No. 21-60845

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC, ET. AL.,
Petitioners,

v.

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

PETITIONERS BURNETT SPECIALISTS, CHOICE STAFFING, LLC AND STAFF FORCE, INC.'S REPLY IN SUPPORT OF MOTION FOR STAY

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:

Burnett Specialists

The Burnett Companies Consolidated, Inc.

Choice Staffing, LLC

Staff Force, Inc.

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

Petitioners Burnett Specialists; Choice Staffing, LLC; and Staff Force, Inc., file the following reply to Respondents' Opposition to Emergency Stay Motions, and would show the Court the following:

I. This Court should reject the government's attempt to abuse the regulatory process in order to coerce compliance with the administration's policy preferences.

The Biden Administration continues to act in defiance of this Court's emergency stay order, and this Court should issue an immediate preliminary injunction to protect Americans from being coerced to comply with the unconstitutional vaccine mandate during the pendency of this litigation. Just yesterday, the President's Deputy Press Secretary said that "People should not wait. They should continue to move forward and make sure they're getting their workplace vaccinated," which fails to acknowledge this Court's Stay Order currently in effect.[1] Throughout the pandemic, this Administration has manipulated and drawn out the regulatory process in order to achieve its policy objectives. That abuse should end here.

There is a clear pattern. Consider the Administration's extension of the residential eviction moratorium in August of this year, after a majority of the Supreme Court had agreed the moratorium was unlawful. The White House's

[1] https://www.cnbc.com/2021/11/08/biden-vaccine-mandate-white-house-tells-business-to-go-ahead-despite-court-pause.html.

economic recovery czar, Gene Sperling, acknowledged that "the CDC director and her team have been unable to find legal authority" to extend the moratorium. https://thehill.com/policy/finance/housing/566230-biden-buys-time-with-new-eviction-ban. But despite this acknowledgement that there was no authority for the extension, the President pressed ahead with the extension because by "the time it gets litigated it will probably give some additional time" to the government. *Id*.

Similarly here, President Biden announced the vaccine mandate on September 9, 2021. https://www.whitehouse.gov/covidplan/. On the day the plan was announced, the White House Chief-of-Staff, Ron Klain, re-tweeted the following tweet: "OSHA doing this vaxx [sic] mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt [sic] to require vaccinations."

To this Court, Respondent says "most of [Petitioners'] asserted harms are at least a month off, and many of their claimed harms relate to a testing requirement that does not become effective until January 2022. No reason exists to rule on

petitioners' stay motions immediately." Br. At 4. Yet the reality of the private citizen vaccine mandate is quite different.

A vaccine requirement covering more than 80 million Americans[2] is an awesome and unprecedented claim of authority. Yet the ongoing administration approach is to press ahead with constitutionally dubious assertions of power, and legal arguments, knowing that they will have achieved their legal objective ("giv[ing] some additional time" or enacting "the ultimate work-around") by the time the matter winds through the court system, regardless of the ultimate legal outcome. This Court has today the opportunity to reject this cynical strategy.

II. Respondent's non-delegation argument is inconsistent with the statute, and would result in virtually unlimited power for OSHA.

The federal government's argument that the ETS statute gives it plain and obvious power to control a pandemic by commanding vaccinations of private citizens is wrong for four primary reasons:

A. Vaccines are distinguishable from other workplace safety measures because they result in a permanent transformation of people's bodies.

Throughout its response, Respondent treats the vaccine requirement as a mundane workplace safety rule, like wearing a hard hat. It calls the requirement a

[2] The text of the ETA makes it clear that OSHA does not intend to stop at large employers. It already contemplates extending the requirement to all workplaces of any size, and is actively "soliciting stakeholder comment and additional information to determine whether to adjust the scope of the ETS to address smaller employers in the future." COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

"risk-mitigation measure" and a "workplace control[]." However, actual workplace mitigation measures and controls end at the workplace. If someone works around dangerous moving objects, one wears a hard hat; if one welds, one wears a welding mask; if one works on an upper floor, one's workplace must have emergency stairs; etc. Those measures exist at the workplace and are left at the workplace at the end of the workday.

Vaccines are different in kind from these-type measures reasonably within the OSHA statute, because vaccinations induce permanent, irreversible changes in an individual's body. Petitioners do not agree with Respondent's characterization of a disease as a "substance" or "agent," but even if it were, Respondent is claiming the power to force individuals to induce permanent medical changes in their bodies – far from the concept of a workplace safety measure. That certainly requires this Court to take the hardest of looks at whether Congress has delegated to Respondent the authority to do so. For anyone who gets vaccinated as a result of this ETS, there is no going back, and so the Court should have the utmost confidence that the ETS is proper before allowing it to proceed.

