

No. 21-60845

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC, ET AL.,
Petitioners,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, ET AL.,
Respondents.

On Petition for Review of Agency Order

**JOINDER IN THE MOTIONS TO STAY FILED BY BURNETT
SPECIALISTS, ET AL. AND STATE OF TEXAS, ET AL.**

Kelly Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Lea E. Patterson
Keisha T. Russell
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

CERTIFICATE OF INTERESTED PERSONS

- 1) BST Holdings, LLC, et al. v. OSHA, et al., No. 21-60845
- 2) In addition to any interested persons listed by other parties to the consolidated petitions, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner, American Family Association, Inc.

Petitioner, Word of God Fellowship, Inc. d/b/a Daystar Television Network

Counsel for Petitioner:

Kelly Shackelford

Jeffrey C. Mateer

Hiram S. Sasser III

David J. Hacker

Lea E. Patterson

Keisha T. Russell

Respondent, Occupational Safety & Health Administration, Department of Labor

Counsel for Respondent: Edmund C. Baird, the Associate Solicitor for

Occupational Safety and Health

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer

Jeffrey C. Mateer

First Liberty Institute

2001 West Plano Parkway

Suite 1600

Plano, TX 75075

(972) 941-4444

jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

Petitioners American Family Association, Inc. and Word of God Fellowship dba Daystar Television Network join the motions for stay pending review filed by co-petitioners Burnett Specialists, et al. and the State of Texas, et al. Petitioners are filing contemporaneously with this joinder a brief in support of these motions.

Dated November 8, 2021.

Respectfully submitted,

/s/Jeffrey C. Mateer

Kelly Shackelford

Jeffrey C. Mateer

Hiram S. Sasser, III

David J. Hacker

Lea E. Patterson

Keisha T. Russell

FIRST LIBERTY INSTITUTE

2001 West Plano Parkway

Suite 1600

Plano, TX 75075

(972) 941-4444

jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Fed. R. App. P. 27 and Cir. R. 27 because it contains 49 words. This brief complies with the typeface requirements of Circuit Rule 32 because it has been prepared in proportionally spaced typeface 14-point Times New Roman font using Microsoft Word.

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer

Jeffrey C. Mateer

First Liberty Institute

2001 West Plano Parkway

Suite 1600

Plano, TX 75075

(972) 941-4444

jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer
Jeffrey C. Mateer
First Liberty Institute
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

No. 21-60845

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC, ET AL.,
Petitioners,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, ET AL.,
Respondents.

On Petition for Review of Agency Order

**BRIEF OF PETITIONERS AMERICAN FAMILY ASSOCIATION, INC.
AND WORD OF GOD FELLOWSHIP, INC. D/B/A DAYSTAR
TELEVISION NETWORK IN SUPPORT OF THE MOTION FOR STAY
PENDING REVIEW**

Kelly Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Lea E. Patterson
Keisha T. Russell
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

CERTIFICATE OF INTERESTED PERSONS

- 1) BST Holdings, LLC, et al. v. OSHA, et al., No. 21-60845
- 2) In addition to any interested persons listed by other parties to the consolidated petitions, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner, American Family Association, Inc.

Petitioner, Word of God Fellowship, Inc. d/b/a Daystar Television Network

Counsel for Petitioner:

Kelly Shackelford

Jeffrey C. Mateer

Hiram S. Sasser III

David J. Hacker

Lea E. Patterson

Keisha T. Russell

Respondent, Occupational Safety & Health Administration, Department of Labor

Counsel for Respondent: Edmund C. Baird, the Associate Solicitor for
Occupational Safety and Health

