Nos. 21-7000 & 21-4080
MCP No. 165

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61,402

On Petitions for Review

BST HOLDINGS, LLC PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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INTRODUCTION

In an attempt to impose a nationwide COVID-19 vaccine mandate without approval from Congress, the executive branch couched its mandate as an emergency workplace rule affecting nearly 100 million Americans. But the rule is neither a workplace rule nor responsive to an emergency. Vaccination is a public health issue that affects people throughout society; it does not combat a hazard particular to the workplace. And there is no need to avoid administrative accountability by using an emergency rule to address a pandemic that has been going on for over two years. Congress did not grant the Occupational Safety and Health Administration ("OSHA") such sweeping powers in its authorizing statute.

The OSHA rule is one of five COVID-19 vaccine mandates announced by President Joe Biden on September 9, 2021, all of which relied on novel, questionable views of executive authority.[1] Five of five courts to examine those mandates have determined that the executive

[1] *See* Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. The others are mandates on federal employees, federal contractors, Head Start workers, and healthcare workers.

branch agencies charged with enforcing them did not possess the statutory or constitutional authority to do so. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 2021 U.S. App. LEXIS 33698, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (staying the OSHA mandate); *Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga. Dec. 7, 2021) (enjoining the federal contractor mandate); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (same); *Louisiana v. Becerra*, No. 3:21-cv-03970-TAD-KDM, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021) (enjoining the healthcare workers mandate); *Missouri v. Biden*, No. 4:21-cv-01329-MTS, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021) (same). This Court should not become the first court to allow an executive branch vaccine mandate to go forward and should not overrule the decision of its sister court, the Fifth Circuit.

This Court should deny Respondents' Emergency Motion to Dissolve [the] Stay [of the Fifth Circuit] [Dkt. 69] (the "Motion") because the rule is not related to the workplace; it does not address a "grave danger"; it is not "necessary"; and it does not address a "toxic or physically harmful" "substance" or "agent." Furthermore, vacating the

stay would cause irreparable harm to Petitioners and the public, but maintaining it will not harm OSHA.

LEGAL STANDARD

The Motion does not contain a separate section on the standard of review for one court reviewing the stay entered by another, but one exists and counsels deference to the Fifth Circuit here. "The bar for vacating a stay is high. Among other things, the decision at issue must be 'demonstrably wrong.'" *Valentine v. Collier*, 141 S. Ct. 57, 59 (2020) (Sotomayor, J., dissenting from the denial of application to vacate stay) (quoting *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers)). Even the Supreme Court "may not vacate a stay entered by a court of appeals unless that court clearly and 'demonstrably' erred in its application of 'accepted standards.'" *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (quoting *W. Airlines*); *see also Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) ("a Circuit Justice has jurisdiction to vacate a stay where . . . the Circuit Justice is of the opinion

that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay").

The Government must, therefore, show that the Fifth Circuit was "demonstrably wrong" in its application of the appropriate standard. The appropriate standard applied in this case includes "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *BST Holdings*, 2021 WL 5279381, at *7 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

In this Circuit, "the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). Furthermore, even if the plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits," an injunction can be issued if the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

The Fifth Circuit's application of the standard was appropriate and certainly does not rise to the sort of demonstrable error required to vacate it.

FACTUAL BACKGROUND

On September 9, 2021, President Joe Biden held a press conference in which he stated that his "patience is wearing thin" with unvaccinated Americans, and he announced COVID-19 vaccine mandates on nearly 100 million Americans.[2]

The chosen tool for imposing the broadest vaccine mandate possible was to "frame[it] as an ETS" (Emergency Temporary Standard) promulgated by OSHA. *BST Holdings*, 2021 WL 5279381, at *6. After many publicly questioned whether OSHA had such power, President Biden explained that he was "moving forward with vaccination requirements wherever [he] can."[3]

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[2] Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans,* CNN (Sept. 9, 2021, 9:01 P.M.), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html.

