

No. 21-4114, 21-7000
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTEN CHEVROLET, INC.,
PETITIONER,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
DEPARTMENT OF LABOR, AND
MARTIN J. WALSH, U.S. SECRETARY OF LABOR
RESPONDENTS

**PETITIONER'S MOTION TO EXTEND STAY AND IN OPPOSITION TO
RESPONDENTS' MOTION TO LIFT STAY**

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**PETITIONER’S MOTION TO EXTEND STAY AND IN OPPOSITION TO
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Petitioner Betten Chevrolet, Inc. (“**Petitioner**”) respectfully requests that this Court, pursuant to 28 U.S.C. § 2112 (a)(4), extend the current stay ordered by the Fifth Circuit Court of Appeals on November 6, 2021, until, at a minimum, after the Court issues an order on the pending petitions for initial hearing *en banc*, and, we submit, until after this Court rules on the merits of these challenges. The basis for this motion, and our opposition to the Respondents’ Motion, is set forth in the accompanying Brief in Support.

For these reasons, Petitioner moves this Court to extend the stay ordered by the Fifth Circuit Court of Appeals on November 6, 2021 and to deny the Respondents’ Motion to lift the Fifth Circuit’s stay.

Dated: November 30, 2021

Respectfully submitted,

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**BRIEF IN SUPPORT OF
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STATEMENT OF ISSUES

Whether the Court should grant Respondent’s Emergency Motion to Dissolve Stay of Enforcement of the Emergency Temporary Standard issued by the Fifth Circuit Court of Appeals on November 6, 2021 or extend the Fifth Circuit’s stay until, at least, after the Court issues an order on the pending petitions for initial hearing *en banc*.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On September 9, 2021, President Biden announced his intent to impose a nationwide vaccination mandate.¹ In response, on November 5, 2021, the Occupational Safety and Health Administration (“OSHA”) issued a vaccination mandate in the form of an emergency temporary standard. (“ETS” or “ETS”) 86 Fed. Reg. 61,402.

The ETS mandated that all employers with 100 or more employees “develop, implement, and enforce a mandatory COVID-19 vaccination policy” and required such employers to force workers who refuse to provide proof of vaccination to “undergo [weekly] COVID-19 testing and wear a face covering at work in lieu

¹ E.g., Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates that Could Cover 100 Million Americans*, CNN (Sept. 9, 2021), available at <https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html>.

of vaccination.” 86 Fed. Reg. 61,402, 61,520. The ETS effectively deputized America’s largest employers to become the nation’s vaccine police. Any employer refusing to comply could face monetary penalties that OSHA describes as “high enough to motivate the very large employers who are unlikely to be deterred by penalty assessments of tens of thousands of dollars[.]” *Id.* at 61, 444.

Betten Chevrolet, Inc. (“**Betten**”) is a Michigan General Motors automobile dealership. Betten employs over 100 employees, making it subject to the ETS. Betten will be adversely affected by the ETS because, *inter alia*, it faces a shortage of full-time employees, and many current and prospective employees do not want to be forced to receive a COVID-19 vaccine or be subject to and pay for weekly testing and forced to wear a mask. (Declaration, Betten, R.1, filed with Petition).

Critically, there are at least twelve other competitors in the immediate vicinity of Betten’s showroom that all employ fewer than 100 employees and, as such, are not subject to the ETS. *Id.* Those dealerships will be able to hire employees who leave Betten because they do not require employees to be vaccinated or to pay for and be subjected to regular testing and wear masks. *Id.*

Not only will Betten lose highly trained employees, it will also be subject to the burdens of using existing staff resources to hire new staff and implement the administrative requirements of the ETS. *Id.*

Additionally, Betten will likely bear the cost of worker's compensation premium increases for employee injuries caused by the vaccine mandated as a condition of employment. *Id.* Thus, the ETS makes it more difficult to hire new and retain current employees in an already tight labor market. *Id.*

B. PROCEDURAL HISTORY

In the week following November 5, 2021, several petitioners filed Petitions for Review in various courts of appeals pursuant to 29 U.S.C. § 655(f). The Fifth Circuit, on November 6, 2021 stayed the ETS “pending adequate judicial review of the petitioners’ underlying motions for a permanent injunction,” and ordered that “OSHA take no steps to implement or enforce the [Standard] until further court order.” *BST Holdings, L.L.C. v Occupational Safety and Health Admin.*, No. 21-60845, 2021 WL 5279381, at *27, --- F.4th --- (5th Cir Nov. 12, 2021). On November 16, pursuant to 28 U.S.C. § 2112 (a), the Judicial Panel on Multidistrict Litigation consolidated and transferred the pending petitions to this Court. Pursuant to the multi-circuit process, any stay issued before the transfer may “be modified, revoked, or extended” by the court “designated” to hear the case. 28 U.S.C. § 2112 (a)(4).

