**Nos. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4082, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103**

**MCP No. 165**

# In The United States Court of Appeals For The Sixth Circuit

IN RE: OSHA RULE ON
COVID-19 VACCINATION AND
TESTING, 86 FED. REG. 61402
On Petitions for Review
21-4083

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**ASSOCIATED BUILDERS AND CONTRACTORS, INC., ASSOCIATED BUILDER AND CONTRACTORS OF ALABAMA, INC., INDEPENDENT ELECTRICAL CONTRACTORS, INC., AND INDEPENDENT ELECTRICAL CONTRACTORS – FWCC, INC.'S OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Counsel for Petitioners, certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

Associated Builders and Contractors, Inc., Petitioner

Associated Builders and Contractors of Alabama, Inc., Petitioner

Baird, Edmund, Attorney for Respondent

Betts, Louise M., Attorney for Respondent

Independent Electrical Contractors, Inc., Petitioner

Independent Electrical Contractors – FWCC, Inc., Petitioner

Occupational Safety & Health Administration, Department of Labor, Respondent

Stine, J. Larry, Attorney for Petitioner

Totaro, Martin, Attorney for Respondent

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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## INTRODUCTION

On November 23, 2021, the government filed an emergency motion to dissolve the stay of enforcement of the ETS. (Dkt. 69.) The motion should be denied. The stay should not be dissolved because the ETS suffers from many fatal flaws and a permanent injunction is highly likely. As the Fifth Circuit explained, Petitioners are likely to succeed on the merits, they face irreparable harm, and the balance of equities and public interest tilt in their favor. *See Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In *BST Holdings,* 2021 U.S. App. LEXIS 33698*,* the Fifth Circuit entered a nationwide stay prohibiting OSHA from enforcing the vaccine mandate pending further court action. *BST Holdings, LLC,* 2021 U.S. App. LEXIS 33698 at *27. Associated Builders and Contractors (ABC) and International Electrical Contractors (IEC) representing tens of thousands of construction industry employers, are in complete agreement with the Fifth Circuit's reasoning in that case: there is "cause to believe there are grave statutory and constitutional issues with the Mandate," *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *6. Petitioners' intention in this brief is to supplement and reinforce the Fifth Circuit's conclusions and offer additional reasons why the Sixth Circuit should preserve the stay.

## ARGUMENT

### A. Lifting the 5th Circuit's Stay of the OSHA ETS Will Cause Irreparable Harm in the Construction Industry.

Dissolving the stay will have immediate adverse impacts on the construction industry. It will force businesses to attempt to come into compliance with hugely burdensome obligations even as they confront workplace shortages, supply chain disruptions, and year-end customer demands. Among these obligations are developing a mandatory vaccination policy or testing and face covering policy, determining the vaccination status of their employees, and informing employees about the ETS,[1] vaccine efficacy and the criminal penalties associated with providing false information and documentation. 86 Fed. Reg. at 61552, 61554. While the Fifth Circuit has issued a stay, effectively pushing out the compliance dates, these compliance dates remain on the minds of employers affected by this ETS. Deadlines include comments to the rulemaking Docket No. OSHA–2021–0007 (previously due December 6, 2021, and now due January 19, 2022), and reporting and recordkeeping obligations that were due by December 6 and vaccination deadlines in January if this court dissolves the Fifth Circuit stay.

[1] Emergency Temporary Standard – COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1918, 1926, and 1928) (hereafter "ETS").