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer

Jeffrey C. Mateer

First Liberty Institute

2001 West Plano Parkway

Suite 1600

Plano, TX 75075

(972) 941-4444

jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONSi

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES.....v

INTRODUCTION.....1

SUMMARY OF FACTS RELEVANT TO AFA AND DAYSTAR.....1

ARGUMENT3

I. THE ETS VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.....4

A. The ETS Imposes a Substantial Burden on the Religious Beliefs and Practices of AFA and Daystar.4

B. OSHA Lacks a Compelling Interest to Substantially Burden the Religious Beliefs and Practices of AFA and Daystar.....7

C. The Vaccine Mandate Is Not the Least Restrictive Means.9

D. The ETS also violates the First Amendment.....12

II. AFA AND DAYSTAR JOIN THE OTHER ARGUMENTS AS TO WHY THE ETS IS UNCONSTITUTIONAL AND UNLAWFUL.12

III. AFA AND DAYSTAR ARE SUFFERING IRREPARABLE INJURIES.....12

IV. THE BALANCE OF HARMS FAVORS A STAY.....13

V. THE PUBLIC INTEREST FAVORS A STAY.14

CONCLUSION.....15

CERTIFICATE OF COMPLIANCE.....16

CERTIFICATE OF SERVICE.....17

TABLE OF AUTHORITIES

Cases

<i>Asbestos Information Ass’n N. Am. v. OSHA</i> , 727 F.2d 415 (1984).....	3
<i>Bear Creek Bible Church & Braidwood Mgmt., Inc. v. EEOC</i> , No. 4:18-CV-00824-O, 2021 WL 5052661 (N.D. Tex. Oct. 31, 2021).....	6
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	5, 9, 10
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993)	9
<i>Combs v. Cent. Texas Ann. Conf. of United Methodist Church</i> , 173 F.3d 343 (5th Cir. 1999).....	6
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	12
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006)	7, 8, 14
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 565 U.S. 171 (2012).....	12
<i>In re EPA</i> , 803 F.3d 804, 808 (6th Cir. 2015), vacated on other grounds <i>In re U.S. Dep’t of Def.</i> , 713 F. App’x 489, 490 (6th Cir. 2018)	13
<i>Kedroff v. St. Nicholas Cathedral</i> , 344 U.S. 94 (1952).....	12
<i>Opulent Life Church v. City of Holly Springs</i> , 697 F.3d 279 (5th Cir. 2012) ...	12, 13
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020).....	11
<i>Roman Cath. Diocese of Brooklyn v. Cuomo</i> , 141 S. Ct. 63 (2020)	13

Texas v. U.S. EPA 829 F.3d 405 (5th Cir. 2016).....12

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994)12

United States v. Baylor Univ. Med. Ctr., 711 F.2d 38 (5th Cir.1983)3

Statutes

29 U.S.C. § 6574

29 U.S.C. § 6594

29 U.S.C. § 6664

42 U.S.C. § 2000bb-34, 7, 9, 14

42 U.S.C. § 2000e5, 6

Other Authorities

1 Corinthians 8:10-133

Brief of Department of Labor in Response to Emergency Petition for Writ of
Mandamus at 34, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020) 11

OSHA, National Emphasis Program—Coronavirus Disease (COVID-19)
Appendices A & B (Mar. 12, 2021) (last accessed Nov. 8, 2021),
https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-01_CPL-03.pdf..... 11

OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, <https://www.osha.gov/coronavirus/safework> (last accessed Nov. 8, 2021) 11

U.S. Department of Labor, Memorandum: 2021 Annual Adjustments to OSHA

Civil Penalties (DOL-OSHA-DEP 2021-001) (Jan. 8, 2021),

[https://www.osha.gov/memos/2021-01-08/2021-annual-adjustments-osha-civil-](https://www.osha.gov/memos/2021-01-08/2021-annual-adjustments-osha-civil-penalties)

[penalties](https://www.osha.gov/memos/2021-01-08/2021-annual-adjustments-osha-civil-penalties)5

Rules

Fed. R. App. P. 18 1

Regulations

21 C.F.R. § 1307.318

29 C.F.R. § 1903.144

29 C.F.R. § 1903.34

29 C.F.R. § 1903.64

Dep’t of Labor, OSHA, “COVID-19 Vaccination and Testing; Emergency

Temporary Standard,” 86 Fed. Reg. 61402–61555 (Nov. 5, 2021).....passim

INTRODUCTION

Respondent Occupational Health and Safety Administration (“OSHA”) published an emergency temporary standard on November 5, 2021, that, among other things, purports to require employers with 100 or more employees to force their employees to be vaccinated against COVID-19 or perform weekly testing and masking. *See* Dep’t of Labor, OSHA, “COVID-19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61402–61555 (Nov. 5, 2021) (hereinafter the “ETS”).

