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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

**PETITIONER BENTKEY SERVICES, LLC D/B/A THE DAILY
WIRE'S OPPOSITION TO OSHA'S MOTION TO DISSOLVE STAY
(ECF # 69)**

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CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8 6

To further its goal of controlling the American public’s personal medical decisions, the federal government is making an unprecedented, pretextual use of a rare administrative procedure, the Emergency Temporary Standard, under the authority of the Occupational Safety and Health Administration (“OSHA”). *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (“ETS”). The ETS is just one part of the President’s announced plan to impose a nationwide vaccine mandate after running out of “patience” with the unvaccinated, and while circumventing Constitutional restrictions prohibiting such a mandate. *BST Holdings, L.L.C.*, 17 F.4th 604 (5th Cir. 2021) (“Order”), at 617–18; *id.* at nn. 11, 13. Courts have already blocked other parts of this plan, including vaccination mandates for federal contractors and health care workers, because the agencies exceeded their statutory authorities. *See Georgia v. Biden*, Civ. No. 1:21-cv-163, slip op. at 18–19, 21 (S.D. Ga. Dec. 7, 2021) (federal contractor mandate); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021) (same); *Missouri v. Biden*, -- F. Supp. 3d ---, *8 (E.D. MO, Nov. 29, 2021) (healthcare worker mandate) (appeal filed).

As the Fifth Circuit held, “[e]xtraordinary power is delivered to [OSHA] under the emergency provisions of the Occupational Safety and Health Act,” so “[t]hat power should be delicately exercised, and only in those emergency situations which require it.” Order at 609 (citing *Fla. Peach Growers Ass’n v. U.S. Dep’t of Lab.*, 489 F.2d 120, 129–30 (5th Cir. 1974)) (alterations in original). OSHA has issued ten ETSs in 50 years, six of which “were challenged in court,” “most” of the challenged ETSs were stayed, and “only one survived.” Order at 609; *id.* at n. 2.

The ETS’s purpose, which circumvents federal administrative law’s mandatory public notice and comment rulemaking, is to pressure non-healthcare related private-sector employees into vaccination. It thus classifies tens of millions of American workers as workplace hazards subject to OSHA’s control, solely based on their medical choices outside of work, for a disease that is not unique to the workplace or necessarily present in them or their workplace. Almost eighteen months after the current pandemic began, and six months after widespread COVID-19 vaccine availability, the President’s command prompted OSHA to abruptly deem the virus a “grave danger” to justify one of the most sweeping exercises of federal government power in American history.

Even worse, OSHA issued its belated ETS as COVID cases, hospitalizations, and deaths have significantly declined, and as the vaccination rate continues to climb.

The ETS would require employers to monitor their workers' COVID-19 vaccinations, track constant testing, enforce mask-wearing for vaccinated workers, invade employees' personal medical histories and religious choices, and fire noncompliant employees. The employers' compilation of confidential medical information would also complicate personnel decisions and create legal liability. The government, lacking legitimate power to impose a direct vaccination requirement on the public, is instead forcing businesses to do it for them and thereby risking liability to their employees under the Americans with Disability Act, anti-discrimination laws, and privacy rules.

The plethora of ETS citations showing that people have tested positive or died from COVID are irrelevant. OSHA must show substantial evidence that *workplace* COVID-19 exposures present a grave danger to workers, and that mandating employee vaccinations for companies with more than 100 workers is necessary to alleviate that

danger. *See Asbestos Information Ass'n/N. America v. OSHA*, 727 F.2d 415, 427 (5th Cir. 1984).

OSHA's radical power grab is unconstitutional, not authorized by statute, and fails to satisfy the basic requirements for an ETS. OSHA's arguments are so outlandish, they can only be understood as *post hoc* excuses for a general vaccine mandate masquerading as a workplace safety rule. The Daily Wire is submitting three expert declarations that highlight the inconsistencies and inadequacies of OSHA's justifications.

