IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC; RV TROSCLAIR, LLC; 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 PARIS, LLC; TROSCLAIR TERRY, LLC; TROSCLAIR WILLIAMS, LLC; RYAN DAILEY; JASAND GAMBLE; CHRISTOPHER L. JONES; DAVID JOHN LOSCHEN; SAMUEL ALBERT REYNA; KIP STOVALL; ANSWERS IN GENESIS, INC.; AMERICAN FAMILY ASSOCIATION, INC.; BURNETT SPECIALISTS; CHOICE STAFFING, LLC; STAFF FORCE, INC.; LEADINGEDGE PERSONNEL, LTD.; STATE OF TEXAS; HT STAFFING, LTD., D/B/A HT GROUP; THE STATE OF LOUISIANA; COX OPERATING, LLC; DIS-TRAN STEEL, LLC; DIS-TRAN PACKAGED SUBSTATIONS, LLC; BETA ENGINEERING, LLC; OPTIMAL FIELD SERVICES, LLC; THE STATE OF MISSISSIPPI; GULF	Case No. 21-60845

COAST RESTAURANT GROUP, INC.; THE STATE OF SOUTH CAROLINA; THE STATE OF UTAH; WORD OF GOD FELLOWSHIP, INC., D/B/A DAYSTAR TELEVISION NETWORK
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR; MARTIN J. WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR; DOUGLAS PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
Respondents.

PETITIONER'S MOTION FOR STAY PENDING REVIEW

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case:

LeadingEdge Personnel, Ltd.

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Petitioners has any parent corporation and that no publicly held corporation holds more than 10% of their stock.

These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners

On November 5, 2021, Respondent Occupational Safety and Health Administration ("OSHA") published an emergency temporary standard involving COVID-19 vaccination of private-sector employees, 29 C.F.R. § 1910.501 et seq. (2021) (the "ETS"). Due to the unique nature of emergency temporary standards, the ETS will take effect with no opportunity for public comment. 29 U.S.C. § 655(c)(1). Even under normal circumstances, an ETS is an extraordinary power that should be—and has been—judiciously exercised. Since its formation 50 years ago, OSHA has issued only ten ETS. But this particular ETS represents a unique and unprecedented assertion of federal authority: namely, the power to coerce at least 80 million Americans to inject an irreversible vaccine into their bodies, under threat of losing their livelihoods and threat of fines and other penalties against Petitioners.

Petitioner LeadingEdge Personnel, Ltd. ("Petitioner") has asked this Court to review the ETS, pursuant to 29 U.S.C. § 655(f), because it violates the Commerce Clause, Article I, Section 8 of the U.S. Constitution. Because the ETS will cause irreparable harm to Petitioner, Petitioner asks this Court to stay implementation of the ETS under Rule of Appellate Procedure 18. As shown below—in addition to suffering irreparable harm—Petitioner has a high likelihood of success on the merits,

the federal government will not be harmed by the stay, and the public interest favors issuance of a stay by this Court.[1]

STATEMENT OF FACTS

On September 9, 2021, President Joseph Biden announced his plan to direct the Department of Labor to issue the ETS which, through OSHA, would require 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 before coming to work." *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, https://www.whitehouse.gov/covidplan/ (last accessed November 4, 2021). The White House expects the ETS to "impact over 80 million workers in private sector businesses." *Id.*

OSHA published the ETS on November 5, 2021. In addition to requiring employers to check the vaccination status of their employers or to require weekly COVID-19 tests, 29 C.F.R. § 501(e) and (g), it also requires employers to give employees paid time off to obtain and recover from a vaccination, 29 C.F.R. § 501(f). It requires unvaccinated employees to wear masks when in close contact with others

[1] This motion seeks broader relief than the administrative stay of the ETS entered by the Court on Saturday; it also identifies additional "grave … constitutional issues with the" ETS; namely, the Commerce Clause violations discussed herein.

while at the workplace. 29 C.F.R. § 501(i). Failure to comply with the ETS could result in penalties of $13,653 per violation and $136,532 per willful or repeated violation. 29 C.F.R. § 1903.15(d).

