UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60845

BST Holdings, LLC; RV Trosclair L.L.C.; Trosclair Airline LLC; Trosclair Almonaster LLC; Trosclair and Sons LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton LLC; Trosclair Claiborne LLC; Trosclair Donaldsonville, LLC; Trosclair Houma LLC; Trosclair Judge Perez LLC; Trosclair Lake Forest LLC; Trosclair Morrison LLC; Trosclair Paris LLC; Trosclair Terry LLC; Trosclair Williams LLC; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall; Answers in Genesis, Incorporated; American Family Association, Incorporated; Burnett Specialists; Choice Staffing, L.L.C.; Staff Force, Incorporated; Leadingedge Personnel, Limited; State of Texas; HT Staffing, Limited d/b/a HT Group; the State of Louisiana; Cox Operating, L.L.C.; Dis-Tran Packaged Substations, L.L.C.; Beta Engineering, L.L.C.; Optimal Field Services, L.L.C.; the State of Mississippi; Gulf Coast Restaurant Group, Incorporated; the State of South Carolina; the State of Utah; Word of God Fellowship, Incorporated d/b/a Daystar Television Network,

Petitioners,

v.

Occupational Safety and Health Administration, United States Department of Labor; United States U.S. Department of Labor; Martin J. Walsh, Secretary, Department of Labor; Douglas Parker, in his official capacity as Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

BST HOLDINGS, LLC PETITIONERS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION TO STAY ENFORCEMENT PENDING REVIEW & EXPEDITE REVIEW

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INTRODUCTION

Just a few months ago, 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. Sweeping authority must come, if at all, from Congress. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

The Occupational Health and Safety Administration (OSHA) is no more the nation's public health agency than the CDC is the nation's housing regulator. The Emergency Temporary Standard (ETS) exceeds OSHA's statutory authority. And just as the Supreme Court granted emergency relief to landlords because of the moratorium's massive economic impact, so too emergency relief is needed here.

Petitioners file this Reply in support of their Emergency Motion to Stay the ETS, 86 Fed. Reg. 61,402 (Nov. 5, 2021). This Court should rule in their favor because 1) an injunction from this Court is needed now to stave off irreparable harm to Petitioners; and 2) the ETS exceeds OSHA's statutory authority.

I. An injunction from this Court is needed now to stave off irreparable harm to Petitioners.

The Government cannot have it both ways: it cannot proclaim this an "emergency" and a "grave danger" 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 this Court is appropriate. If not, OSHA should have followed the normal rulemaking procedures before imposing this mandate.

The Trosclair Companies face irreparable harm without immediate relief. The companies will not be able to hire the workers they need and will lose sales and customers because they cannot stock their shelves. *MacGinnite v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) (unquantifiable lost business opportunities constitute irreparable harm). *See* Trosclair Decl., Emer. Mot. Ex. B, ¶¶ 11–14. They will be at a competitive disadvantage against smaller grocers or convenience stores not subject to the OSHA rule. *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."). *See* Trosclair Decl., Emer.

Mot. Ex. B, ¶ 15. They will have 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). Finally, even if they could quantify these costs, it is doubtful they could recover them, as "federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs. LLC v. United States FDA*, ____ F.4th ____, 2021 U.S. App. LEXIS 32112, *22 (5th Cir. Oct. 26, 2021). The Trosclair Companies, a small chain of family-owned grocery stores, are similar to the "many landlords of modest means" in the CDC eviction case who would face tremendous costs "with no guarantee of eventual recovery" against a federal agency, thus establishing irreparable harm. *Ala. Realtors*, 141 S. Ct. at 2489.

These burdens start now. The Trosclair Companies cannot wait for weeks while the courts contemplate the consolidation of cases. Trosclair must begin crafting the necessary policies and collecting the requisite employee health information now in order to be ready by December 4 and

January 4 to comply, in the midst of the holiday crush. And they cannot recover that lost time and effort if the rule is eventually enjoined.

The six CaptiveAire Employees cannot wait either. The multi-week wait between the shots is not their only or even primary consideration. Without relief, they must consider seeking another job, which may take weeks or months. And that injury cannot be retroactively redressed—they would have already quit their job and potentially moved to a smaller, unregulated employer.

The public interest also weighs in favor of prompt, definitive action by this Court. *Texas v. United States EPA*, 829 F.3d at 434–35. With businesses like Trosclair already struggling with a tight labor market and nationwide logistics crisis, the OSHA mandate only threatens to make things worse, not better. Definitive nationwide injunctive relief is necessary to stave off these consequences.