Petitioners American Family Association, Inc. (“AFA”) and Word of God Fellowship, Inc. dba Daystar Television Network (“Daystar”) seek immediate review of the ETS and a stay pending review because the ETS fails to provide any religious exemptions or accommodations for religious employers as required by the Religious Freedom Restoration Act (“RFRA”).

Thus, AFA and Daystar join the motion for stay pending review filed by co-petitioners Burnett Specialists, et al., and submit this brief in support.¹

SUMMARY OF FACTS RELEVANT TO AFA AND DAYSTAR

AFA and Daystar are nonprofit religious organizations formed according to God’s calling and for His purposes. Hamilton Dec. ¶¶ 3, 6; Torres Dec. ¶¶ 3, 6. Each

¹ Because the ETS takes effect immediately and imposes narrow compliance deadlines, seeking a stay from OSHA would be impracticable and futile. Fed. R. App. P. 18.

organization seeks to spread the Word of God through its respective ministries and views obedience to God as a paramount duty to further their organizational missions. Hamilton Dec. ¶¶ 5, 6; Torres Dec. ¶¶ 5, 6.

These organizations believe the Bible is the inspired, infallible, and authoritative Word of God. Hamilton Dec. ¶ 5; Torres Dec. ¶ 5. The Bible teaches that the right of conscience is sacred and must remain inviolate. Hamilton Dec. ¶ 7; Torres Dec. ¶ 7. Any mandate that forces AFA or Daystar to compel their employees to be vaccinated against their will is one that would require them to violate their employees' sacred rights of belief and conscience. Hamilton Dec. ¶¶ 8–10; Torres Dec. ¶¶ 8-10. That is something neither organization can do without sinning against God. Hamilton Dec. ¶ 11; Torres Dec. ¶ 11.

AFA and Daystar must obey God's Word. Hamilton Dec. ¶¶ 5, 6; Torres Dec. ¶¶ 5, 6. They have no other choice. AFA and Daystar have a sincerely held religious belief that they cannot force their employees to test their beliefs or conscience by requiring them to obtain any of the COVID-19 vaccines. Hamilton Dec. ¶¶ 8–11; Torres Dec. ¶¶ 8-11. Putting their employees to that test is a violation of God's Holy Word. As God's Holy Word declares:

For if someone with a weak conscience sees you, with all your knowledge, eating in an idol's temple, won't that person be emboldened to eat what is sacrificed to idols? ¹¹ So this weak brother or sister, for whom Christ died, is destroyed by your knowledge. ¹² When you sin against them in this way and wound their weak conscience, you sin against Christ. ¹³ Therefore, if what I eat causes my brother or sister to

fall into sin, I will never eat meat again, so that I will not cause them to fall.

1 Corinthians 8:10-13; *see* Hamilton Dec. ¶ 8; Torres Dec. ¶ 8.

AFA and Daystar have religious objections to forcing their employees to test their conscience about receiving the vaccine. Hamilton Dec. ¶¶ 9–12; Torres Dec. ¶¶ 9–12. AFA and Daystar believe that if they implement the required vaccine mandate, they will wound the consciences of their employees and potentially cause them to sin. *Id.* In addition, AFA and Daystar believe that if they even put their employees to the test, the very act of implementing the vaccine mandate is a sin against God’s Holy Word. *Id.*

ARGUMENT

“To obtain equitable relief pending further judicial action on the merits, an applicant must establish (1) a substantial likelihood of success on the merits; (2) danger of irreparable harm if the court denies interim relief; (3) that other parties will not be harmed substantially if the court grants interim relief; and (4) that interim relief will not harm the public interest.” *Asbestos Information Ass’n N. Am. v. OSHA*, 727 F.2d 415, 418 n.4 (1984). “Subsequent interpretations of the four legal criteria de-emphasize the likelihood-of-success criteria and emphasize balancing the equities of the situation.” *Id.* at 418 n. 5 (citing *United States v. Baylor Univ. Med. Ctr*, 711 F.2d 38 (5th Cir.1983)). AFA and Daystar satisfy all four factors.