[3] Robert Towey, *Biden Says Unvaccinated Americans Are 'Costing All of Us' as He Presses Covid Vaccine Mandates,* CNBC (Sept. 24, 2021, 11:12 A.M.), https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html.

Nearly two months later, OSHA published the "emergency" standard in the Federal Register. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (the "Mandate"). The Mandate requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis and wear a face covering while at work. *Id*. at 61402-04.

Petitioners the Trosclair Companies already faced a shortage of full-time employees in their 15 grocery stores, and the Mandate would make it even harder to hire and maintain employees because many of them do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. Trosclair Decl., Emer. Mot. Ex. B, ¶¶4, 11–13 (5th Cir., No. 21-60845).

Petitioners the CaptiveAire Employees do not want to be "put to a choice between their job(s) and their jab(s)," especially the four who work mostly on roofs and are subject to the Mandate only because they occasionally interact with customers. *BST Holdings*, 2021 WL 5279381, at *24; *see also* Dailey Decl., Emer. Mot. Ex. C, ¶¶4, 6-7 (5th Cir., No. 21-

60845); Gamble Decl., Emer. Mot. Ex. D, ¶¶4, 6-7 (5th Cir., No. 21-60845); Jones Decl., Emer. Mot. Ex. E, ¶¶4, 6-7 (5th Cir., No. 21-60845); Loschen Decl., Emer. Mot. Ex. F, ¶¶5-6 (5th Cir., No. 21-60845); Reyna Decl., Emer. Mot. Ex. G, ¶¶4, 6-7 (5th Cir., No. 21-60845); Stovall Decl., Emer. Mot. Ex. H, ¶¶6-7 (5th Cir., No. 21-60845); Luddy Decl., Emer. Mot. Ex. I, ¶¶4-8 (5th Cir., No. 21-60845).

Therefore, on November 5, 2021, Petitioners brought a Petition against the Mandate [5th Cir., No. 21-60845] and an Emergency Motion to Stay Enforcement Pending Review & Expedite Review, seeking relief the next day. On November 6, 2021, the Fifth Circuit granted the stay, citing "grave statutory and constitutional issues" and ordering expedited briefing. After briefing, the Fifth Circuit entered its 22-page order upholding the stay pending adequate judicial review of the motions for a permanent injunction. *BST Holdings*, 2021 WL 5279381.

ARGUMENT

I. The Fifth Circuit did not commit demonstrable error in finding Petitioners are likely to succeed on the merits that the Mandate exceeds OSHA's statutory authority.

Congress passed the Occupational Safety and Health Act (the "Act"), 29 U.S.C. §§ 651-678, to assure safe and healthful working

conditions for the nation's workforce and to preserve the nation's human resources. 29 U.S.C. § 651 (1976). The Act allows the Secretary of Labor (the "Secretary") to promulgate rules and standards for occupational safety and health, *id.* at § 655(b), but "only where a significant risk of harm exists[,] and . . . the Agency [bears the] burden of establishing the need for a proposed standard." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 652–53 (1980). A permanent standard may be issued under 29 U.S.C. § 655(b) to serve the objectives of OSHA and requires procedures similar to informal rulemaking found in the Administrative Procedure Act at 5 U.S.C. § 553.

The Secretary may bypass the normal procedure in favor of promulgating an ETS to take effect immediately upon publication in the Federal Register only if the Secretary determines 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 "that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). An ETS serves only as a proposed rule, on which the Secretary must act within six months of publication. 29 U.S.C. § 655(c)(1).

Therefore, an ETS "'is an "extraordinary power" that is to be "delicately exercised" in only certain "limited situations."'" *BST Holdings*, 2021 WL 5279381, at *10 (quoting *In re Int'l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (per curiam)). As the Fifth Circuit pointed out, "in its fifty-year history, OSHA has issued just ten ETSs. Six were challenged in court; only one survived." *BST Holdings*, 2021 WL 5279381, at *5. And OSHA has "never" before issued an ETS "to mandate vaccines." *Id.* at *28 (Duncan, J., concurring) (citing 86 Fed. Reg. at 61,403). The Mandate represents an egregious government overreach into a private healthcare decision.