On November 6, 2021, this court issued an order granting a stay "pending expedited judicial review" as to petitions challenging the ETS because "the petitions give cause to believe there are grave statutory and constitutional issues with the [OSHA] Mandate." *BST Holdings, L.L.C. et al. v. OSHA et al.*, No. 21-60845, Nov. 6, 2021, at 1.

Petitioner LeadingEdge is a staffing company with about two hundred employees serving the San Antonio and Austin metro areas. Decl. of Patty A. Yarborough at ¶ 2. It specializes in administrative office placements and has no clients outside of Texas. *Id*. Typical roles are positions such as executive assistant, legal assistant, office manager, receptionist, administrative assistant, and accounting assistant. Decl. at ¶ 3. Its employees tend to be people who want immediate work or want to try out a new industry. About 15–20% of its employees are fully remote. Decl. at ¶ 3. Most of its employees plan to only work for LeadingEdge temporarily. Accordingly, many of its employees do not have, and do not intend to build, long-lasting relationships with LeadingEdge. They can be hesitant to share personal or medical information. Decl. at ¶ 4-5.

LeadingEdge's clients are small-to-medium-sized companies. Decl. at ¶ 4. Typically, a temp-to-hire position, where an employee is permanently hired by a client after a trial period, will last about 15 weeks, while other temporary positions could be as short as one day or over six months. Decl. at ¶ 4.

In order to serve its clients' needs, LeadingEdge must be able to provide workers quickly and reliably. Employees are generally onboarded in person at one of LeadingEdge's two office locations. Decl. at ¶ 5. After that, employees almost never come back to the physical office. Decl. at ¶ 5. Last quarter, there were over 500 new employees, and there are currently over 50 job postings. Decl. at ¶ 6. LeadingEdge expects some employees to seek exemptions or accommodations from vaccination or testing. Decl. at ¶ 6. Many will refuse to be vaccinated or refuse to reveal their vaccination status. Decl. at ¶ 6. LeadingEdge is leanly staffed and having to coordinate a testing program will require at least one full-time staff member at each of its two branches. Decl. at ¶ 7. It expects many employees will decide that getting vaccinated or tested will not be worth the hassle and leave for smaller firms that are not subject to the ETS. Decl. at ¶ 7.

ARGUMENT

In reviewing a motion for a stay of an OSHA ETS, this Court uses the "well settled" test that requires applicants to demonstrate: (1) a substantial likelihood that they will prevail on the merits; (2) that they will suffer irreparable harm if they are

not granted a stay; (3) that a stay will not substantially harm other parties to the proceeding; and (4) that a stay will not interfere with the public interest. *Taylor Diving and Salvage Co. v. U.S. Dept. of Labor*, 537 F.2d 819, 821 n.8 (5th Cir. 1976); *Asbestos Info. Association/North Am. v. OSHA*, 727 F.2d 415, 418 n.4 (5th Cir. 1984). The petitioner does not have to show that all factors favor it. The court will "balanc[e] the equities involved." *Asbestos Info.*, 727 F.2d at 418; *see also Ohio v. United States Army Corps of Eng'rs* (In re EPA & DOD Final Rule), 803 F.3d 804, 806 (6th Cir. 2015) (calling the stay factors "not prerequisites to be met, but interrelated considerations that must be balanced").[2] "The first two factors of the . . .standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). As shown below, all four factors weigh strongly in Petitioner's favor.

I. Petitioner has a substantial likelihood of success on the merits.

A "showing of a substantial likelihood of success on the merits, does not require that the movant prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). The purpose of preliminary relief is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). As such, "[e]ven some likelihood of

[2] Petitioner can avoid seeking a stay before the agency if moving for a stay before the agency would be impractical. Fed. R. App. P. 18(A)(1-2). Here, it is futile to seek a stay from OSHA, as the ETS is effective on publication and the statute authorizes direct judicial review by the pertinent court of appeals. 29 U.S.C. § 655(c).

success can be enough" to support the issuance of preliminary relief. *Ass'n of Taxicab Operators, USA v. City of Dall.*, 760 F.Supp.2d 693, 696 (N.D. Tex. 2010) (citation omitted). That standard is amply met.