Finally, there is no guarantee that the Multidistrict Litigation Panel process will move expeditiously. The MDL statute for multicircuit petitions envisions a complicated process of consolidation; the MDL must "provid[e] notice to the public and an opportunity for the submission of comments" about the consolidation. 28 U.S.C. § 2112(a)(3). After

receiving and reviewing the comments, the MDL "prescribes rules" for the consolidated case's management. The future consolidated case will involve at least twelve pending cases, each of which has separate clients and counsel. *See* Doc. 00516084969, *3 (US DOJ letter). Even after the case has been consolidated before the randomly selected circuit, it is possible that it could be moved again "for the convenience of the parties in the interest of justice." 28 U.S.C. 2112(a)(5). This is not a process with a reputation for speed and flexibility. Toni M. Fine, *Multiple Petitions for Review of Agency Rulings: A Call for Further Reform*, 31 New Eng. L. Rev. 39, 72 (1996) ("Concerns over delay in judicial review of actions of administrative agencies have forever been endemic to the process; indeed, commentators have long decried the potential for and actual delays in judicial review proceedings, especially in the context of review of agency action.").

Respondents' suggestion that Petitioners can secure relief after November 16 is of no comfort. If the MDL allows a week for public comment and a week for writing the rules for the case, especially with the Thanksgiving holiday, it will be December before motions can even be filed, briefed, and decided. Petitioners cannot wait until Christmas to

know the law. This Court acts within both its statutory authority and its precedent when it issues emergency injunctive relief prior to transfer or consolidation. *See* 28 U.S.C. § 2112(a)(4) and *Indus. Union Dep't v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977) (stay issued by Fifth Circuit prior to transfer of case to the D.C. Circuit).

II. The ETS exceeds OSHA's statutory authority.

Respondents claim that OSHA's regulation of a hazard extending outside the workplace is "hardly novel." Opp. 13. This assertion is contradicted by the text of the ETS itself: "[T]he agency has never previously used its authority to strictly mandate vaccination . . . ." 86 Fed. Reg. 61,439. Respondents fail to refute that the ETS is novel in four ways that violate the Act: A) it attempts to protect employees from themselves; B) it is not related to the workplace; C) it mandates a vaccine for the first time; and D) it does not address a toxic substance or agent.

A. The ETS is novel in attempting to protect employees from themselves.

Respondents attempt to turn the Act on its head. It is meant to protect employees from their employers—not to protect employers from their employees. As Respondents acknowledge, the purpose of the Act is

to provide workers "'safe and healthful working conditions.'" Opp. 2 (quoting 29 U.S.C. § 651(b)). Yet the ETS attributes the "grave danger" for workers not to their working conditions but to their own "lack of vaccination." 86 Fed. Reg. 61,434. This is not a working condition but a private healthcare decision. Protecting employees from themselves, untethered from the workplace, far exceeds the purposes of the Act. Respondents can point to no other precedent for this extreme paternalism.

The true goal of the ETS is not to ensure workplace safety, but to "to reduce the number of unvaccinated Americans by using regulatory powers . . . ."[1] Its stated purpose is to protect only the *un*vaccinated, not the vaccinated. 86 Fed. Reg. 61,402. It laments that "many employees have yet to take this simple step" to be vaccinated. 86 Fed. Reg. 61,444. Thus, it forces them to take that step by threatening loss of their jobs if they do not. *See* 86 Fed. Reg. 61,475, n.41. The Act is not a catchall to be leveraged when Congress has not otherwise authorized federal action, yet that is precisely how it is being used here. Courts cannot accept

[1] *Path Out of the Pandemic*, The White House, https://www.whitehouse.gov/covidplan/.

"contrived reasons" for administrative law decisions. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). Even though the pretext of the ETS was admitted by the White House, Respondents fail to address it because they have no answer for it.

Furthermore, Respondents failed to address the recent Supreme Court decision on eviction moratoriums. *See Ala. Realtors*, 141 S. Ct. 2485. 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. Opp. 12–13. 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.

B. The ETS is novel because it does not relate to the workplace.

Respondents acknowledge that OSHA's power is limited by "the general rule that OSHA standards may apply only to 'employment and places of employment.'" Opp. 11 (quoting 29 U.S.C. § 652(8)). But the ETS itself admits that "COVID-19 is not a uniquely work-related hazard." 86

Fed. Reg. 61,407. The ETS acknowledges that it is attempting to protect against a "grave danger" that is found throughout society: "In this ETS, . . . OSHA has made a broader determination of grave danger that applies to most unvaccinated workers, regardless of industry." *Id*. at 61,421. The government's own argument against a stay reveals that the ETS is not limited to the workplace because it would have a much broader effect: "A stay would also cause significant harm outside of the workplace." Opp. 19. This ETS extends well beyond the workplace.