The ETS's implementation should remain stayed. Here, The Daily Wire demonstrates the stay is necessary to maintain the status quo pending conclusive determination of the ETS's legality. *In re E.P.A.*, 803 F.3d 804, 806 (6th Cir. 2015). It can show: (1) the likelihood that it will prevail on the merits; (2) the prospect of irreparable harm absent relief; (3) the possibility of substantial harm to others if relief is granted; and (4) the strong public interest in favor of granting the stay. *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020).

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.

The Fifth Circuit correctly concluded that "petitioners' challenges to the Mandate show a great likelihood of success on the merits, and this

fact weighs critically in favor of a stay.” Order at 618. The Daily Wire need only show “a sufficient probability of success on the merits.” See *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 155 (6th Cir. 1991). Where constitutional rights are at stake, the “strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue.” *Baker v. Adams Cty. Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). This ETS offends both federalism and separation of powers. Long after COVID-19 has been relegated to history books, this ETS’s damage to our constitutional government would endure.

A. The Commerce Clause Does Not Empower OSHA to Mandate Vaccination or Testing for Private Employees.

The federal government is using the ETS to pressure Americans to receive a medical treatment the government prefers. As the Fifth Circuit held, however, the purpose of “[t]he Occupational Safety and Health Act, which created OSHA, was . . . to assure Americans ‘safe and healthful working conditions and to preserve our human resources.’” Order at 611 (quoting 29 U.S.C. § 651). “It was not—and likely *could* not be, under the Commerce Clause and nondelegation doctrine—intended to

authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways.” Order at 611, citing *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2488–90 (2021) (per curiam).

The federal government’s enumerated powers do not include “a plenary police power that would authorize enactment of every type of legislation.” *United States v. Lopez*, 514 U.S. 549, 566 (1995); *see also* U.S. Const. Art. I, § 8 (list of Congressional powers). Vaccination requirements have been recognized as state police powers, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which Congress, and by extension OSHA, do not possess. “Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.” *NFIB v. Sebelius*, 567 U.S. 519, 557 (2012).

The Fifth Circuit held the ETS exceeds the federal government’s Commerce Clause authority because a “person’s choice to remain unvaccinated and forgo regular testing is noneconomic activity.” Order 617 (citing *NFIB*, 567 U.S. at 522 (2012) (Roberts, C.J., concurring); *see also id.* at 652–53 (Scalia, J., dissenting)). OSHA may only regulate

commercial activity, *NFIB*, 567 U.S. at 550, which the Supreme Court has repeatedly found is not a limitless grant to prohibit disfavored conduct based on a tenuous link to commercial activity, or to regulate “classes of *individuals*, apart from any activity in which they are engaged.” *Id.* at 556. Like those who choose not to purchase health insurance, those who choose not to vaccinate are “a class whose commercial inactivity rather than activity is its defining feature.” *Id.*

The federal government here utilizes OSHA’s power to regulate workplace safety, an exercise of Congress’s Commerce Clause power, as a pretext to regulate individuals based only on their choice *not* to be vaccinated. “Accepting the Government’s theory would give Congress the same license to regulate what we *do not do*, fundamentally changing the relation between the citizen and the Federal Government.” *Id.* at 554–55 (emphasis added). Even where people “fail to do things that would be good for them or good for society,” the Commerce Clause does not authorize Congress “to compel citizens to act as the Government would have them act.” *Id.* at 554.

The breadth of OSHA’s attempted self-empowerment is illustrated by its inherent lack of a limiting principle: Anyone with a job—for that

reason alone—could be subject to unrestricted OSHA regulation to protect them from their disfavored personal choices. If working means forfeiting the right to make personal *medical* choices to the federal government, there are *no choices or omissions* that remain free or reserved to the states’ police powers. Fortunately, “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.” *Id.*

OSHA likens the ETS to Congress’s regulation of companies engaged in interstate commerce through Title VII and the Fair Labor Standards Act (“FLSA”), Resp’s. Emergency Motion to Dissolve Stay (“Mot.”) at 18. OSHA’s reliance on *United States v. Darby*, 312 U.S. 100 (1941), which upheld challenged portions of the FLSA, is misplaced. The *Darby* Court found that Congress enacted the FLSA to “suppress[] . . . nationwide competition in interstate commerce by goods produced under substandard labor conditions[.]” *Darby*, 312 U.S. at 123. Congress, therefore, did not stray from regulating commercial transactions (the payment of wages) that affected interstate commerce. The Court did not, as OSHA suggests, hold that Congress could regulate *all* aspects of the

employer-employee relationship, much less individual workers' medical decisions.