The Fifth Circuit correctly determined that the Mandate "grossly exceeds OSHA's statutory authority" in at least four ways: it is not related to the workplace; it does not address a "grave danger"; it is not "necessary"; and it does not address a "toxic or physically harmful" "substance" or "agent." *BST Holdings*, 2021 WL 5279381, at *9.

A. The Mandate is not related to the workplace.

The Mandate exceeds the statutory authority given to OSHA by Congress in the Act because it is not limited to "employment and places of employment." 29 U.S.C. § 652(8). The Mandate itself admits that

"COVID-19 is not a uniquely work-related hazard." 86 Fed. Reg. 61,407. Instead, the Mandate attempts to regulate a hazard one might encounter anywhere in the world. In regulating public health generally, OSHA exceeds its statutory authority. The Act was not "intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings*, 2021 WL 5279381, at *8 (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488-90 (2021) (per curiam)).

In *Alabama Association of Realtors*, the Supreme Court explained that the Centers for Disease Control and Prevention (CDC) could not unilaterally grant itself control of the nation's housing market by issuing a nationwide eviction moratorium. Sweeping authority must come, if at all, from Congress. *Ala. Realtors*, 141 S. Ct. at 2485. In their Motion, Respondents failed to acknowledge this recent decision. There, as here, the government's reading of the statute was far too expansive: "The Government contends that the [statute] gives [it] broad authority to take whatever measures it deems necessary to control the spread of COVID-19 . . . ." *Id.* at 2488. Here, the government asserts that the Act gives

OSHA the power to regulate the spread of COVID-19 well beyond the workplace. Mot. 15-16. In both cases, "[i]t strains credulity to believe that this statute grants the [agency] the sweeping authority that it asserts." *Ala. Realtors*, 141 S. Ct. at 2486. As the Fifth Circuit correctly analogized, "health agencies do not make housing policy, and occupational safety administrations do not make health policy." *BST Holdings*, 2021 WL 5279381, at *26 (citing *Ala. Realtors*, 141 S. Ct. at 2488-90).

1. Workplace safety is a pretext.

The Fifth Circuit correctly recognized that OSHA's workplace vaccine mandate was being used on a "pretextual basis" for a larger goal: to increase vaccinations everywhere. *BST Holdings*, 2021 WL 5279381, at *15. President Biden announced the true purpose of the Mandate: "to reduce the number of unvaccinated Americans."[4] Thus, he commanded *all* unvaccinated Americans, "Get vaccinated."[5] The Mandate itself laments that "many employees have yet to take this simple step." 86 Fed.

[4] *Path Out of the Pandemic,* The White House, https://www.whitehouse.gov/covidplan/ (last visited Sept. 22, 2021).

[5] *See* Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

Reg. 61,444. Then it forces them to take the step by threatening loss of their jobs if they do not. *See* 86 Fed. Reg. 61,475, n.41.

As the Fifth Circuit recognized, the "Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate. The vehicle it landed on was an OSHA ETS." *BST Holdings*, 2021 WL 5279381, at *9 (quoting White House Chief of Staff Ron Klain's retweet of MSNBC anchor Stephanie Ruhle's tweet stating, "OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.").