Although OSHA claims that employers with more than 100 employees "will have sufficient administrative systems in place to comply quickly with the ETS[,]" 86 Fed. Reg. at 61403, the agency's confidence is unsupported by any data in the construction industry. Even if employers could comply quickly to a reinstated ETS, ABC's and IEC's member employers are reporting that significant percentages of their skilled employees will quit or accept termination if the ETS is enforced. The construction industry workforce is inherently transient and mobile, and employees can and will easily take their services to smaller contractors who are not as yet covered by the ETS. This is not mere speculation: ABC's and IEC's members, many of whom are small businesses, have been told in no uncertain terms that significant numbers of their unvaccinated employees will be irreparably harmed by the loss of their skilled and unskilled workers. The Executive Vice President of Cajun Industries Holding, LLC, a member of ABC stated in a sworn declaration made part of the record in another federal court proceeding: "[I]t has reason to believe that many of its unvaccinated workers (over half its total workforce) will quit if they are required to be vaccinated." *Georgia v. Biden*, 21-cv-163, slip op. at 14 (S.D. GA. Dec. 7. 2021).

Preserving the status quo pending review on the merits, i.e., maintaining the 5th Circuit's stay, is vital to allowing the construction industry to continue its fragile recovery from the pandemic. Employers should be able to rely on the Fifth Circuit's

instruction that the ETS remains stayed pending adequate judicial review of the underlying motions for permanent injunction.

## B. OSHA Is Unlikely to Succeed On The Merits of the Pending Petitions For Review.

### 1. The Fifth Circuit Properly Held That OSHA Likely Lacks Statutory Authority to Impose a Vaccination Mandate Through the ETS "Workaround".

The ETS claims to find new powers buried in the OSH Act that have gone undetected for five decades: unilateral executive authority to regulate not simply the workplace, but the medical decisions of working adults throughout the entire country.

The Supreme Court has previously confronted overbroad claims of authority by OSHA and rejected them: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view." *Indus. Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 645, 100 S. Ct. 2844 (1980). "[T]he Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit." *Id*. Such an interpretation of the OSH Act would constitute a "sweeping delegation of legislative power" of the kind rejected in previous Supreme Court cases. *Id*. at 646 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S.

495, 539, 55 S. Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241 (1935)).

As the Fifth Circuit also rightly observed: The Supreme Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021). "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id*. at 2490, citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 582, 585-586, 72 S. Ct. 863 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization).

If the OSH Act allows the Secretary to impose a COVID-19 vaccine mandate on 100 million Americans, then it allows almost anything, delegating to the Secretary of Labor plenary power to establish whatever legal requirements he or she wishes, regardless of how attenuated they may be to workplace safety. Such an interpretation would render the Act the equivalent of the delegations the Supreme Court previously enjoined, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the

economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 474, 121 S. Ct. 903 (2001).

In this case, the Secretary's position is that OSHA's newfound authority empowers it not simply to set safe levels of potential carcinogens in the workplace, or require safety equipment and employee training, but to regulate the *off-site* medical decisions of employees completely disconnected from work. If OSHA can require that companies mandate vaccines, what can it not require? Perhaps OSHA could mandate that all companies require their workers to join a local gym or stick to a favored diet. Since a healthy immune system might arguably prevent all sorts of bacteria from spreading in the office, under this logic, there could be a rule mandating the appropriate regimen of vitamins.

OSHA's claim of authority, however, is even more troubling than some other proposed expansions of OSHA's jurisdiction. Previous excursions were at least subject to administrative process. There was advance notice, comments were heard, and time was taken to consider the merits of the proposal. Yet, OSHA has operated under no such encumbrances in promulgating the current ETS. In the previous half-century since the Act was passed, OSHA never before invoked emergency powers compelling employer responses to an infectious disease. To allow such an expansion with no administrative check, would untether the agency from any intelligible principle.

As Justice Rehnquist, examining another provision of the same OSH Act, explained more than forty years ago, "If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring).