OSHA designed the ETS to prevent the spread of disease. But the federal government lacks general police power to prevent the spread of disease or issue public health laws in general. *United States v. Lopez*, 514 U.S. 549, 594, 115 S. Ct. 1624, 1647 (1995) (Thomas, J., concurring) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)). OSHA can only exert regulatory power justified by some enumerated power. *NFIB v. Sebelius*, 567 U.S. 519, 534-35 (2012). On this critical point, OSHA falls short. It points to the Commerce Clause. 86 Fed. Reg. 61,505. But the ETS cannot be justified under the Commerce Clause, either by itself or in combination with the Necessary and Proper Clause.

A. OSHA cannot justify the ETS under the Commerce Clause.

In *Lopez*, 514 U.S. at 558-59, the Court laid out three categories of activities that fell within the Commerce Clause: (1) activities involving the "the channels of interstate commerce"; (2) activities involving "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." The Court later clarified that the third category—the substantial effects test—is derived from the Necessary and Proper Clause, not the Commerce Clause alone. *See*

Gonzales v. Raich, 545 U.S. 1, 5, 22 (2005); *id.* at 34 (Scalia, J., concurring) (explaining more fully the relationship between the substantial effects test and the Necessary and Proper Clause).

No one could fairly dispute that the first two *Lopez* categories are not at issue. The ETS does not regulate roads, train tracks, or rivers—*i.e.*, the channels of interstate commerce—nor who or what may travel on them—*i.e.*, the instrumentalities of interstate commerce. It regulates the private healthcare decisions of employees—whether or not *intrastate*. The ETS therefore can be justified, if at all, only under the substantial effects test. *See United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009) (adopting Scalia's explanation of the substantial effects test from *Raich*).

B. The ETS is neither necessary to, nor proper for, effectuating the Commerce Clause.

The Necessary and Proper Clause empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution [its enumerated powers]." U.S. Const. art. I, § 8, cl. 18. On occasion, the Necessary and Proper Clause allows the federal government to regulate purely intrastate activities as a means of carrying into execution its authority over interstate commerce, provided that the intrastate activity substantially effects interstate commerce or that its

regulation is essential to some broader regulation of interstate commerce. *See Raich*, 545 U.S. at 36 (Scalia, J. concurring) (quoting *Lopez*, 514 U.S., at 561)).

But the Court has stressed that any invocation of this implied power must be examined "carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. If the relationship to commerce is too tenuous, or the invocation of the commerce authority is simply a "pretext" to pass laws for other purposes, a court has the "painful duty" of ruling that the government's exercise of power is unsupported by the Necessary and Proper Clause and thus unconstitutional. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

To surpass this hurdle, a restriction on intrastate activity must be both necessary— *i.e.,* "plainly adapted" to the regulation of interstate commerce—and proper— *i.e.,* consistent "with the letter and spirit of the constitution." *NFIB*, 567 U.S. at 537 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). The ETS fails both tests.

1. The ETS is not plainly adapted to the regulation of interstate commerce.

The plainly adapted standard largely tracks the considerations applied in *Lopez* and *United States v. Morrison*. *See Raich*, 545 U.S. 1, 35-36 (Scalia, concurring); *U.S. v. Morrison*, 529 U.S. 598, 617-18 (2000); *see also Comstock*, 560 U.S. 126, 135, 148 (referring to *Raich*, *Lopez*, and *Morrison* as Necessary and Proper Clause cases). Those considerations include: (1) the economic nature of the intrastate

activity; (2) the presence of a jurisdictional element in regulation, which limits its application to matters affecting interstate commerce; (3) any findings in the regulation concerning the effect that the regulated activity has on interstate commerce; and (4) the attenuation of the link between the intrastate activity and its effect on interstate commerce. *Morrison*, 529 U.S. at 610-12. While no one of these considerations alone is dispositive, each plays an important role in ensuring that that the government does not convert the Commerce Clause into a grant of a general police power. *See Lopez*, 514 U.S. at 567-68.