Indeed, that the Mandate was announced as part of a larger plan to use several administrative agencies to force vaccinations on as many Americans as possible reveals its true purpose was to extend beyond the workplace. Thus, it is not surprising that three of these mandate "workaround[s]" have now been enjoined for exceeding statutory or constitutional authority. For courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). "Accepting contrived reasons [for administrative law decisions] would defeat the purpose of the

enterprise." *Id*. As the Fifth Circuit said, "courts need not turn a blind eye to the statements of those issuing such pronouncements." *BST Holdings*, 2021 WL 5279381, at *14 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Thus, the Fifth Circuit took President Biden at his word. His intention was to impose the Mandate "wherever [he] can."[3]

2. Respondents admit the Mandate extends beyond the workplace.

The government's own argument to dissolve the stay reveals the Mandate is not limited to the workplace: "The stay could also cause significant harm outside of the workplace." Mot. 41. Respondents acknowledge this overreaching effect but argue that OSHA can regulate a "grave danger" that exists both inside and outside the workplace. Mot. 15-16.

But they fail to acknowledge that, to be related to the workplaces covered, OSHA standards must find that the harm is *more* likely to occur there than in other places. Rather than reference workplace "clusters" and "outbreaks" that have occurred in certain industries, Mot. 1, 4, 5, 11, 15, 36, OSHA must make a finding to support the Mandate in workplaces with 100 or more employees "'based upon exposure in actual levels found

in th[os]e workplace[s].'" *BST Holdings*, 2021 WL 5279381, at *12 (quoting *Int'l Chem. Workers*, 830 F.2d at 371). OSHA did not make such a finding but, instead, adopted a rule that was both over- and under-inclusive. *See, infra,* at 18. Thus, the Mandate "commandeers U.S. employers" to prevent their employees from spreading COVID-19 everywhere they go, unlawfully attempting to shift to them the cost of paying for a problem throughout society. *BST Holdings*, 2021 WL 5279381, at *22. Allowing OSHA to implement standards based on dangers in society generally, rather than work-specific dangers, would be a huge shift in the law, giving OSHA far more power than Congress intended. "[H]ard hats and safety goggles, this is not." *Id*. at *23, n.20.

OSHA has never attempted to implement a rule this broad. First, it has never implemented even a permanent rule regulating airborne infectious diseases. It considered doing so in 2014 but received many public comments in opposition and ultimately declined to promulgate the rule.[6]

[6] *Regulatory Framework,* Regulations.gov (Oct. 9, 2014), https://www.regulations.gov/document/OSHA-2010-0003-0245.

Second, it has never mandated a vaccine. 86 Fed. Reg. 61,439. The only other vaccination ever covered by an OSHA standard is its Bloodborne Pathogens standard, which mandated that employers whose workers could be exposed to blood or other potentially infectious materials at work *offer* free Hepatitis B vaccinations. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). Workers who chose not to be vaccinated for Hepatitis B were required to sign a form acknowledging that they were offered the shot and declined. *Id.*; *see also* 29 C.F.R. § 1910.1030(f)(2)(iv). Unlike the Mandate, that rule did not require employees to be vaccinated or test negative. And that rule applied only to workers who could potentially be exposed to bloodborne pathogens in specific fields *at work*. Yet even that rule was found partially unlawful because it applied in an overbroad manner to sites not controlled either by the employer or by a hospital, nursing home, or other entity that was itself subject to the bloodborne-pathogens rule. *Am. Dental Ass'n*, 984 F.2d at 830. Thus, in the most analogous example cited by Respondents for the authority to issue the Mandate, the standard applied only to workers facing an enhanced risk of exposure *at their workplace*. 29 C.F.R. § 1910.1030(b) (Occupational Exposure definition). Extending the

definition of "grave danger" to a risk that exists just as much, if not more so, outside the workplace would be truly novel and would "strain[ ] credulity." *Ala. Realtors*, 141 S. Ct. at 2486; *BST Holdings*, 2021 WL 5279381, at *15.

B. The Mandate does not address a "grave danger."

"The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos Info. Ass'n/North Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). "[T]he ETS statute is not to be used merely as an interim relief measure, but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Id*. OSHA must show that the spread of COVID-19 is a "grave danger" that requires it to implement the measure now rather than wait for the normal notice-and-comment procedure.