**2. <u>The Only Agency Vested by Congress With (Limited) Authority to Require Vaccinations is HHS, Not OSHA</u>.**

Relying on 29 U.S.C. § 669(a)(5), OSHA claims that it has authority to require "immunization," including to "protect[] the health and safety of others." [Doc. 69, p. 16]. In fact, this very section demonstrates that Congress considered whether any federal agency should have authority to mandate vaccinations and chose *not* to give that authority to OSHA; instead Congress gave very limited authority only to the Secretary of Health, Education, and Welfare (now Secretary of Health and Human Services), not to OSHA. Specifically, § 669(a)(5) states:

> **(5)** The Secretary of Health, Education, and Welfare, in order to comply with his responsibilities under paragraph (2), and in order to develop needed information regarding potentially toxic substances or harmful physical agents, may prescribe regulations requiring employers **to measure, record, and make reports on the exposure of employees to substances or physical agents** which the Secretary of Health, Education, and Welfare reasonably believes may endanger the health or safety of employees. The Secretary of Health, Education, and Welfare also **is authorized to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses**. Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination,

> immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the Secretary of Health, Education, and Welfare shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

29 U.S.C. § 669(a)(5) (emphasis added). Thus, Section 669(a)(5) is not a grant of authority to OSHA, but rather only allows the Secretary of Health and Human Services to make reports as to the exposure to substances and physical agents and set up medical examinations and tests to determine the incidence of occupational illnesses and the susceptibility of employees to such illness ("measuring and recording"). In the context of making such determinations, and only in that context, HHS may only use immunizations where such treatment is necessary for the measuring and recording. Even under that limited authority, HHS must pay the employer for any additional expenses incurred. OSHA cannot cite any other provision of the OSH Act that grants OSHA authority to require vaccinations or any other medical treatment.

OSHA certainly cannot use this very limited authority set forth in 29 U.S.C. § 669(a)(5) as the basis for the broad authority to mandate vaccines as set forth in the ETS. As the Supreme Court held in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct 1891,1925 (2020). "Because we must interpret the statutes

"as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute."

In determining what authority Congress statutorily delegated to an agency, the courts look "not only [to] the ultimate purposes Congress has selected, but [to] the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Tiger Lily, LLC v. United States HUD*, 5 F.4th 666 at 670-71 (6th Cir. 2021), *citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co*., 512 U.S. 218, 231 n.4, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994). Thus, this Court must hold OSHA to the text of 29 U.S.C. § 669(a)(5), which, at best, vests HHS only when it is engaged in measuring and recording with limited authority regarding immunizations. Nowhere in the text of that statute is there any authority for what OSHA purports to do in the ETS.

### 3. The ETS Does Not Address a "Grave Danger"; Certainly Not in a Lower Risk Industry Like Construction.

The ETS also exceeds OSHA's authority because the Secretary cannot adequately show that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c)(1). This is particularly true in the construction industry, where most employees perform their work outside or in socially distant situations while wearing personal protective equipment already specified by extensive OSHA regulations tailored to the industry. *See* 29 U.S.C. § 1926; 86 Fed Reg 61412-13

(11/5/2021): "There is no comprehensive source of nationwide workplace infection data…." So, OSHA relied on anecdotal, unverified state and local reports of workplace exposures to COVID. A remarkable number of these unvetted "studies" showed no correlation between COVID and construction work.

In deciding whether to exercise the "extraordinary power" to issue an ETS, OSHA must determine whether "employees are exposed to grave danger" *in the workplace*, and whether an emergency standard including mandatory vaccination or weekly testing is "necessary" to protect them from such workplace danger. 29 U.S.C. § 655(c); *In re International Chemical Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987). Such a determination is necessarily based upon "'considerations of policy as well as empirically verifiable facts.'" *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1156 (1983), *quoting Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 655 n.62, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980).

Here, OSHA is really attempting to use the ETS as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS. "[T]he ETS statute is not to be used merely as an interim relief measure but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Id*. (citing *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)); see also *Taylor*