OSHA claims the ETS merely prescribes how to engage in commercial activity, Mot. at 20–22, but the ETS's vaccination and testing requirements do not even involve commercial activity. Instead, the ETS controls what workers do *outside* of work, and is transparently just one part of a national vaccination strategy. OSHA lists supposedly similar requirements—serving patrons regardless of race, filling out paperwork, establishing job qualifications, and *workplace* safety and health standards. Mot. at 19. But these have a direct bearing on transacting commerce. Even job qualifications, before OSHA promulgated the ETS, directly relate to a worker's job fitness and suitability. The ETS is markedly different because it regulates “noneconomic inactivity traditionally within the States' police power,” Order at 617 (citations omitted), by barring the noncompliant from the workplace.

As the Fifth Circuit found, the ETS likely violates the separation of powers. The nondelegation doctrine “constrains Congress's ability to delegate its legislative authority to executive agencies.” Order at 611 n.8 (“we have long insisted that ‘the integrity and maintenance of the system

of government ordered by the Constitution’ [sic] mandate that Congress generally cannot delegate its legislative power to another Branch.” (quoting *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989)). OSHA’s answer that its power is “unambiguous and limited”, Mot. at 22, is belied by the limitless power it asserts to control individual workers based solely on their presence in the workplace, to include their out-of-workplace medical decisions.

Finally, the Fifth Circuit aptly noted that the ETS was both under- and over-inclusive, Order at 615–16, which is detailed below within the context of OSHA’s burden to establish the ETS is “necessary” and not arbitrary under the OSH Act and the Administrative Procedure Act (“APA”), respectively.

B. The OSH Act Does Not Delegate Vaccine Mandate Authority to OSHA.

Even if the Commerce Clause allowed Congress to impose a national vaccination mandate (or a mandate that extends only to an arbitrary class of workers), Congress did not confer that authority on OSHA. The OSH Act empowered OSHA to protect employees from *workplace hazards*, not dictate workers’ personal medical decisions

outside the workplace. Indeed, until it submitted to political pressure to issue and defend this ETS, OSHA “conceded in the past that “[t]he OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis without notice and comment.” Order at 612 n.14 (citing Department of Labor’s Resp. to the Emergency Pet. for a Writ of Mandamus at 33–34, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020)).

The government’s interpretation of its statutory power is “unreasonable [where] it would bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization.” *Util. Air Regul. Grp.* (cleaned up) (citing *Brown & Williamson*, 529 U.S. at 159–60 (2000)). The Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” *Ala. Ass’n of Realtors*, 141 S. Ct. 2485, 2489 (2021) (cleaned up); *Util. Air Regul. Grp.*, 573 U.S. at 302; *see also Ala. Ass’n of Realtors*, 141 S. Ct. 2485, 2489 (2021) (CDC authority to prevent spread of communicable diseases did not authorize banning landlords from evicting 17 million tenants).

Congress empowered OSHA to develop and promulgate “occupational safety and health standards,” 29 U.S.C. § 651(b)(3), defined as “a standard which requires *conditions, or the adoption or use of one or more practices, means, methods, operations, or processes*, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. § 652(8) (emphasis added). It applies “with respect to employment performed *in a workplace*.” *Id.* § 653(a) (emphasis added). The statute was not intended to provide OSHA with the authority to issue broad, sweeping edicts with society-wide implications relating to public health outside the workplace. Order at 611. Yet, in enacting the ETS, OSHA did precisely that.