I. THE ETS VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

The ETS fails to provide the protections to religious organizations like AFA and Daystar that the Religious Freedom Restoration Act requires.² 42 U.S.C. § 2000bb-3. RFRA outlines a two-step process for evaluating whether a religious claimant may be exempt from a generally applicable federal rule or law. *Id.* § 2000bb-1(a) & (b). First, AFA and Daystar bear the burden of demonstrating that the ETS “substantially burdens” their exercise of religion. *Id.* § 2000bb-1(a). Second, once AFA and Daystar establish that the ETS causes a substantial burden on their religious exercise, the burden of production of evidence and persuasion passes to the government for the second step. *Id.* § 2000bb-1(b). The government must put forward evidence and argument to demonstrate that the ETS advances a compelling interest and that mandating AFA and Daystar to implement the vaccine mandate of the ETS is the least restrictive means to advance that identified interest.

A. The ETS Imposes a Substantial Burden on the Religious Beliefs and Practices of AFA and Daystar.

The ETS substantially burdens AFA and Daystar’s religious beliefs and practices in several ways. OSHA has authority to conduct surprise inspections and assess penalties for failures to comply. 29 U.S.C. §§ 657, 659, 666; 29 C.F.R.

² In the interest of brevity and to avoid duplicating other petitioners’ briefing, AFA and Daystar advance only their RFRA argument in this brief, but reserve the right to raise additional applicable arguments in merits briefing.

§§ 1903.3, 1903.6, 1903.14. The civil penalties to AFA and Daystar for refusing to comply with the ETS is statutorily up to \$70,000 per violation, 29 U.S.C. § 666, but according to OSHA’s internal procedures it may attempt to assess penalties of up to \$136,532.³ Such excessive fines are a substantial burden on AFA and Daystar. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014) (holding that a fine of \$100 per day per employee is a substantial burden). The ETS will also force AFA and Daystar to expend significant sums to comply with the mandate’s policy, tracking, and reporting requirements. *See* 86 Fed. Reg. 61478–94; Hamilton Dec. ¶ 12; Torres Dec. ¶ 12. Both organizations believe a significant number of employees will resign if forced to comply with the mandate, thus leaving AFA and Daystar with workforce shortages that will hamper their ministries. Hamilton Dec. ¶ 13; Torres Dec. ¶ 13. Moreover, no amount of monetary fine compares to the wrath of God that AFA and Daystar fear if they sin against God’s Holy Word by forcing their employees to test their conscience due to the vaccine mandate.

For two reasons, it is no argument that AFA and Daystar could ameliorate the substantial burden by readily granting employees religious accommodations under Title VII. First, Title VII largely does not apply to AFA and Daystar. Title VII protects “all aspects of religious observance and practice, as well as belief” in the

³ *See* U.S. Department of Labor, Memorandum: 2021 Annual Adjustments to OSHA Civil Penalties (DOL-OSHA-DEP 2021-001) (Jan. 8, 2021), <https://www.osha.gov/memos/2021-01-08/2021-annual-adjustments-osha-civil-penalties>.

workplace. 42 U.S.C. § 2000e(j). It also exempts religious employers like AFA and Daystar from its prohibitions on religious discrimination: “This subchapter [Title VII] shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a); *see Combs v. Cent. Texas Ann. Conf. of United Methodist Church*, 173 F.3d 343, 346 (5th Cir. 1999) (holding Title VII exempts religious organizations from its prohibition on religious discrimination in the workplace). The Title VII exemption for religious organizations also shields those organizations from other employment decisions based on religious beliefs. *See Bear Creek Bible Church & Braidwood Mgmt., Inc. v. EEOC*, No. 4:18-CV-00824-O, 2021 WL 5052661, at *6 (N.D. Tex. Oct. 31, 2021) (“The plain text of this exemption [in Title VII], therefore, is not limited to religious discrimination claims; rather, it also exempts religious employers from other forms of discrimination under Title VII, so long as the employment decision was rooted in religious belief.”).