*Diving & Salvage v. U.S. Dep't of Labor*, 537 F.2d 819, 820-21 (5th Cir. 1976); *Fla. Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120 at 129 (1974)*; *Dry Color Manufacturers' Ass'n v. Dep't of Labor*, 486 F.2d 98, 104 n.9a (3d Cir. 1973). "[T]he plain wording of the statute limits [the court] to assessing the . . . grave danger that the ETS may alleviate, during the six-month period that is the life of the standard." *Asbestos Info. Association/North Am. v. OSHA, 727 F.2d 415 at 422 (1984)*. "The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos*, 727 F.2d 415, 422 (5th Cir. 1984). Of course, OSHA did issue an ETS related to COVID 19 on June 21, 2021, and the six-month period of that ETS expires on December 21, 2021. OSHA is attempting to extend the six-month period on COVID-19 by issuing a new ETS, which is not authorized by the Act. In fact, OSHA explicitly considered—and rejected—proposals to apply the June 21 ETS beyond healthcare.[2]

Moreover, in that same time period, June 2021, OSHA published guidance saying, "most employers no longer need to take steps to protect their workers from

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

COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated."[3] In a matter of months, OSHA went from "most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace" to COVID-19 exposure in every workplace is a "grave danger." Such inconsistency by OSHA should lead this Court to view with suspicion its current claim that COVID-19 exposure is a grave danger requiring an emergency rule and allowing OSHA to skip notice-and-comment procedures.

Furthermore, COVID-19 cannot be said to be a "grave danger" at every industry or in every job site in the nation with more than 100 employees. The consequences of COVID-19 depend significantly on the age and the health of the person infected by the virus.[4] Older people and those with weakened immune systems tend to be the most susceptible and at risk of death if they contract COVID-19.[5] Younger adults who perform most construction work, and those who are not immune-compromised are less likely to die or be hospitalized from COVID-19. *Id*. Therefore, it is the condition of the individual and their working conditions that

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[3] Emily Harbison et al., OSHA Issues Updated COVID-19 Guidance for All Workplaces, The Employer Report (June 10, 2021), https://www.theemployerreport.com/2021/06/osha-issues-updated-covid- 19-guidance-for-all-workplaces/.

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

[5] *Id*.

determine whether COVID-19 is a "grave danger"—not the number of workers at the individual's company.

**4. Defendants Have Failed to Sufficiently Explain Their Dramatic Change of Position.**

When an agency changes its existing position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2124-25 (2016), quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800 (2009). In *Encino*, the Court held that agencies must provide a reasoned explanation for any change in existing policies. *Id*., citing *Fox Television Stations,* 556 U.S. at 515. In this regard, the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* (emphasis deleted). In explaining its changed position, an agency also must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Id.*; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516, 129 S. Ct. 1800. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency

practice." *Encino Motorcars*, 579 U.S. 211, 136 S. Ct. at 2125-26. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. *Id*.

The government has indulged in just such arbitrary and capricious policy flip-flops here. President Biden was opposed to mandatory vaccinations until he was for them. On January 21, 2021, President Biden instructed OSHA to prepare an Emergency Temporary Standard (ETS) to protect worker health and safety from COVID 19. On June 21, 2021, six months later, OSHA issued an ETS to protect healthcare workers with certain safety measures; however, OSHA did not find a grave danger to the employees in other industries. Furthermore, OSHA did not mandate vaccines or weekly testing even for healthcare workers that had the greatest exposure to COVID-19. On September 9, 2021, President Biden announced that his "patience was wearing thin" and directed all federal agencies to require vaccines. On November 5, 2021, OSHA issued a second ETS, 86 Fed. Reg. 61,402, directed to all industries for employers of 100 or more employees to require COVID vaccines or mandatory weekly testing. The second ETS provided exceptions for employees working outdoors exclusively, which exempted many construction workers and provided exemptions for employees working remotely.