This list is not exhaustive. *Raich*, 545 U.S. at 39 (Scalia, J., concurring) (explaining that there are "other restraints" under the Necessary and Proper Clause). Restrictions "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Id*. As discussed in section, I (B) (2) *infra*, these additional considerations were elaborated on in *NFIB* and would independently be dispositive here. Because this case can be decided on the four *Morrison* considerations alone, we begin there.

a. The ETS regulates non-economic activity

To decide if a law "substantially affects interstate commerce," a court first asks "whether the regulated activity is an activity economic in nature." *Groome Res., Ltd. v. Par. of Jefferson*, 234 F.3d 192, 205 (5th Cir. 2000). Courts look "only to the expressly regulated activity" itself. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622,

634 (5th Cir. 2003). The motivation behind the activity or its ultimate effects are irrelevant for this part of the analysis. *See id.* at 633.

On its face, the ETS regulates the choice of employees not to get vaccinated. That standard requires that employers adopt a mandatory vaccination policy, enforced through an elaborate system of surveillance and record keeping. 86 Fed. Reg. 61552. But an employee's decision to forgo a vaccination is not "economic activity" for the purposes of the Commerce Clause. *See NFIB*, 567 U.S. at 552 (decision not to purchase health insurance is not economic activity); *Raich*, 545 U.S. at 25 (defining economic activity as the "production, distribution, and consumption of commodities.")

OSHA will likely raise two arguments in response, both of which fail.

First, the government will argue that an employee's decision not to get vaccinated is economic activity because it increases his risk of infection and therefore affects workplace safety by increasing the risk that his co-workers will be exposed to the virus at work. See 86 Fed. Reg. 61403. But non-economic activities do not become economic activities simply because they may have downstream economic effects. *See Morrison*, 529 U.S. at 611("any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far"). Otherwise, there would be no limit to commerce power. *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C.

Cir. 2003) (Roberts, J., dissenting from the denial of rehearing *en banc*) (quoting *GDF Realty*, 326 F.3d at 634-35).

Boundless federal power is exactly what the ETS presents here. Under the government's argument, all manner of private non-economic activities in the home would be subject to federal regulation. Hepatitis is a highly contagious disease. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). OSHA has therefore adopted workplace safety protocols for healthcare facilities to protect healthcare workers from transmission. *Id*. But Hepatitis may also be transmitted through unprotected sex. A healthcare employee's decision to have unprotected sex in his own home could therefore increase his risk of infection and therefore the risk that individuals in his workplace are exposed to Hepatitis. By OSHA's logic, this tangential relationship to workplace safety converts that worker's intimate choices into "economic activities" subject to federal regulation.

Poor sleep can also detract from workplace safety. And as any parent knows, allowing one's child to crawl into bed with you if she has a nightmare can affect the quality of sleep. Under OSHA's conception of federal power, that parenting decision would become subject to federal regulation simply because of its downstream effects on workplace safety.

Controlling Supreme Court precedent forecloses such a limitless view of the commerce power.

Second, OSHA may argue that it does not force anyone to be vaccinated directly but instead requires employers to impose that requirement on their employees. But OSHA may not escape the restraints of the Commerce Clause by commandeering private companies to regulate activities that OSHA has no authority to regulate itself. Under the Constitution, "what cannot be done directly cannot be done indirectly." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 24 (1866). The first *Morrison* consideration therefore cuts in Petitioner's favor.

b. The ETS lacks a jurisdictional element

The next consideration the Court must evaluate is whether the regulation has an "express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12. A common example triggers a federal regulation only where the regulated item or person "has traveled across state lines." *Id.* at 613 n.5.

Here, the ETS has no jurisdictional element. It applies to all employers with at least 100 employees, regardless of whether the business at issue is engaged in interstate commerce or activities that substantially affect interstate commerce. The second *Morrison* consideration therefore cuts in Petitioner's favor.

c. The ETS contains no findings establishing that it is necessary to a broader regulation of interstate commerce

The Court must next consider the extent to which the government regulation is supported by findings. When, as in this case, the regulation is of non-economic activity, these findings must show that the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Alternatively, when the regulation is targeted at economic activity, the question is whether any findings support a claim that the regulated activity has a substantial effect on interstate commerce. *Id.*

Here, the ETS contains no findings regarding the connection with interstate commerce. In 154 pages, commerce or economics appears only in a single sentence where the agency baldly claims that the Commerce Clause authorizes the regulation. 86 Fed. Reg. 61,505. The third *Morrison* consideration also cuts in Petitioner's favor.

d. To justify the ETS, the government must pile inference on inference in a way that converts the Commerce Clause into a general police power

The next consideration is the level of fit between the facts in the record and any alleged substantial effect on interstate commerce. If the fit is too tenuous or requires the court to "pile inference upon inference" to arrive at the government's

conclusions in a manner that would justify a federal police power, then the court will not find the requisite substantial effect. *Lopez*, 514 U.S. at 567.