Thus, the Fifth Circuit rejected “OSHA’s attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life threatening to a vast majority of employees” into statutory authority to regulate “substances” and “agents” in the workplace. Order at 613. The OSH Act section upon which this ETS supposedly relies limits OSHA to regulating when “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) (emphasis added). OSHA’s ETS defines “the grave danger as workplace exposure to SARS–CoV–2, the virus that causes the development of COVID–19.” ETS at 61,407 n. 3. Rather than regulate workers’ potential virus exposure, however, the ETS regulates employees without reference to their workplace or actual exposure risk. But unvaccinated employees are not “toxic” “substances or agents” to which other unvaccinated “employees are exposed” under §655. And, of course, an unvaccinated employee is neither “exposed” to herself, nor “new,” nor a “hazard[].”

OSHA’s argument that it is merely promulgating regulations relating to viruses that also happen to exist outside the workplace, Mot. at 2, is unavailing. OSHA’s refusal to require testing and masks for vaccinated workers, despite acknowledging that they too can contract and transmit COVID-19, reveals that the ETS is truly regulating people, not workplace hazards.

OSHA seeks to transform the OSH Act into something resembling federal police power. OSHA argues the Act’s purpose was to ensure that workers could “work in a safe and healthy ‘environment,’” including “the air we breath[e] at work,” Mot. at 15–17 (cleaned up), and therefore

OSHA can control workers' medical choices if they affect the air at their workplace. This tortured reading of the OSH Act would give OSHA virtually limitless authority to regulate workers rather than bona fide workplace conditions.

OSHA cites 29 U.S.C. § 669(a)(5) for the strained proposition that OSHA has the authority to “require ‘immunization’ . . . to protect employees from communicable diseases.” Mot. at 16. OSHA’s reading of § 669 is no more faithful than its reading of § 655. Section 669(a)(5) states that the Secretary of Health and Human Services, “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[.]” 29 U.S.C. § 669(a)(5) (emphasis added). The only reference to “immunization” in § 669 is a *prohibition* on “authoriz[ing] or requir[ing] medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health and safety of others.” *Id.* This section must be read in parallel with the overall statutory scheme to address workplace and occupation hazards. Nothing in the

OSH Act comes close to authorizing OSHA to enact a vaccine mandate across all industries and workplaces (limited only by the arbitrary measure of number of employees).

The Fifth Circuit linked the Constitutional concerns, above, with OSHA's impermissibly expansive reading of its own power. "[E]ven if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading." Order at 618 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018)). As the Fifth Circuit put it, the ETS is "a monumental policy decision," and not a matter of "hard hats and safety goggles." Order at 617 n. 20. The Fifth Circuit therefore "[did] not infer" any "clear expression of congressional intent in § 655(c) to convey OSHA such broad authority" to promulgate the ETS. Order at 618. (Nor could it under the Commerce Clause, *see* p. 5, *supra*).

C. The ETS Is Not Supported by Substantial Evidence and OSHA Acted Arbitrarily and Capriciously.

The APA prohibits agency action that is unconstitutional, exceeds statutory authority, or is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. §§ 705–06. Further, the ETS must be supported by "substantial

evidence,” requiring courts to take a “harder look” than even under the APA’s arbitrary and capricious standard for reasoned decision-making. 29 U.S.C § 655(f); *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 421 (5th Cir. 1984). Agencies must also provide reasons for changes in position and explain their rejection of alternatives. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–15 (2020); *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The substantial evidence standard requires that agency action be “reasonable under the state of the record before” the agency. *Texas Indep. Ginners v. Marshall*, 630 F.2d 398, 405 (5th Cir. 1980).

The ETS glosses over the statistics showing that COVID-19 cases, deaths, and hospitalizations across the United States have plummeted. See ETS at 61, 4431. As a result, issuing the ETS at the same time the effects of the virus are dissipating, is not reasonable and not supported by substantial evidence or “reasonably necessary and appropriate to remedy a significant risk of material health impairment.” *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Instit.*, 100 S. Ct. 2844, 2863 (1980).