Respondents acknowledge this overreaching effect but argue that it is not novel and that OSHA can regulate a "grave danger" that exists both inside and outside the workplace. Opp. 12–13. But they fail to refute Petitioners' position that OSHA is limited to regulating a "grave danger" that is *more likely to occur* in the workplace. In other instances they cite, employees faced an *enhanced* risk from the "grave danger" at the workplace. For example, the OSHA Bloodborne Pathogens standard they cite applies only to workers facing an enhanced risk of exposure to blood or other potentially infectious materials *at work*. 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 than in would be truly novel and would "strain[ ] credulity." *Ala. Realtors*, 141 S. Ct. at 2486.

C. The ETS is novel because it mandates a vaccine.

On four different occasions, Respondents attempt to say the vaccine mandate is not really a mandate because it gives the "option" to test weekly and wear a mask, *see* Opp. 2, 4, 9, 21, but the ETS itself belies that claim. Testing and mask wearing is mere window-dressing on the stated goal of the ETS, which is to "increas[e] a workforce's vaccination rate." 86 Fed. Reg. 61437. OSHA admits that forcing employees to pay for their own tests "will provide a financial incentive" to get vaccinated, and by placing this financial pressure on employees, OSHA intends to compel vaccination through attrition. *Id*. Therefore, testing and face coverings are pretexts to paper over the legal defects of a pure vaccine mandate.

Mandating a vaccine is a new extension of OSHA powers: "[T]he agency has never previously used its authority to strictly mandate vaccination . . . ." 86 Fed. Reg. 61,439. In its "traditional practice," it "has viewed mandating [vaccine and other health] procedures as a measure to avoid if possible" because of "the agency's concerns about the Government

intruding into a private and sensitive area of workers' lives." *Id.* at 61,436. In the Bloodborne Pathogens standard, for example, OSHA did not mandate that workers *take* the Hepatitis B vaccine but only that employers *offer* them to take it for free. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993).

Respondents also claim statutory authority for mandatory immunizations in 29 U.S.C. § 669(a)(5). *See* Opp. 11. 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.*

D. The ETS is novel because it does not address a "toxic or physically harmful" "substance" or "agent."

Respondents claim that COVID-19 is a "toxic or . . . physically harmful agent" *Id.* at 7. Yet the natural reading of the term "toxic or physically harmful agent" does not include viruses.[2] It should be no

[2] 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.

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." Opp. 7 (quoting Merriam-Webster[3]). But Merriam-Webster defines "principle" as "an ingredient (such as a chemical) that exhibits or imparts a characteristic quality."[4] And an "ingredient" is "something that enters into a compound or is a component part of any combination or mixture."[5] It is, thus, not a virus.

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."[6] 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

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[3] https://www.merriam-webster.com/dictionary/agent.
[4] https://www.merriam-webster.com/dictionary/principle.
[5] https://www.merriam-webster.com/dictionary/ingredient.
[6] 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.

to mandate a vaccine on 84 million American workers. *See* 86 Fed. Reg. 61,468, 61,403, 61,511–12.

For all four of these reasons, the ETS is a novel expansion of OSHA authority, "the sheer scope" of which "would counsel against the Government's interpretation." *Ala. Realtors*, 141 S. Ct. at 2489.[7]

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enjoin the ETS throughout the United States.

November 9, 2021

Respectfully submitted,

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[7] Further, if the ETS were authorized, the Act would violate the interstate Commerce Clause. Respondents' reliance on *United States v. Darby*, 312 U.S. 100 (1941), *see* Opp. 10-11, fails to account for subsequent Commerce Clause analysis, including *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which a majority of the Court stated that Congress cannot regulate the decision to *refrain* from engaging in commerce by not purchasing a healthcare product like insurance or a vaccine or test. Furthermore, OSHA did not link any of its "Rationale[s] for the ETS" to interstate commerce. 86 Fed. Reg. 61,407-29.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2021, I caused a copy of this Reply to be served on Respondents by filing it in the CM/ECF system and by sending an email as directed in the ETS to:

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CERTIFICATE OF COMPLIANCE

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