OSHA's assertion that the spread of COVID-19 is a "grave danger" that needs immediate attention is undermined by its own recent actions. First, "OSHA itself spent nearly two months" drafting its response to the

"purported 'emergency.'" *BST Holdings*, 2021 WL 5279381, at *9. Also, just a few months ago, OSHA evaluated this exact same hazard—whether COVID-19 presents a grave danger to all covered workplaces—and came to the opposite conclusion: that only workplaces providing healthcare services faced enough "grave danger" to warrant an ETS. 86 Fed. Reg. 32,376 (June 21, 2021). This was not simply an oversight: OSHA explicitly considered—and rejected—proposals to apply the June 21 ETS beyond healthcare.[7] Furthermore, though emergency use authorization vaccines were in widespread circulation, there was no mandate for those on the front lines of fighting the pandemic. That OSHA concluded just a few months ago that all workplaces did *not* face a "grave danger" undermines its recent claim that the situation has changed today. The Fifth Circuit correctly concluded that OSHA is really attempting to use the Mandate as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS.

[7] Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the health care industry*, N.Y. Times (June 10, 2021), https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html ("[Labor Secretary Marty] Walsh indicated that the risks to most workers outside health care had eased as cases had fallen and vaccination rates had risen.")

C. The Mandate is not "necessary."

For an ETS to survive judicial scrutiny, it must "be 'necessary' to alleviate employees' exposure to gravely dangerous hazards in the workplace." *BST Holdings*, 2021 WL 5279381, at *11 (citing *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 130 (5th Cir. 1974). That means OSHA must consider other potential rules to address the proposed harm and show that they are inadequate. *Asbestos Info.*, 727 F.2d at 426. OSHA failed to do so here and failed to engage in the narrow tailoring required of an ETS. Instead, the White House wanted the broadest possible mandate, and the ETS delivered. The Mandate represents "the rare government pronouncement that is both overinclusive . . . *and* underinclusive." *BST Holdings*, 2021 WL 5279381, at *8-9 (emphasis in original).

The Mandate is overinclusive because it applies to employees across the board, regardless of age, existing immunity, health, or location of one's work. The risks of obtaining COVID-19 vary depending on several factors OSHA does not consider.[8] Also, OSHA did not consider different

[8] *See, e.g.,* CDC, COVID-19 Risks and Vaccine Information for Older Adults (Aug. 2, 2021), https://www.cdc.gov/aging/covid19/covid19-older-adults.html.

rules based on how workplaces are arranged. For example, the Mandate is overinclusive in applying to Petitioners Dailey, Gamble, Jones, and Reyna, who work mostly on roofs and only briefly interact with customers. Indeed, "'no standard that covers all of the Nation's workers would protect all those workers equally.'" *BST Holdings*, 2021 WL 5279381, at *19 (quoting Letter from Loren Sweatt, Principal Deputy Assistant Sec'y, OSHA, to Richard L. Trumka, President, AFL-CIO, at 9 (May 29, 2020)). Because the Mandate does not consider the different degrees of risk associated with differing workplaces it cannot be considered "necessary" for *all* workplaces.

The Mandate is underinclusive because it "purport[s] to save employees with 99 or more coworkers from a 'grave danger' in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat." *BST Holdings*, 2021 WL 5279381, at *9. "The reason . . . , as even OSHA admits, [is only that] companies of 100 or more employers will be better able to administer (and sustain) the Mandate." *Id.* at *19 (citing 86 Fed. Reg. 61,402-03). The Mandate is also underinclusive because even vaccinated people may be infected and transmit the disease to others, yet they are relieved from the mask

requirement.[9] Further, unvaccinated workers could obtain and spread the virus between their weekly tests. Thus, "[t]he underinclusive nature of the Mandate implies that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary." *Id*. at *20.