Generally, courts require that the administrative record contain “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). And “the extent to which the supporting evidence has survived public and scientific scrutiny, however, will affect the weight given to it by an inexpert judiciary.” *Asbestos Information Ass'n/N. America v. Occupational Safety and Health Admin.* (5th Cir. 1984) 727 F.2d 415, 421. Courts have developed several exceptions countenancing use of extra-record evidence including:

(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; . . . (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Esch v. Yeutter, 876 F.2d 976, 991-92 (D.C. Cir. 1989) (underscoring added).

Because OSHA sidestepped relevant factors, more evidence is needed to understand the issues, and new evidence shows OSHA’s

decision was not correct, the Court should consider the expert testimony included here.

1. OSHA failed to establish workplace exposure.

The Fifth Circuit concluded OSHA failed to meet a “threshold burden” of “show[ing] that employees covered by the ETS are in fact *exposed* to the dangerous substances, agents, or hazards at issue—here, COVID-19.” Order at 613. Random information about workplace COVID-19 “‘clusters’ and ‘outbreaks’ and other significant ‘evidence of workplace transmission’ and ‘exposure’” . . . misses the mark, as OSHA is required to make findings of exposure—or at least the presence of COVID-19—in *all* covered workplaces.” *Id.* (quoting OSHA 5th Cir. Opp’n to Emergency Stay Mot. at 8). In fact, 98% of the ETS’s 658 references are unrelated to COVID-19 workplace transmissions. (Kaufman Dec. ¶ 77, Exhibit “2”). For the few cases even slightly relevant to workplace transmissions, the authors warned about significant limitations in these studies which show that the ETS failed to prove that it was alleviating a grave risk to workers. (Kaufman ¶ 78).

2. OSHA failed to establish the gravity of potential workplace exposure.

The Fifth Circuit correctly noted that OSHA has not met its burden to establish the gravity of the workplace exposure COVID-19 risks, as the ETS concedes COVID-19 effects may range from “mild” to “critical.” Order at 614. In addition, the gravity prong must also be considered alongside the fact that Americans over eighteen, who comprise nearly the entire workforce, are overwhelmingly vaccinated. *Id.* Currently 83.5%, and climbing, have received at least one vaccination dose. See *COVID Data Tracker*, Centers for Disease Control, available at https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr (last accessed December 6, 2021).

OSHA failed to offer substantial evidence that SARSCoV-2 and COVID-19 pose a grave danger of a “serious or life threatening disease or condition” for all unvaccinated employees in non-medical workplaces. The risk of dying from COVID-19 varies widely based on age. (Bhattacharya Decl. ¶ 11-18, Exhibit “1”); (Lyons-Weiler Decl. ¶¶ 9, 25, Exhibit “3”); and (Kaufman Decl. ¶ 15, 34, 36-38, Exhibit). Rather than account for employees of different ages and for widespread vaccination rates among adults, the ETS tracks numbers of employees in a company—not even the number in a given location. It also ignores the

potential impact of treatment options, which are expanding.¹ (Lyons-Weiler Decl. ¶ 31-33); (Kaufman Decl. ¶ 16); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 (2020) (agency failed to “provide a reasoned explanation for its action” by failing “to consider conspicuous issues”, raising “doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner.”).

3. OSHA failed to establish the need for the ETS because it is overbroad, underinclusive, and arbitrary.

As found by the Fifth Circuit, OSHA “‘reasonably determined’ in June 2020 that an emergency temporary standard (ETS) was ‘not necessary’ to ‘protect working people from occupational exposure to infectious disease, including COVID-19.’” Cir. Order at 609 (quoting *In re AFL-CIO*, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)). The Fifth Circuit also correctly concluded “[t]he Mandate is staggeringly overbroad,” because it “fails to consider what is perhaps the most salient

