safety and Health Administration (OSHA) issued nine emergency temporary standards. Of those, six were challenged. The courts fully vacated or stayed the standards in four cases, partially stayed the standards in another, and upheld only one of the six.

Courts are skeptical because the law demands it. To justify an emergency temporary standard, OSHA must determine that “employees are exposed to *grave danger* from exposure to *substances or agents* determined to be toxic or physically harmful or from *new hazards* . . . .” and it must conclude that “such emergency standard is *necessary* to protect employees from such danger.”<sup>5</sup> Each of the italicized phrases defeats your attempt to rely on this statute. First, while “grave danger” is left undefined, your own statements during the announcement that those who are vaccinated have little chance of hospitalization or death undercut any assertion that there is “grave danger.” Moreover, many Americans who have recovered from COVID-19 have obtained a level of natural immunity, and the statistics are clear that young people without co-morbidities have a low risk of hospitalization from COVID-19. You thus cannot plausibly meet the high burden of showing that employees in general are in grave danger.

What is more, the COVID-19 virus is not the sort of “substance,” “agent,” or “hazard [ ]” to which the statute refers. OSHA, as its full name suggests, exists to ensure *occupational* safety.

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<sup>4</sup> Centers for Disease Control and Prevention, Estimated COVID-19 Burden, updated May 29, 2021, <https://perma.cc/QKL7-VS36>.

<sup>5</sup> 29 U.S.C. § 655(c)(1).

In other words, it deals with *work-related* hazards, not all hazards one might encounter anywhere in the world. Congress made this clear in empowering OSHA to establish workplace standards not concerning whatever it likes, but rather “employment and places of employment.”<sup>6</sup> The findings Congress passed with the law say the bill was motivated by a concern that “personal injuries and illnesses *arising out of work situations* impose a substantial burden upon ... interstate commerce.”<sup>7</sup> Congress expressly intended to encourage “employers and employees in their efforts to reduce the number of *occupational safety and health hazards* at their places of employment.”<sup>8</sup>

When used in the context of a law directed toward occupational safety, the words “substances,” “agents,” and “hazards” relate to the dangers presented by the job itself—for example, chemicals used at job sites and tools used to carry out tasks—not to dangers existing in the world generally. And indeed, this is consistent with how the Act elsewhere uses these words. One provision, for example, requires the government to prepare a report “listing all toxic substances *in industrial usage*.”<sup>9</sup> Another provision repeatedly imposes duties and powers regarding “substances” and “agents” to which employees are exposed as part of their employment.<sup>10</sup> Still another requires studies regarding “the contamination of workers’ homes with hazardous chemicals and substances, including infectious agents, transported from the workplaces of such workers.”<sup>11</sup> All of these provisions are most naturally focused on dangers occurring at work *because of one’s work*, as opposed to dangers occurring in society generally, *including* at work.

Finally, broadly mandating vaccinations (or weekly COVID-19 testing) for 80 million Americans, simply because they work at a business of a certain size, hardly seems “necessary” to meet any such danger. On the contrary, it is vastly overbroad and inexact. There are many less intrusive means to combat the spread of COVID-19 other than requiring vaccinations or COVID-19 testing. The risks of COVID-19 spread also vary widely depending on the nature of the business in question, many of which can have their employees, for example, work remotely. The one-size-fits-almost-all approach you have decreed makes clear that you intend to use the OSH act as a pretext to impose an unprecedented, controversial public health measure on a nationwide basis that only incidentally concerns the workplace.

To the extent there is any ambiguity on this score, a few interpretive principles command this narrower interpretation.

*First*, there is “the background assumption that Congress normally preserves the constitutional balance between the National Government and the State.”<sup>12</sup> As a result, Congress must speak clearly if it wishes to upset the constitutional balance of power. Allowing OSHA to mandate vaccines to protect against a virus that is endemic in society generally would vastly alter the constitutional balance of power. Millions of Americans work for private companies subject to OSHA rules. Thus, reading the statute as empowering the Department of Labor to regulate employees’ responses to illnesses existing in society at large would entail reading it to regulate the

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<sup>6</sup> 29 U.S.C. § 652(8).

<sup>7</sup> 29 U.S.C. § 651(a).

<sup>8</sup> 29 U.S.C. § 651(b)(1).

<sup>9</sup> 29 U.S.C. § 675.

<sup>10</sup> 29 U.S.C. § 669.

<sup>11</sup> 29 U.S.C. § 671a.