Here, the ETS makes no effort to connect the vaccine mandate to interstate commerce at all. To be sure, the government could argue that an individual's failure to get vaccinated increases his risk of infection; and therefore, increases his risk of spreading COVID; and that the spread of COVID could have economic effects. But the spread of any disease affects interstate commerce. If that were sufficient to invoke federal authority, then the Commerce Power would be converted into a general police power over public health—a power explicitly withheld from the federal government. As Chief Justice Roberts explained in *NFIB.*, 567 U.S. at 554:

> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned.

The final *Morrison* consideration thus cuts in Petitioner's favor.

2. Even if the ETS were necessary, it is not Proper

Even if the government could show that the regulation at issue here was "necessary" under the four-considerations above, this Court would still need to evaluate whether the regulation was "proper." *NFIB*, 567 U.S. at 560; *see also Raich*,

545 U.S. at 39 (Scalia, J., concurring) (adding the "proper" analysis as an additional consideration after the *Morrison* factors).

To be "proper," a regulation of intrastate conduct "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Raich*, 545 U.S. at 39 (quoting *McCulloch v. Maryland*, 17 U.S. at 421-22). These "phrases are not merely hortatory," but reflect a solemn command to the Court. *Id*. (citing *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144, (1992)).

Among other things, a regulation is not "proper for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty," *id*., "undermine[s] the structure of government established by the Constitution," *NFIB*, 567 U.S. at 559, or marks a novel or "substantial expansion of federal authority" into areas traditionally reserved to individuals or to the states. *See id.*

NFIB demonstrated that the "proper" prong of the Necessary and Proper Clause has teeth. There, the Court assessed the constitutionality of the Affordable Care Act's national mandate to purchase health insurance. The government argued that the mandate was essential to its broader regulatory scheme to drive down the cost of health insurance, and therefore justified as Necessary and Proper in furtherance of the regulation of interstate commerce. The Court disagreed: "Even if

the individual mandate [were] 'necessary' to the Act's insurance reforms," the Court concluded, such an expansion of federal power into traditional matters of state concern was "not a 'proper' means for making those reforms effective." *Id*. at 560 (Roberts, C.J.); *id*. at 653 (joint dissent) ("the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated [and hence limited] federal power").

The same reasoning applies here. First, the ETS is unprecedented. The federal government did not mandate vaccination in response to Polio, or even mandate that healthcare workers be vaccinated against Hepatitis. *Am. Dental Ass'n*, 984 F.2d at 825. While not dispositive, "sometimes 'the most telling indication of a severe constitutional problem . . . is the lack of historical precedent'" for the federal action. *Id*. at 549 (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)). "At the very least, we should 'pause to consider the implications of the Government's arguments' when confronted with such new conceptions of federal power." *Id*. at 550 (quoting *Lopez*, 514 U.S. at 564.)

Second, the ETS marks a substantial expansion of federal power into matters of traditional state concern, with significant effects on state sovereignty. On its face, the ETS regulates vaccination and expressly preempts contrary state vaccination

laws. 86 Fed. Reg. 61551. But public health laws have traditionally been the exclusive province of the states.

Finally, there is simply no limiting principle to the government's theory of federal authority in this case that would prevent the Commerce Clause from becoming a general police power. *See NFIB*, 567 U.S. at 536. As explained above, the government's arguments here would equally justify virtually any federal public health law.