Respondents request in the alternative that this Court vacate the stay of the testing and masking requirements for the unvaccinated. Mot. 46-48. But they admit these requirements exist only to compel vaccination. The Mandate departs from OSHA's usual posture that employers must bear the costs of workplace safety measures. Instead, it forces workers to pay for their own tests, which "will provide a financial incentive" to get vaccinated. 86 Fed. Reg. 61,437. By placing this financial pressure on employees, OSHA intends to compel vaccination through attrition. Therefore, keeping these requirements in place would only further the Mandate.

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[9] Laurel Wamsley, *Vaccinated People with Breakthrough Infections Can Spread the Delta Variant, CDC Says*, NPR (July 31, 2021) https://www.npr.org/sections/coronavirus-live-updates/2021/07/30/1022867219/cdc-study-provincetown-delta-vaccinated-breakthrough-mask-guidance.

D. COVID-19 is not a "toxic or physically harmful" "substance" or "agent."

Respondents claim that COVID-19 is a toxic or physically harmful agent and a new hazard. 86 Fed. Reg. 61,408. Yet the natural reading of the term "toxic or physically harmful agent" does not include viruses.[10] It should be no surprise that "[t]he majority of OSHA's previous ETSs addressed toxic substances that had been familiar to the agency for many years prior to issuance of the ETS." 86 Fed. Reg. 61,408. Respondents rely on definition 2b from Merriam-Webster, which defines "agent" as "a chemically, physically, or biologically active principle." Mot. 10 (quoting Merriam-Webster[11]). But Merriam-Webster defines "principle" as "an ingredient (such as a chemical) that exhibits or imparts a characteristic quality."[12] And an "ingredient" is "something that enters into a compound or is a component part of any combination or mixture."[13] It is, thus, not a virus.

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[10] Larkin & Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for COVID-19 Vaccinations* (Oct. 3, 2021), SSRN: https://ssrn.com/abstract=3935420 at 11.
[11] https://www.merriam-webster.com/dictionary/agent.
[12] https://www.merriam-webster.com/dictionary/principle.
[13] https://www.merriam-webster.com/dictionary/ingredient.

According to the Oxford Advanced American Dictionary, an "agent" is "a chemical or a substance that produces an effect or a change or is used for a particular purpose."[14] Thus, in the context of the Act, "agent" means a substance that is "used for a particular purpose" in the workplace. The statute was meant to protect workers from the substances with which they are working; it does not allow the Secretary to mandate a vaccine on 84 million American workers. *See* 86 Fed. Reg. 61,468.

Further, OSHA cannot attempt to shoehorn an infectious disease into the phrase "new hazards." As the Fifth Circuit pointed out, "To avoid 'giving unintended breadth to the Acts of Congress,' courts 'rely on the principle of *noscitur a sociis*—a word is known by the company it keeps.'" *BST Holdings*, 2021 WL 5279381, at *11 (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (cleaned up)); *see also Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 163 n.19 (2012) ("the canon of ejusdem

[14] https://www.oxfordlearnersdictionaries.com/us/definition/american_english/agent, at definition 5. Both this definition and the one from Merriam Webster give the example of an "oxidizing agent," which is used for a particular purpose at the workplace.

generis limits general terms that follow specific ones to matters similar to those specified") (cleaned up).

Finally, Respondents incorrectly claim statutory authority for mandatory immunizations in 29 U.S.C. § 669(a)(5). Mot. 16. But the statute says no such thing. It authorizes a different secretary—of Health and Human Services—to establish medical tests and record keeping necessary to track occupational illnesses. 29 U.S.C. § 669(a)(5). The word "immunization" appears only in a *prohibition* on mandating medical care for religious objectors. *Id.*

Thus, the Mandate violates both the letter and spirit of the law, as "Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry." *Indus. Union Dep't*, 448 U.S. 607, 651 (1980). Respondents' interpretation of the Act would allow just such unbridled power.

II. The Fifth Circuit did not commit demonstrable error in finding Petitioners met the remaining three criteria for a stay.