<sup>12</sup> *Bond v. United States*, 572 U.S. 844, 862 (2014) (internal quotation marks omitted).

health and well-being of millions of Americans. That would be a sweeping intrusion on traditional state authority: “the regulation of health and safety matters is primarily, and historically, a matter of local concern.”<sup>13</sup>

*Second*, the major-questions doctrine leads to the same result. Courts “expect Congress to speak clearly when authorizing an agency to exercise powers of “vast ‘economic and political significance.’”<sup>14</sup> Reading the emergency temporary standard provision as permitting the Department of Labor to regulate private health decisions made outside of work would be a major power indeed. Because the statute does not clearly empower the Department to regulate such matters, it must be read not to do so.

*Third*, the constitutional-doubt canon resolves any lingering ambiguity. “A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”<sup>15</sup> Reading the emergency temporary standard statute to permit your proposed order would create grave doubts about the statute’s constitutionality. Congress cannot hand its job to make the law to OSHA or any other agency—our Constitution vests the legislative power in Congress alone. Even if OSHA’s general grant of authority passes constitutional muster, which some have questioned, *this particular statute* is unconstitutional if it gives the executive branch complete discretion to regulate any matter related to the general health and safety of the American people. And any reading that would permit the executive branch to mandate vaccines would seem to do just that—if *that* order is allowed, then it is unclear what order would *exceed* the Department’s power.

This isn’t the first time you have reached for new and startlingly broad powers in old statutes. The Supreme Court recently halted your eviction ban because Congress had not granted the CDC the authority to issue such a decree. While the Supreme Court opined that your earlier “claim of expansive authority . . . is unprecedented,”<sup>16</sup> your latest gambit goes even further. As the Supreme Court noted then, “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”<sup>17</sup> And as with the eviction moratorium, Congress has *not* clearly granted you the authority to impose your sweeping vaccine mandate, which would have enormous social, economic, and political consequences.

According to you, Mr. President, this would affect nearly 80 million Americans. But many millions more will be directly and indirectly harmed. Millions of Americans are threatened with losing their jobs and the benefits that come with them, including life and health insurance and retirement benefits. Your threat carries with it the threat of people losing their homes and shifting the financial obligation of supporting currently independent and employed individuals to public support systems. Worse still, if your expansive reading of the law succeeds, the American people

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<sup>13</sup> *Hillsborough Cty. v. Automated Med. Lab’ys, Inc.*, 471 U.S. 707, 719 (1985).

<sup>14</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at \*3 (U.S. Aug. 26, 2021) (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>15</sup> *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Ala. Assoc. of Realtors*, 2021 WL 3783142, at 3.

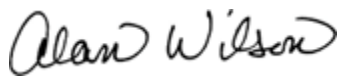
can expect further abuses, as it is hard to imagine any requirement that the law would *not* allow.<sup>18</sup> You are clearly acting beyond the scope of the statute, and you will fail in court.

Some proponents of broad government mandates have claimed authority from the previously little-known case of *Jacobson v. Massachusetts*.<sup>19</sup> But that case is irrelevant. It holds only that a *State's* vaccine mandate does not always violate the Fourteenth Amendment right to due process. The case does not come close to suggesting that the *federal government* has the power to impose such sweeping national mandates. Nor could it have. "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"<sup>20</sup> Your proposed plan would invert that structure and put the federal government at the forefront. States have taken varying approaches to dealing with the virus, and, whether you like it or not, that is how our constitutional structure is arranged.

The vaccines have helped protect millions of Americans, and there are surely others who could benefit from obtaining this treatment. But convincing those who are hesitant to do so would require you to allow room for discussion and disagreement. Instead, you have offered the American people flimsy legal arguments, contradictory statements, and threatening directives. It is almost as if your goal is to sow division and distrust, rather than promote unity and the public's health.

We thus urge you to reconsider your unlawful and harmful plan and allow people to make their own decisions. If your Administration does not alter its course, the undersigned state Attorneys General will seek every available legal option to hold you accountable and uphold the rule of law.

Respectfully,



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Attorney General for South Carolina



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<sup>18</sup> For example, will we see lockdowns of private businesses? Or because the available COVID-19 shots do not confer lasting immunity, should Americans expect to see a mandated third or fourth shot in the coming months?

<sup>19</sup> 197 U.S. 11 (1905).

<sup>20</sup> *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in the denial of injunctive relief) (quoting *Jacobson*, 197 U.S. 11 at 38).



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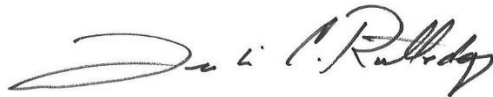
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