¹ See Brendan Morrow, *Pfizer says effectiveness of COVID antiviral pill is 'beyond our wildest dreams'*, Yahoo News (Nov. 5, 2021). https://news.yahoo.com/pfizer-says-effectiveness-covid-antiviral-110635778.html?fr=sycsrp_catchall

fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. . . . [O]ne constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.” Order at 615. Indeed, the Fifth Circuit noted that OSHA was previously opposed to a one-size-fits-all mandate for all workplaces, that could be “counterproductive,” “inefficacious,” and a “poorly-suited approach.” *Id.*

It is a well-established scientific fact that natural COVID-19 immunity provides strong and long-lasting protection from subsequent infection without a vaccine. (Bhattacharya Decl. ¶ 7, 19, 22, 23, 25 & 26); (Kaufman Decl. ¶ 13, 56, 57, 59, 60, 61, 68, 69, 70 & 84); and (Lyons-Weiler Decl. ¶ 24). This ETS, however, makes no distinction between unvaccinated workers who have recovered from COVID and those who have never been exposed, which is arbitrary and capricious. *See Missouri v. Biden*, -- F. Supp. 3d ---, *8 (E.D. MO. Nov. 29, 2021) (appeal filed) (arbitrary and capricious that CMS rejected alternatives to vaccine mandates for “those with natural immunity by a previous coronavirus infection.”).

The Fifth Circuit also doubted the need for the ETS based on its “underinclusive nature”, which “implies that the Mandate’s true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary.” Order at 616. One key aspect of the ETS’s underinclusiveness is that it “cannot prevent vaccinated employees from spreading the virus in the workplace, or prevent unvaccinated employees from spreading the virus in between weekly tests.” Order at 616 n. 19. The coronavirus vaccine is only meant to decrease the length and severity of disease, but does not prevent infection and transmission. (Kaufman Decl. ¶¶ 40, 42, 50.) Both vaccinated and unvaccinated workers alike may become infected and transmit the virus. (Kaufman Decl. ¶¶ 13, 51.)

4. The ETS is an impermissible stop-gap measure.

The Fifth Circuit also concluded the ETS was defective because it was being used as a mere “stop-gap measure.” Order at 616 (citing *Asbestos Info.*, 727 F.2d at 422; ETS at 61,402, 61,434–35 (acknowledging that the ETS allows OSHA to “act as quickly as possible” while “[c]rafting a multi-layered standard that is comprehensive and feasible”)).

5. The ETS’s testing requirement undermines its alleged necessity.

The ETS's testing requirement undermines the premise of its necessity, because COVID testing delivers both false positive and false negative results. (Lyons-Weiler Decl. ¶ 37). These errors are not harmless as false positives lead to unwarranted and costly workforce quarantining while allowing infectious individuals into the workplace. (Lyons-Weiler Decl. ¶¶ 14,15. False positive tests also lead to a higher fatality reporting rate. (Lyons-Weiler Decl. ¶¶ 13-18). The efficacy of testing in reducing the alleged grave danger is therefore unsupported.

II. II. THE BALANCE OF EQUITIES FAVORS A STAY

OSHA argues that Petitioners “have not shown any injury that outweighs the injuries to the government and the public interest.” (Motion p. 40). Yet OSHA glosses over the fact that 98% of the ETS's references have nothing to do with workplace transmission. (Kaufman Decl. ¶ 77). The few relevant cases have minimal, extremely weak evidence and are loaded with confounding variables. (Kaufman Decl. ¶ 79).

While OSHA argues that delaying the ETS would endanger thousands, the ETS has failed to consider a single study involving the known adverse vaccine side effects from sources like the Department of

Health and Human Services Vaccine Adverse Event Reporting System. (Kaufman Decl. ¶ 80). While OSHA contends that there is extensive evidence of workplace transmission, a careful review of the ETS's 490 pages shows a complete lack of statistically significant references attributing risk to specific workplace environments. (Kaufman Decl. ¶ 81).

Similarly, OSHA contends, without a single scientific citation, that the ETS has proven that workers “are being hospitalized with COVID-19 every day, and many are dying. Pmbl.-61549.” The ETS's few studies that even directly deal with worker COVID-19 infections fail to properly determine whether worker infection was due to a workplace or community transmission. (*See, e.g.*, Kaufman Decl. ¶ 78.b, 78.d, 78.j, and 78.l).