B. Respondent misapprehends the meaning of *Big Time Vapes v. FDA*.

Respondent's primary case is this Court's decision *Big Time Vapes v. FDA*, 963 F.3d 436 (5th Cir. 2020). There, the plaintiff raised a nondelegation challenge to the FDA's regulation of certain tobacco products under the Family Smoking

Prevention and Tobacco Control Act ("TCA"). The Act specifically authorized the FDA to "determine which other products should be governed by the TCA's regulatory scheme." *Id*. at 437. In 2016, the FDA promulgated a rule that swept Electronic Nicotine Delivery Systems ("ENDS") into the TCA, resulting in a host of additional regulatory burdens for the plaintiff. *Id*. at 439-40. Plaintiff objected, claiming that ENDS were not tobacco products, and that Congress had not delegated to the FDA the authority to regulate them. *Id*. at 440.

This Court rejected that claim, holding that Congress *had* delegated to the FDA authority that properly reached ENDS systems. As the Court noted, it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 1 (1946) (internal quotations omitted).

Although this Court found that FDA ENDS regulation satisfied all three parts of that test, it emphasized two points: First, "critically, Congress enacted a controlling definition of 'tobacco product,' which necessarily restricts the Secretary's power to only products meeting that definition." *Id*. at 445. Compare that to the words "agent" and "hazard" here, which have no such "controlling definitions." 29 U.S.C. § 655(C).

Second, it mattered greatly that

> Congress restricted the Secretary's discretion by making many of the key regulatory decisions itself. Among myriad other things, the TCA

> requires tobacco manufacturers to submit comprehensive data about their products' ingredients (including nicotine) and health effects. The Act also requires manufacturers to file annual registration statements listing their products and to update those lists biannually. And finally, the TCA prohibits manufacturers from introducing new tobacco products without premarket authorization, and it details the steps manufacturers must take to obtain approval. As those substantive provisions show, *Congress painted much of the regulatory canvas, leaving the finishing touches to the FDA.*
>
> (Internal quotations omitted; emphasis added.)

This case could not be more different. Here, Congress has essentially left Respondent with a blank canvas—one that the administration is using as the "ultimate work-around" to enact a near-population wide COVID-19 vaccination mandate. *Big Time Vapes* shows how Congress properly delegates authority to the executive branch; this case, on the other hand, presents fatal nondelegation problems to the Court.[3]

C. The authority to require limited immunizations pursuant to 29 U.S.C. 699(a) is not relevant here.

Respondent cites 29 U.S.C. 669(a)(5) for the proposition that it may "require immunization." However, Section 669(a) deals narrowly with research and related activities conducted by OSHA, not regulations for workplace safety. If anything, the inclusion of a discussion of immunization in Section 669(a) undermines the government's argument, because it shows that Congress understood how to allow

[3] The ETS also violates the Commerce Clause, as more fully explained in the Motion for Stay Pending Review, filed by petitioner LeadingEdge Personnel, Ltd. Document No. 00516085110.

for immunization when it wanted to. It chose not to include similar language in 29 U.S.C. § 655. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (cleaned up).

Moreover, the fact that Congress chose to allow immunization requirements for research (an exercise of the spending power where Congress has broad leeway), does not indicate an intent to allow for OSHA to adopt regulations for private workers (an exercise of the commerce power, which is much more restricted).

D. Respondent acknowledges that this is actually about far more than workplace safety.

In its response, the federal government complains that a "stay would also cause significant harm outside of the workplace." Resp. at 22. But this argument expressly undermines Respondent's argument that the ETS is a workplace safety rule and is thus properly within the authority granted to Respondent by Congress. Either this is a workplace safety rule, or it is a sham: a pandemic response disguised as a workplace safety rule. The administration's public statements confirm that it is the latter, and Respondent's concession that staying the rule would "cause significant harm outside of the workplace" is further evidence that the rule is a sham.

III. Petitioners will be irreparably harmed without a stay

Respondents argue that any harm to Petitioners from compliance with the regulation will be de minimis. But it is the irreparable nature of the harm, not the amount of harm that matters. Here, the compliance cost for Petitioners will be significant, and due to sovereign immunity, wholly unrecoverable after the fact. That is sufficient to render Petitioners' injuries irreparable. *Teladoc, Inc. v. Texas Med. Bd.,* 112 F.Supp.3d 529, 543 (W.D. Tex. 2015) ("The possibility that the [the State of Texas] will assert immunity from monetary damages as a state agency also weighs in favor of finding Plaintiffs face irreparable harm.")