Second, the violation of AFA and Daystar’s organizational religious faith is not resolved because the ETS and Title VII provide them with discretion to grant religious accommodations to their employees. *See* ETS, 86 Fed. Reg. at 61447, 61552. The very institution of the mandate against AFA and Daystar, and the

requirement that they ask their employees whether they have a religious objection to vaccination is a substantial burden on AFA and Daystar’s religious belief that they must not put their employees to the test in the first place. And the ETS does not only require AFA and Daystar to challenge their employees’ consciences; it requires them to track and report their findings for each employee. *See* 86 Fed. Reg. 61478–94. Thus, the ETS substantially burdens AFA and Daystar’s religious beliefs and practices.

B. OSHA Lacks a Compelling Interest to Substantially Burden the Religious Beliefs and Practices of AFA and Daystar.

Once AFA and Daystar establish that the ETS substantially burdens their religious beliefs and practices, the burden shifts to the government to prove that it has a compelling interest for doing so. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). OSHA cannot satisfy this burden.

OSHA contends that the ETS combats the “grave danger” of COVID-19 by forcing employers with over 100 employees to mandate that their employees receive a vaccine against COVID-19. For purposes of RFRA analysis, the Court could presume that the government’s characterization of its generalized interest of preventing deaths and disease are all true and indeed compelling (AFA and Daystar do not concede those points). But that is not the test for compelling interest under RFRA. As the Supreme Court held in *O Centro*, RFRA asks whether the government’s interest is compelling as to the person seeking the exemption. *O*

Centro, 546 U.S. at 430-31 (“RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” (quoting 42 U.S.C. § 2000bb–1(b))). In other words, what is the government’s compelling interest in not providing an exception to AFA and Daystar? The ETS provides no path for AFA and Daystar to seek an exemption from the ETS itself.

Furthermore, the government cannot have a compelling interest in forcing AFA and Daystar to mandate the vaccine when the ETS automatically exempts employers, including religious employers, with 99 or fewer employees. 86 Fed. Reg. 61402. In *O Centro*, Congress exempted religious use of peyote, a Schedule I narcotic, even though Congress considered it dangerous. 546 U.S. at 433 (citing 21 C.F.R. § 1307.31 (2005)). Once Congress did that, the government no longer had a compelling interest in denying exemptions for religious use of other Schedule I narcotics, such as the hoasca tea at issue in *O Centro. Id.* at 439.

Here, the link between the exception for employers with up to 99 employees and the exemption AFA and Daystar seek are even closer. The government is not regulating two different threats like it was in *O Centro* with peyote and hoasca tea. Here, the two comparators are exactly the same—mandatory vaccination of employees against COVID-19. Employers, including religious organizations, with

99 or fewer employees need not comply with the vaccine mandate. But religious organizations like AFA and Daystar with 100 or more employees must comply. Exempting some companies, including religious companies, from the ETS but not others devastates the government’s purported compelling interest. *See O Centro*, 546 U.S. at 433-39. Either COVID-19 presents a workplace hazard or it does not, regardless of whether an employer employs more than or fewer than 100 employees.⁴ *See* 86 Fed. Reg. 61403. By “leav[ing] appreciable damage to [its] supposedly vital interest unprohibited,” the ETS “cannot be regarded as protecting an interest of the highest order” in refusing to exempt AFA and Daystar. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation and internal quotation marks omitted). On this ground alone, the ETS fails RFRA’s strict scrutiny test.