II. Petitioners will be irreparably harmed.

When considering whether to grant a stay, the Court must determine whether the challenged regulation will inflict irreparable harm on Petitioner. It will. Without a stay, the ETS will impose on Petitioner administrative and financial burdens that will never be recouped. "Indeed 'complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.'" *Texas v. U.S. Environmental Protection Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment)). On this point, "it is not so much the magnitude but the irreparability that counts." *Enter. Int'l v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985) (quotation omitted). Petitioner faces multiple irreparable harms that threatens its present and future success.

A. The financial penalties for non-compliance are extraordinary.

The OSHA Act allows for civil and criminal penalties. 29 U.S.C. § 666. Penalties are assessed "for each violation." *Id* at § 666(a). Every year, OSHA adjusts its maximum penalty consistent with inflation. *See Southern Hens, Inc. v. Occupational Safety and Health Review Commission*, 930 F.3d 667, 683 (5th Cir. 2019). The current penalty for violations is $13,653 per violation and $136,532 per willful or repeated violation. 29 C.F.R. § 1903.15(d). Even if Petitioner manages to ensure 90% compliance with the ETS, it would still be facing the choice of either losing the use of 10% of its workforce or risking thousands of dollars in penalties—an impossible choice.

B. The ETS is administratively unworkable.

The administrative costs of inquiring into each of its employees' vaccination status and managing the testing status of those that choose not to get vaccinated will be unduly burdensome and administratively unworkable. Petitioner relies on being nimble and administratively light. Decl. at ¶ 7. A handful of administrative employees coordinate the employment of hundreds of temporary workers. Petitioner tends to employ people who want immediate work, are open to doing any type of job, or want to try out a new industry. Decl. at ¶ 3. It also employs people who are looking to fill gaps in employment or are trying to supplement their income with part-time work. *Id*.

Additionally, because many employees plan to only work for Petitioner temporarily, many employees do not have, and do not intend to build, long-lasting relationships with Petitioner. Decl. at ¶ 4-5. They can be hesitant to share personal or medical information. When employees work in an office, they report to one of Petitioner's clients, not to Petitioner's offices. Decl. at ¶ 5. Once a client agrees to hire an employee and the employee is successfully onboarded, communication between the employee and Petitioners is minimal until the temporary job is finished. Decl. at ¶ 5.

Added administrative burdens will result in lost hours for Petitioner's administrative staff, perhaps resulting in the need to work overtime or hire new employees. Additionally, because the employees rarely work at Petitioner's facilities, complying with the testing requirement is not as simple as using at-home tests when employees come to work. Requiring unvaccinated employees to be tested at their working location will take an untold number of hours. The paid time-off required by the ETS will, likewise, cause great hardship to Petitioner because of the high turnover in the industry.

C. Due to unequal application of the vaccine mandate, Petitioner is likely to lose employees to smaller competitors.

Petitioner faces another irreparable harm. Valuable employees can be expected to leave Petitioner for a smaller entity not subject to the mandate or drop out of the workforce entirely. The temporary nature of its job assignments makes

employees especially mobile, and employees will often work at the physical location of smaller firms that are not subject to the ETS. These employees will immediately notice the incongruity of having to be vaccinated or tested, unlike their officemates. The employees who only work on a part-time or short-term bases may also decide the added burden of getting vaccinated or getting tested weekly is not worth the hassle of maintaining employment. Losing these employees will demonstrably harm existing relationships between Petitioner and its clients. In sum, the ETS threatens Petitioner's ability to retain and recruit employees, which will harm its relationship with existing clients and prevent it from developing relationships with new clients.

III. OSHA will not be substantially harmed.

By sharp contrast, OSHA will not suffer any harm from a stay. This Court has already discerned "grave statutory and constitutional issues with the [OSHA] Mandate." *BST Holdings, L.L.C.*, No. 21-60845, at 1. Requiring OSHA to await expedited judicial review before enforcing the ETS against Petitioner—or any other covered party—will not substantially harm the government. And if the ETS is found to be unconstitutional, as we maintain, any asserted harm will be illusory.