Vacating the Fifth Circuit's stay would cause irreparable harm to Petitioners and the public, but maintaining it will not harm OSHA. The government cannot have it both ways: it cannot proclaim this an

"emergency" which must be met with immediate action that skips notice-and-comment rulemaking but insist that there is plenty of time for the courts to address this matter on the usual routine schedule without expedited consideration. If this is truly an emergency, then emergency consideration by the Fifth Circuit was appropriate. If not, OSHA should have followed the normal rulemaking procedures before imposing this mandate.

A. Petitioners the Trosclair Companies would suffer irreparable harm if the stay were lifted.

The Trosclair Companies would face irreparable harm without a stay. The companies would not be able to hire the workers they need and would lose sales and customers because they could not stock their shelves. *See* Trosclair Decl. ¶¶11–14; *see also MacGinnite v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) (unquantifiable lost business opportunities constitute irreparable harm). They would be placed at a competitive disadvantage against smaller grocers or convenience stores not subject to the OSHA rule. *See* Trosclair Decl., ¶15; *see also Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) ("A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm."). They would face compliance costs setting

up a human-resources system to ask employees about vaccination status, enforce the mask mandate, and collect weekly test results. *Texas v. United States EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs") (cleaned up). Therefore, the Trosclair Companies, a small chain of family-owned grocery stores, are similar to the "many landlords of modest means" in *Alabama Realtors*, whose tremendous costs "with no guarantee of eventual recovery" established irreparable harm. 141 S. Ct. at 2489.

Respondents argue the stay was premature because "[P]etitioners claimed little prospect of harm until December 7 at the earliest." Mot. 6. That is today; therefore, these burdens have begun.

B. Petitioners the CaptiveAire Employees would suffer irreparable harm if the stay were lifted.

The six CaptiveAire Employees cannot wait either. The multi-week wait between the shots would not be their only or even primary consideration. Without a stay, they would be forced to consider seeking another job, which could take weeks or months. For those who chose another job over a jab, that injury could not be retroactively redressed.

When Respondents attempted to balance the harms between Petitioners and themelves, they ignored the harm to workers. *See* Mot. 2. The Fifth Circuit was correct to consider it and conclude "the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'" *BST Holdings*, 2021 WL 5279381, at *24 (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)).

C. Vacating the stay would thwart the public interest.

Vacating the stay could push millions out of the workforce and cause a massive upheaval in the American economy. The Trosclair Companies are not alone in their shortage of workers. At the end of July, there were 10.9 million job openings in America, contrasted with 6.7 million new hires that month.[15] The Mandate would compound this problem by forcing workers to choose between leaving their jobs or having a deeply personal health decision forced upon them.

In addition, business groups have argued supply chain bottlenecks could worsen, transportation costs could soar, and the inflation of

[15] Bureau of Labor Statistics, Job Openings and Labor Turnover Summary, Sept. 8, 2021, https://www.bls.gov/news.release/jolts.nr0.htm.

commodity prices could increase for all businesses and consumers.[16] Thus, maintaining the stay is very much in the public interest.

D. The stay is not harming OSHA.

OSHA just now issued an emergency standard for a "purported 'emergency' that the entire globe has now endured for nearly two years." *BST Holdings*, 2021 WL 5279381, at *9. Allowing the stay to continue until the merits are briefed will not harm OSHA. The stay does not interfere with OSHA's clearly-defined powers over workplace safety—only with novel powers that it has never before asserted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondents' Emergency Motion to Dissolve [the] Stay [of the Fifth Circuit].

December 7, 2021

Respectfully submitted,

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[16] CNBC, *Businesses Ask White House to Delay Biden COVID Vaccine Mandate Until After Holidays* (Oct. 25, 2021), https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html.

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CERTIFICATE OF COMPLIANCE

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December 7, 2021

CERTIFICATE OF SERVICE

I certify that on December 7, 2021, I caused a copy of this Response to be served on all parties through CM/ECF.

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