C. The Vaccine Mandate Is Not the Least Restrictive Means.

If the government loses on compelling interest, the Court need not explore whether the government is advancing its interest through the least restrictive means. But even if the government has a compelling interest for substantially burdening

⁴ Petitioners do not concede that COVID-19 is a workplace hazard within the meaning of the OSH Act.

AFA and Daystar’s religious beliefs and practices, the ETS is not the least restrictive means of doing so. 42 U.S.C. § 2000bb-1(b)(2).

RFRA’s “least-restrictive-means standard is exceptionally demanding.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). To demonstrate that it is using the least restrictive means, OSHA must show that “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties” *Id.* at 728. OSHA cannot make that showing. In *Hobby Lobby*, the federal government required employers with 50 or more employees to offer group health insurance coverage that included coverage for contraceptives. *Id.* at 696. But the government accommodated nonprofit organizations with religious objections to the mandate. *Id.* at 698 & 731. As a result, the Supreme Court concluded that HHS could also offer an accommodation to the closely-held for-profit employers with religious objections to the contraceptive mandate; thus, HHS had a less restrictive means available to accomplish its purported compelling interest. *Id.* at 730–31.

Similarly, OSHA has a less restrictive means available to accomplish its interest in reducing the spread of COVID-19 in the workplace. Throughout the past 18 months, OSHA provided guidance to help employers reduce the spread of

COVID-19.⁵ It apparently deemed those guidelines sufficient for employers with fewer than 100 employees, and no reason is apparent why those guidelines are insufficient to advance OSHA's interest as to AFA and Daystar. Moreover, OSHA's previous enforcement prioritization effort recognized that religious organizations, like AFA and Daystar, are not among the industries at high risk of COVID-19 transmission.⁶ OSHA could have simply exempted all religious organizations from its vaccine mandate, because it exempted organizations with fewer than 100 employees. Put another way, OSHA's refusal to impose a mandate on employers with fewer than 100 employees demonstrates that it has a less restrictive means of pursuing its asserted interest, as OSHA itself acknowledged in previous litigation. *See* Brief of Department of Labor in Response to Emergency Petition for Writ of Mandamus at 34, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020) ("A broad and rushed standard promulgated by OSHA is not the only means of protecting AFL-CIO's workers from COVID-19."). Thus, because OSHA could have exempted

⁵ *See, e.g.*, OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, <https://www.osha.gov/coronavirus/safework> (last accessed Nov. 8, 2021).

⁶ *See* OSHA, National Emphasis Program—Coronavirus Disease (COVID-19) Appendices A & B (Mar. 12, 2021) (last accessed Nov. 8, 2021), https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-01_CPL-03.pdf (listing industries at high risk of COVID-19 transmission, namely healthcare, meatpacking, certain construction, various manufacturing, restaurants, and grocery retail, but not listing religious organizations); *cf.* 29 C.F.R. § 1904.2 (exempting employers in low-risk industries, including religious organizations, from certain injury reporting requirements).

religious employers and relied on its existing guidance strategy, the ETS is not the least restrictive means of accomplishing the government's interest.

D. The ETS also violates the First Amendment.

The ETS also violates the First Amendment. In violation of the church autonomy doctrine, the ETC interferes with free exercise rights of AFA and Daystar by interfering with their religious mission, internal management, and employment decisions. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

AFA and Daystar—and their co-petitioners—are likely to succeed on the merits of these petitions for review.

II. AFA AND DAYSTAR JOIN THE OTHER ARGUMENTS AS TO WHY THE ETS IS UNCONSTITUTIONAL AND UNLAWFUL.

AFA and Daystar join and incorporate by reference the arguments of their co-petitioners as to why the ETS otherwise violates the Constitution and federal law.