IV. A stay will promote the public interest.

Under the final prong, the public interest favors a stay. There "is generally no public interest in the perpetuation of unlawful agency actions." *State v. Biden*, 2021 U.S. App. LEXIS 24872, at *45, 10 F.4th 538 (5th Cir. 2021) (quoting *League of*

Women Voters of U.S. v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016)). A stay that "maintains the separation of powers and ensures that a major new policy undergoes notice and comment" is also in the public interest. *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). The same principle holds true of the Commerce Clause objections presented here.

The public would benefit greatly from a stay of the ETS. A stay will help ensure that OSHA does not exceed its authority under the Constitution. If the ETS remains in effect during this litigation, employers will spend time and money complying with a regulation whose constitutionality is doubtful. Employees that do not want to be vaccinated, tested, or simply do not want to share their personal healthcare decisions with their employers will quit their jobs for smaller firms or leave the workforce all together, exacerbating an already urgent labor shortage. Additionally, as the President himself noted, vaccinated workers are "highly protected from severe illness" even in breakthrough cases. Workers that want to be protected from severe illness can be and have already dramatically lowered their risk of contracting a rare breakthrough case. Issuing a stay will also preserve our federal structure, where it is the primary province of the States to regulate public health and safety. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (U.S. 1905).

Finally, the ETS imposes a truly irreparable burden on Petitioner's employees. Compelling them to submit to a vaccination over their objections cannot be undone.

Once vaccinated, an individual cannot be de-vaccinated—even if the ETS is declared unconstitutional. Nor do already vaccinated employees face real risks from the unvaccinated while the ETS is under consideration. Vaccines confer excellent protection. *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, https://www.whitehouse.gov/covidplan/.

CONCLUSION

For the foregoing reasons, this Court should issue an order staying the enforcement of the ETS until it can be fully reviewed on its merits.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

As required by 5th Cir. Rule 27.4, I certify that I have emailed Edmund Baird, the agency designee regarding the merits of this motion and I have not received a response from Mr. Baird.

/s/Matthew R. Miller
MATTHEW R. MILLER

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2021, the following document was served via CM/ECF on all registered counsel, and in accordance with 28 U.S.C. § 2112(a), I served a copy of Petitioner's Motion for Stay Pending Review by delivering a copy via electronic mail to the agency designee:

Edmund C. Baird
Associate Solicitor for OSHA
Office of the Solicitor
U.S. Department of Labor
zzSOL-Covid19-ETS@dol.gov

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,018 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface suing Word O365 in 14-point, Times New Roman font.

Dated November 8, 2021

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LEADINGEDGE PERSONNEL, LTD.
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; U.S. DEPARTMENT OF LABOR,
Respondents.

Case No. _____

DECLARATION OF PATTY A. YARBROUGH

I, Patty A. Yarbrough, hereby declare as follows:

1. I am over the age of eighteen (18), of sound mind, and capable of making this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct.

2. I am the President of LeadingEdge Personnel, Ltd., a staffing company with about 200 employees serving the San Antonio and Austin metro areas. It specializes in administrative office placements and has no clients outside of Texas.

3. Typical roles are positions such as executive assistant, legal assistant, office manager, receptionist, administrative assistant, and accounting assistant. About 15–20% of its employees are fully remote.

4. Its clients are small-to-medium-sized companies and more than half will not be subject to the ETS. Typically, a temp-to-hire position, where an employee is permanently hired by a client, will last about 15 weeks, while other temporary positions could be as short as one day or over six months.

5. Employees are generally onboarded in person at one of LeadingEdge's two office locations. After that, employees almost never come back to the physical office.

6. Last quarter, there were over 500 new employees, and there are currently over 50 job postings. LeadingEdge expects some employees to seek exemptions or accommodations from vaccination or testing. Many will refuse to be vaccinated or refuse to share their vaccination status.

7. LeadingEdge is very leanly staffed, and having to coordinate a testing program will require at least one full-time staff member at each of its two branches. It expects many employees will decide that getting vaccinated or tested will not be worth the hassle and leave for smaller firms that are not subject to the ETS.

Pursuant to 28 U.S.C. § 1746, I, Patty A. Yarbrough, declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 2nd day of November, 2021.

Patty A. Yarbrough

PATTY A. YARBROUGH
President
LeadingEdge Personnel, Ltd.
12500 San Pedro, Suite 120
San Antonio, TX 78216