

SENATE JOINT RESOLUTION 9005

By McNally

A RESOLUTION to address the federal government's penalizing, or taxation of, citizens of this State through enforcement of restrictions relative to COVID-19 by supporting the challenging, condemning, and nullifying of such action.

WHEREAS, on September 9, 2021, the President of the United States announced an executive order that mandates COVID-19 vaccinations for employees of federal contractors and subcontractors; and

WHEREAS, President Biden also announced a forthcoming Emergency Temporary Standard (ETS) to be issued by the Occupational Safety and Health Administration (OSHA) regarding COVID-19 vaccinations or routine testing for employers with more than 100 employees; and

WHEREAS, part of the President's COVID-19 Action Plan includes having the Centers for Medicare & Medicaid Services (CMS) require COVID-19 vaccinations for workers in most healthcare settings that receive Medicare or Medicaid reimbursement, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies; and

WHEREAS, the new CMS requirements will be in addition to the vaccination requirement for nursing facilities previously announced by CMS, and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care; and

WHEREAS, federalism is described and analyzed in *Bond v. United States*, 564 U.S. 211 (2011), in which the United States Supreme Court declared that the federal system rests on the insight that "freedom is enhanced by the creation of two governments, not one"; and

WHEREAS, the Court further stated that this freedom is enhanced "first by protecting the integrity of the [two] governments themselves, and second by protecting the people, from whom all governmental powers are derived"; and

WHEREAS, federalism serves "to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another . . . [and] preserves the integrity, dignity, and residual sovereignty of the States"; and

WHEREAS, this federal balance "ensure[s] that States function as political entities in their own right"; and

WHEREAS, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake"; and

WHEREAS, the limitations prescribed under federalism are not "a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States"; and

WHEREAS, the United States Supreme Court in *National Federation of Independent Business (NFIB) v. Sebelius*, 567 U.S. 519 (2012), further analyzed federalism and the Tenth Amendment to the United States Constitution as well as the taxing power of the federal government; and

WHEREAS, the Court acknowledged that a government's "police power" is the general power of governing, possessed by the states but not by the federal government as the federal government only possesses enumerated powers listed in the United States Constitution; and

WHEREAS, the Constitution's express conferral of some powers for the federal government makes clear that it does not grant others, and the federal government can exercise only the powers granted to it; and

WHEREAS, the independent power of the states serves as a check on the power of the federal government; by denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power; and

WHEREAS, the federal government may create incentives for states to act in accordance with federal policies, but when pressure turns into compulsion, it runs contrary to federalism, and the Constitution does not give federal government the authority to require the states to regulate, regardless of whether the federal government directly commands a state to regulate or indirectly coerces a state to adopt a federal regulatory system as its own; and

WHEREAS, assertions of federal authority must be grounded in some constitutional grant of power, with the most common basis for federal intervention in private affairs being the Constitution's Commerce Clause, which empowers Congress "to regulate commerce . . . among the several states"; and

WHEREAS, in *NFIB v. Sebelius*, the Supreme Court held that the Commerce Clause cannot be used to compel individuals to engage in activity, even when such activity has an impact on interstate commerce; and

WHEREAS, while the compelled activity in *NFIB* was purchasing health insurance, the logic applies with equal force to a federal mandate to get an injection or submit to a weekly test, as foreshadowed by Chief Justice John Roberts, writing for the majority, when he rejected an interpretation of the Commerce Clause that would allow, for example, Congress to pass a law requiring individuals to buy vegetables to promote healthier eating habits; and

WHEREAS, it is Congress, not the executive branch, that is granted the enumerated power under Article I, § 8, to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"; and

WHEREAS, the essential feature of any "tax" is that it produces at least some revenue for the government, and in distinguishing penalties from taxes, the general concept of a "penalty" means punishment for an unlawful act or omission; and

WHEREAS, the federal government cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other; and

WHEREAS, the Court in *NFIB* determined that the exaction that the Patient Protection and Affordable Care Act imposed on those without health insurance, through the act's shared responsibility payment, was a "tax," for purposes of Congress's taxing power, though the act described the exaction as a penalty rather than as a tax, and the exaction was intended to affect individual conduct; and

WHEREAS, by requiring employees or employers in this State to pay for a COVID-19 test to comply with federal mandates, including the forthcoming ETS to be issued by OSHA, such employees or employers will effectively be taxed by the executive branch and not by an act of Congress, as constitutionally required; and

WHEREAS, reliance by the federal government on OSHA to implement a federal mandate represents an egregious overstepping of the authority that is granted to OSHA under the 1970 Occupational Safety and Health Act, as nothing in that law even hints at the sweeping powers the President has claimed; and

WHEREAS, the Occupation Safety and Health Act's reference to "substances or agents" strongly suggests that OSHA's ETS power is meant to target workplace hazards like dangerous chemicals and not naturally occurring hazards like viruses; and

WHEREAS, decisions regarding any vaccine mandate properly belong to the states, not the federal government, and United States Supreme Court precedents on the validity of vaccine mandates under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Zucht v. King*, 260 U.S.

174 (1922), involve state, not federal, laws, and are part of the broad "police powers" enjoyed by the states; and

WHEREAS, the announced executive orders and COVID-19 Action Plan are attempts by the federal government to coerce the State of Tennessee and its citizens in violation of both the United States Constitution and the Tennessee Constitution; and

WHEREAS, each member of the General Assembly has taken an oath to uphold the Constitution of Tennessee and the Constitution of the United States; and

WHEREAS, if the federal government intends to overreach its authority to the point that it assumes the traditional constitutional role of a state legislative body, it is only fitting and proper that the very existence, as well as the depth and breadth, of this federal power be condemned and challenged not just in a court of law, but also through actions of the General Assembly to nullify such federal overreach; now, therefore,

BE IT RESOLVED BY THE SENATE OF THE ONE HUNDRED TWELFTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES CONCURRING, that the State of Tennessee condemns any attempt by the federal government to penalize or tax citizens of this State in an effort to enforce an unconstitutional mandate regarding COVID-19 vaccinations or other COVID-related restrictions and requirements.

BE IT FURTHER RESOLVED that it is the right of the Tennessee General Assembly to enact such legislation as it deems necessary to nullify actions taken by the federal government regarding COVID-19 when those actions violate the United States Constitution.

BE IT FURTHER RESOLVED that the Tennessee General Assembly urges the Attorney General and Reporter of the State of Tennessee to initiate or intervene in one or more civil actions on behalf of the State of Tennessee or, in the alternative, seek appropriate relief in a federal court of competent jurisdiction regarding COVID-19 mandates issued by the federal government, and any actions taken by the federal government, including the President of the

United States, the head of any department or agency, or any other employee of the executive branch of the federal government, in violation of federal law or as prohibited by the Tenth Amendment to the United States Constitution, or any other statutory or constitutional provisions of the United States or the State of Tennessee, with respect to the implementation or enforcement in this State of any provision of the federal government's mandate that requires citizens of this State to either receive a COVID-19 vaccination or submit to routine testing.

BE IT FURTHER RESOLVED, that a certified copy of this resolution be transmitted to the Attorney General and Reporter of Tennessee.