III. AFA AND DAYSTAR ARE SUFFERING IRREPARABLE INJURIES.

AFA and Daystar are suffering irreparable injuries due to the ETS. The loss of First Amendment freedoms, even for a moment, constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Likewise, the loss of religious liberty afforded by RFRA constitutes an irreparable injury. *Opulent Life Church v. City of Holly*

Springs, 697 F.3d 279, 295 (5th Cir. 2012). As described above, the ETS substantially burdens the religious beliefs and practices of AFA and Daystar. Thus, they satisfy the irreparable injury requirement for issuance of a stay. Moreover, “complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance cost.” *Texas v. U.S. EPA* 829 F.3d 405, 433 (5th Cir. 2016) (granting stay of EPA order) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment)); Hamilton Dec. ¶¶ 12–13; Torres Dec. ¶¶ 12–13. AFA and Daystar also incorporate by reference the arguments of co-petitioners as to why the ETS otherwise inflicts irreparable injuries.

IV. THE BALANCE OF HARMS FAVORS A STAY.

AFA and Daystar’s injuries to their religious beliefs and practices far outweigh the government’s injury if a stay is granted. AFA and Daystar are suffering irreparable injuries; thus, the government must present “powerful evidence” of harms it will experience if a stay issues. *Opulent Life Church*, 697 F.3d at 297. OSHA cannot meet this burden. The government has waited nearly a year to impose a vaccine mandate on the nation, so issuing a stay while the Court reviews the petitions on the merits will not injure the government. Moreover, granting the stay preserves the status quo, which the government has failed to show a compelling interest in changing. *See In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated on*

other grounds In re U.S. Dep't of Def., 713 F. App'x 489, 490 (6th Cir. 2018). AFA and Daystar incorporate by reference arguments of its co-petitioners why the balance of harms otherwise favors a stay.

V. THE PUBLIC INTEREST FAVORS A STAY.

Everyone would like to see an end to COVID-19. “But even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The public interest always favors the protection of religious liberty rights. *Opulent Life Church*, 697 F.3d at 298. In *O Centro*, the Supreme Court noted that even if the public interest in health and safety weighed in favor of protecting individuals from controlled substances, that public interest could not overcome the religious liberty protections afforded by RFRA. 546 U.S. at 438. In fact, in RFRA, Congress decided that all later-enacted statutes and regulations, like the ETS here, must comply with RFRA’s terms. 42 U.S.C. § 2000bb-3. Since OSHA failed to abide by RFRA’s requirements, enjoining the ETS is in the public’s interest. Protecting the rights under RFRA are in the public’s interest. AFA and Daystar also incorporate by reference arguments of their co-petitioners why a stay otherwise serves the public interest.

CONCLUSION

The Court should grant the stay pending review.

Dated November 8, 2021.

Respectfully submitted,

/s/Jeffrey C. Mateer
Kelly Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Lea E. Patterson
Keisha T. Russell
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 27 and Cir. R. 27 because it contains 3342 words. This brief complies with the typeface requirements of Circuit Rule 32 because it has been prepared in proportionally spaced typeface 14-point Times New Roman font (12-point Times New Roman font in footnotes) using Microsoft Word.

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer

Jeffrey C. Mateer
First Liberty Institute
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

Date: November 8, 2021

Respectfully submitted,

/s/ Jeffrey C. Mateer
Jeffrey C. Mateer
First Liberty Institute
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel of Record for American
Family Association, Inc. and
Word of God Fellowship, Inc. dba
Daystar Television Network*

No. 21-60845

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC, ET AL.,
Petitioners,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, ET AL.,
Respondents.

On Petition for Review of Agency Order

DECLARATION OF ABRAHAM HAMILTON, III

Kelly Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Keisha T. Russell
Lea E. Patterson
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

1. I, Abraham Hamilton, III, am General Counsel and Public Policy Analyst with American Family Association (“AFA”) and authorized as an officer of AFA to make this affidavit.
2. I am over the age of 18 years and am competent to testify to the matters attested to in this declaration.
3. AFA a non-profit corporation, faith-based religious organization with a mission to inform, equip, and activate individuals and families to transform American culture.
4. AFA has more than 100 employees.
5. AFA believes that the Bible is the inspired, infallible, and authoritative Word of God.
6. AFA believes that all of its actions must be in furtherance of its religious mission and in obedience to the Word of God.
7. The Bible teaches that the right of conscience is sacred and must remain inviolate.
8. The Bible says in Romans 14 and 1 Corinthians 8:10-13 that in the case of a disputable matter, that is, any matter not specifically addressed in scripture, our consciences may compel us to act differently than a fellow Christian. When that happens, Christians are commanded not to test the beliefs of

fellow brothers and sisters by inquiring into those decisions. Such inquiries could compel a fellow Christian to act contrary to their conscience.