IV. It serves the public interest to grant a preliminary injunction because the Constitution does not grant public-health authority to the federal government.

The Constitution does not grant the general police power, including public-health authority, to the federal government. *See, e.g., United States v. Morrison*, 529 U.S. 598, 618 (2000) (rejecting any federal "plenary police power"); *Bond v. United States*, 572 U.S. 844, 854 (2014) (while "[t]he States have broad authority to enact legislation for the public good—what we have often called a 'police power' … [t]he Federal Government, by contrast, has no such authority"). Thus, such power is not Congress's to delegate to Respondent (which it did not), even if it had wanted to do so. Furthermore, [t]here is no pandemic exception to the Constitution." *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020). The federal government may not use

the pandemic to justify creation of new powers not allowed under the Constitution. There is a reason why the President's Chief-of-Staff was so proud of the administration's "ultimate work-around." And because they recognize that the President lacks the authority to mandate vaccinations of private citizens, yet knows they will get away with it if allowed time by the Courts.

And so, nearly two months after the ETS was announced, Respondent has finally seen fit to publish it in the federal register, with 154 pages of post-hoc justifications for the President's policy choices. But none of those justifications can change one simple fact: Congress never authorized Respondent to use its obscure, rarely used ETS authority to address a pandemic.

Over the past year, courts around the country have found limits on government's authority to restrict people's freedoms during a pandemic. In *Alabama Association of Realtors v. HHS*, the Supreme Court evaluated a nondelegation challenge to a COVID-related eviction moratorium put in place by HHS after Congress's own moratorium expired. 141 S. Ct. 2485, 2486 (2021). "Concluding that further action was needed, the CDC decided to do what Congress had not. The new, administratively imposed moratorium went further than its statutory predecessor, covering all residential properties nationwide and imposing criminal penalties on violators." *Id*. 2486. As Respondent does here, the agency claimed to have discovered statutory authority for its extension of the moratorium. As here, that

provision "ha[d] rarely been invoked" and "never before to justify" the expansive authority that the government was asserting. *Id*. at 2487. Finding that the agency had far exceeded its statutory authority, the Court concluded that while "[i]t is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant[,] our system does not permit agencies to act unlawfully even in pursuit of desirable ends. It is up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id*. at 2490 (internal quotations and citations omitted).

In *Roman Catholic Diocese v. Cuomo*, the Supreme Court rejected New York's arbitrary capacity limits on houses of worship, noting that "even in a pandemic, the Constitution cannot be put away and forgotten." 141 S. Ct. 63, 68 (2020). Last month, the Sixth Circuit ruled in favor of student athletes who challenged Western Michigan University's mandatory vaccination policy for student athletes. *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 2021 U.S. App. LEXIS 30153, *16 (6th Cir. 2021). In issuing the injunction, the court noted that "Proper application of the Constitution, moreover, serves the public interest, as it is always in the public interest to prevent the violation of a party's constitutional rights[.]" *Id*. at *17 (internal quotations and citations omitted).

Earlier this year, the Eastern District of Texas found that the CDC's eviction moratorium was not a proper exercise of government power under the Commerce

Clause. *Terkel v. CDC*, 521 F. Supp. 3d 662, 676 (E.D. Tex. 2021). "The absence of an historical analog," noted the court, "calls to mind the Supreme Court's instruction that '[p]erhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent.'" *Id*. at 675 (*quoting Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505, (2010)). That judgment was left in place by this Court. *Terkel v. CDC*, No. 21-40137, 2021 U.S. App. LEXIS 31431, at *6 (5th Cir. Oct. 19, 2021)

* * *

The message from these cases, and others, is clear: there is not a pandemic exception to the Constitution. A public health emergency (especially one that has been ongoing for over 20 months) does not grant the government free-ranging authority to do whatever it wants in the name of "controlling" the virus. To be sure, viruses like COVID-19 can be deadly. Humans have always lived with deadly viruses, but they have never before been used to allegedly justify the kinds of ongoing population-level controls that the government has asserted during this pandemic. Respondent's private employer vaccine mandate is the latest and most sweeping example of pandemic-related overreach. It will not be the last. If a line cannot be drawn here, then the federal government's power is truly unlimited for as long as COVID-19 is with us.

CONCLUSION

For the foregoing reasons, Petitioners ask that the Court act prior to the lottery consolidation process to permanently enjoin enforcement of the ETS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2021, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/Matthew R. Miller
MATTHEW R. MILLER

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

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Dated November 9, 2021

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