When the government undertakes a dramatic change of course, from opposition to vaccine mandates to their imposition, *Encino* suggests that some sort

of explanation is in order. Yet no reasoned explanation has been offered. *See BST Holdings*, 2021 U.S. App. LEXIS 33698, at *14 & n.11. In its Motion, OSHA merely asserts that the Delta variant created a new danger after June 21, 2021 (Doc. 69, p. 14). That explanation fails because WHO designated the Delta variant as a variant of concern on May 10, 2021, and the Delta variant already accounted for a significant percentage of sequenced virus samples in the US as of June 21, 2021.[6]

**5. The Tenth Amendment Limits OSHA's Authority to Mandate Vaccinations.**

"The Tenth Amendment was intended to confirm the understanding of the people at the time the CONSTITUTION was adopted, that powers not granted to the United States were reserved to the States or to the people." *United States v. Sprague*, 282 U.S. 716, 733, 51 S. Ct. 220 (1931); see also, *United States v. Darby*, 312 U.S. 100, 124, 61 S. Ct. 451 (1941) ("allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

Nowhere in the CONSTITUTION is the federal government given authority to dictate that people must be vaccinated or must submit to any other medical

[6] https://edition.cnn.com/2021/06/10/health/delta-variant-india-explained-coronavirus-intl-cmd/index.html

treatment.[7] It has long been the States' power to legislate health—including vaccination. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting "health laws of every description" belong to the states); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, ---, 2021 WL 5279381, at *7 (5th Cir. 2021) (citing *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24 (1922) (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination")). *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) (As to mandatory vaccine, "They are matters that do not ordinarily concern the National Government.") *See also, United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) (rejecting federal statute prohibiting possession of firearms in school zone).

More recently, the Supreme Court indicated that state and local governments have the power to implement and enforce public health measures in response to COVID-19. *See S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 140 S. Ct. 1613 (U.S. May 29, 2020) (Roberts, C.J., concurring in denial of application for injunctive relief) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard

[7] Although OSHA relies on the Commerce and Supremacy clauses, those clauses neither explicitly nor implicitly grant the federal government any authority over the medical treatment decisions made by the people.

and protect.'" (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358 (1905)).

Sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for an agency's action. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549, 132 S. Ct. 2566 (2012). With such a history of exclusive State power, this Court should be certain that Congress intended for OSHA to require vaccinations for millions of Americans, before considering OSHA's motion to lift the current stay. *See Bond v. United States*, 572 U.S. 844, 858, 134 S. Ct. 2077 (2014) (noting "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers" (internal quotations omitted)).

Despite the plain language of the Tenth Amendment and the Supreme Court's continued recognition of the States' power in matters of public health, including COVID-19, the ETS claims "to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees." 86 Fed. Reg. at 61551, § 1910.501(a) (Nov. 5, 2021). Yet, how can federal preemption apply to matters of public health that are within the police powers reserved to the States? It cannot.

**C. The Equities and the Public Interest Weigh in Favor of Injunctive Relief.**

Enjoining the vaccine mandate is in the public interest. "From economic uncertainty to workplace strife, the mere specter of the mandate has contributed to untold economic upheaval in recent months." *BST Holdings*, 2021 WL 5279381, at *8. "The public interest is also served by maintaining our constitutional structure and . . . the liberty of individuals to make intensely personal decisions according to their own convictions." *Id*.

There is no dispute that the public has an interest in stopping the spread of COVID-19. However, the public would suffer little, if any, harm from maintaining the "status quo" through the litigation of this case. While Defendants argue that enjoining the rule would harm the public interest in slowing the spread of COVID-19 among millions of workers and the public with whom they interact, they fail to acknowledge the harm to employers if the Mandate goes into effect and workers either quit or are terminated from employment for noncompliance.

In any event, there is no public interest in the perpetuation of unlawful agency action. As the Supreme Court said in *Alabama Ass'n of Realtors*, "It is indisputable that the public has a strong interest in combating the spread of the COVID–19[;]" however, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." 141 S. Ct. at 2490.

## CONCLUSION

For the foregoing reasons, Respondents' Emergency Motion to Dissolve Stay [Doc 69] should be denied and the stay imposed by the U.S. Court of Appeals for the Fifth Circuit should not be dissolved.

Respectfully Submitted this 7th day of December 2021.

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## CERTIFICATE OF COMPLIANCE

This brief contains ***4,368*** words. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, proportionally spaced.

*/s/ J. Larry Stine*
*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

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