9. The employer vaccine mandate requires AFA to inquire into its employees' private health decisions on the disputable matter of vaccinations. Such inquiries require AFA to violate its belief that such topics should be kept between an individual Christian and God.

10. Further, any mandate that forces AFA to compel their employees to be vaccinated against their conscience would require AFA to violate its and its employees' sacred rights of belief and conscience.

11. AFA believes that the Word of God requires it not to comply with the employer vaccine mandate because it violates Scripture, and therefore, the sincerely-held religious beliefs of the organization and its employees.

12. Additionally, the mandate requires AFA to track the regular COVID-19 testing of unvaccinated employees. AFA believes that complying with this component of the mandate will cost AFA significant amounts of money and time, which would detract from the resources devoted to ministry efforts.

13. AFA believes that a significant amount of its employees would quit if AFA enforced the vaccine mandate.

14. As a religious employer, AFA believes it should have the autonomy to decide how to regulate its own employees regarding vaccinations.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.



Abraham Hamilton, III

Executed on November 8, 2021.

No. 21-60845

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC, ET AL.,
Petitioners,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, ET AL.,
Respondents.

On Petition for Review of Agency Order

DECLARATION OF ARNOLD TORRES

Kelly Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Keisha T. Russell
Lea E. Patterson
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
jmateer@firstliberty.org

*Counsel for American Family
Association, Inc. and Word of God
Fellowship, Inc. dba Daystar
Television Network*

1. I, Arnold Torres, am the Business Administrator of Daystar Television Network and authorized by Daystar to make this affidavit.
2. I am over the age of 18 years and am competent to testify to the matters attested to in this declaration.
3. Daystar is an award winning, faith-based network dedicated to spreading the Gospel of Jesus Christ 24 hours a day, seven days a week – all around the globe, through all media formats possible.
4. Daystar has more than 100 employees.
5. Daystar believes that the Bible is the inspired, infallible, and authoritative Word of God.
6. Daystar believes that all of its actions must be in furtherance of its religious mission and with the Word of God.
7. The Bible teaches that the right of conscience is sacred and must remain inviolate.
8. The Bible says in Romans 14 and 1 Corinthians 8:10-13 that in the case of a disputable matter, that is, any matter not specifically addressed in scripture, our consciences may compel fellow Christians to make different decisions about such matters. When that happens, Christians are commanded not to quarrel nor to test the beliefs of fellow brothers and sisters by inquiring into

their decisions. Such inquiries could compel a fellow Christian to act contrary to their conscience.

9. The employer vaccine mandate requires Daystar to inquire into its employees' private health decisions on the disputable matter of vaccinations. Such inquiries require Daystar to violate its belief that such topics should be kept between an individual Christian and God.
10. Further, any mandate that forces Daystar to compel their employees to be vaccinated against their conscience would require Daystar to violate its and its employees' sacred rights of belief and conscience.
11. Daystar believes that it is compelled by God not to comply with the employer vaccine mandate because it would violate Scripture, and therefore, the sincerely-held religious beliefs of the organization and its employees.
12. Additionally, the mandate requires Daystar to track the regular COVID-19 testing of unvaccinated employees. Daystar believes that complying with this component of the mandate will cost Daystar significant amounts of money and time, which would detract from the resources devoted to ministry efforts.
13. Daystar believes that a significant amount of its employees would quit if Daystar enforced the vaccine mandate.

14. As a religious employer, Daystar believes it should have the autonomy to decide how to regulate its own employees regarding vaccinations.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.



Arnold Torres

Executed on November 8, 2021.