While the ETS fails to prove that there is a grave danger of workplace transmission, the ETS puts the Daily Wire in an untenable position. The Daily Wire employs over 100 people. (Declaration of Jeremy Boreing (Boreing Decl. at 38-54, Exhibit “4”). The ETS will force it to either (A) intrude on employees' private health decisions, undertake significant compliance costs, face increased liability to workers, and lose

key employees; or (B) pay crushing fines for noncompliance. (Boreing Decl. at 39-54.) “As an employer, Bentkey Services is obligated to take extraordinary steps to protect employees’ private health information.” (Boreing Decl. at 43.) The ETS “exposes the company to danger of liability should any employee's information related to the vaccine or testing be exposed” and “opens the door to potential discrimination claims, including for example under the Americans with Disabilities Act and the Civil Rights Act.” (*Id.*) By some estimates, administration costs could be millions of dollars a year.²

As the Fifth Circuit correctly concluded, companies such as The Daily Wire “seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA’s plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees.” Order at 618. “[C]omplying with a regulation later held invalid almost *always*

² Rebecca Rainey, Biden’s Workplace Vaccine Mandate Faces Headwinds, Politico, *available at* <https://www.politico.com/news/2021/09/13/biden-mandates-vaccines-reactions-511680> (last accessed December 5, 2021).

produces the irreparable harm of nonrecoverable compliance costs.” *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment).

The Fifth Circuit also correctly concluded that “a stay is firmly in the public interest” because of the “economic uncertainty” and “workplace strife” caused by “the mere specter of the Mandate” but, more importantly, “the principles at stake when it comes to the Mandate are not reducible to dollars and cents.” Order at 618. “The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials.” Order at 618–19.

III. OSHA’S PROPOSED ALTERNATIVE RELIEF DOES NOT CURE OSHA’S LACK OF AUTHORITY OR EVIDENCE FOR THE ETS

If OSHA lacks the authority to issue an ETS imposing a general national vaccination mandate irrespective of workplace conditions or occupation, it has no such power to issue its proposed alternative—a general national testing and masking mandate. Even assuming *arguendo*

it has any such power, the same statutory and evidentiary defects discussed above would remain.

III. CONCLUSION

The Daily Wire asks the Court to deny OSHA's motion to dissolve the stay imposed by the Fifth Circuit based on the constitutional and statutory reasons found by that court. Further, as the Fifth Circuit held and as demonstrated above, OSHA has failed to show that COVID-19 exposures in the workplace present a grave danger to workers, and the record considered as a whole substantially fails to support OSHA's conclusion that an ETS mandating employee vaccines for employers with more than 100 workers is necessary to alleviate a grave risk to workers during the next six months.

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Respectfully submitted,

/s/ Harmeet K. Dhillon

Ryan L. Bangert
Ryan J. Tucker
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbangert@ADFlegal.org
rtucker@ADFlegal.org

Harmeet K. Dhillon
Ronald D. Coleman
Mark P. Meuser
Michael A. Columbo
Stuart S. McCommas
DHILLON LAW GROUP
177 Post Street, Suite 700
San Francisco, California 94108
(415) 433-1700

David A. Cortman
John J. Bursch
Matthew S. Bowman
Frank H. Chang
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org
jbursch@ADFlegal.org
mbowman@ADFlegal.org
fchang@ADFlegal.org

harmeet@dhillonlaw.com
rcoleman@dhillonlaw.com
mmeuser@dhillonlaw.com
mcolumbo@dhillonlaw.com
smcommas@dhillonlaw.com

*Counsel for Bentkey Services,
L.L.C. d/b/a The Daily Wire*

CERTIFICATE OF COMPLIANCE

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/s/ Harmeet K. Dhillon

Harmeet K. Dhillon

Date: December 7, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, a true and accurate copy of the foregoing 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.

/s/ Harmeet K. Dhillon

Harmeet K. Dhillon

Date: December 7, 2021