C. LEGAL STANDARD²

Courts consider the following four factors in determining whether a stay of an agency rule is warranted: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). Respondents bear the burden to show that “a significant change either in factual conditions or in law” warrants dissolving the stay. *See Doe v. Shanahan*, 755 F. App’x 19, 22 (D.C. Cir. 2019).

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals’ stay should be extended pursuant to 28 U.S.C. § 2112 (a)(4) until, at least, after the Court issues an order on the pending petitions for initial hearing *en banc*. Petitioner is likely to prevail on the merits because the ETS is an unconstitutional exercise of legislative power vested in Congress and reaches beyond its enabling statute, the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“**the OSH Act**”). Without an extension of the stay, Petitioner will suffer irreparable harm in the loss of its workforce. OSHA

² Pursuant to FRAP 18, it is futile to seek relief with OSHA because OSHA is seeking to lift the stay; further, there is no administrative record to cite to, because OSHA has not filed it and as other Petitioners have pointed out, may never do so.

will not be harmed by an extension of the stay, which is in the public interest, because any harm a stay might cause OSHA pales in comparison to the harm to Petitioner and its employees if the stay were to be dissolved.

ARGUMENT

I. PETITIONER IS LIKELY TO PREVAIL ON THE MERITS

A. PUBLIC HEALTH AND SAFETY IS LEFT TO THE STATES AND OSHA'S ETS EXCEEDS CONGRESS' AUTHORITY

The ETS is a gross intrusion into the States' police powers and unconstitutionally extends the Commerce Clause beyond recognition. The Tenth Amendment states that any powers not delegated by the Constitution to the federal government are reserved to the States or the people. The police powers, including the power to regulate public health, safety and welfare, are part of those powers reserved to the States. *See Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1088 (9th Cir. 2021). *See also Smith v. Turner*, 48 U.S. 283 (1849) (the States may pass quarantine and health laws in the exercise of police powers and such laws are not regulations of commerce); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Congress passed the OSH Act pursuant to its Commerce Clause power. Therefore, the OSH Act is limited to activities that substantially affect interstate

commerce. In his September 9, 2021, speech,³ President Biden revealed the true intent of the ETS, stating: “I’m announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health.”

This type of general regulation of public health is well beyond the scope of interstate commerce. 29 U.S.C. §§ 651 *et seq.* More than once, the Supreme Court has reigned in similar attempts by the federal government to expand the Commerce Clause into a general police power. *See United States v. Lopez*, 514 U.S. 549, 567 (1995); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (“people...often fail to do things that would be good for them or good for society” but the Government may not use the Commerce Clause to compel citizens to buy vegetables). To wit, the Court did so earlier this year, with respect to eerily similar overreaching by this administration on COVID-19 related measures. *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

The ETS is explicit in its intent to trample on the traditional police powers of the state. In describing the events leading up to the ETS, OSHA noted with alarm that “an increasing number of states have promulgated Executive Orders or statutes that prohibit workplace vaccination policies that require vaccination or proof of

³ *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28pm EDT), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

vaccination status[.]” 86 Fed. Reg. 61,402-01, 61,432. It also noted that certain states have banned mask mandates in workplaces. *Id.* OSHA made clear the ETS was intended to halt this trend. *Id.* at 61,506 (“OSHA’s intent to preempt all inconsistent State and local requirements that relate to the issues addressed by this ETS”), 61,508 (describing how state restrictions on vaccine mandates “serve as a barrier to OSHA’s implementation of this ETS” and are therefore preempted).

Not only is the ETS an unconstitutional power grab under the guise of workplace safety, but on November 9, 2021, the White House openly defied the Fifth Circuit’s temporary injunction preventing implementation of the ETS. *See BST Holdings, L.L.C. v Occupational Safety and Health Admin.*, No. 21-60845, 2021 WL 5279381, at *9, --- F.4th --- (5th Cir Nov. 12, 2021) (“*BST*”) (issuing injunction). At a press gathering, Principal Deputy Press Secretary Jean-Pierre explicitly stated they “continue to advocate” to “push businesses to move forward with their policies now.”⁴ She said this even though the Fifth Circuit’s order directed that the government “take no steps to implement or enforce the Mandate until further court order.” *BST*, 2021 WL 5279381 at * 9. This is not the first time the Administration

⁴ *Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo*, The White House Briefing Room (November 9, 2021, 1:15pm EDT), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/09/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo/>.

has ignored an adverse injunction, the Supreme Court had to address a similar issue earlier this year. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2485 (granting emergency injunction against CDC Order after the administration continued it with knowledge it was overreaching).

B. THE ETS EXCEEDS THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

OSHA has never been permitted to issue an emergency temporary standard this broad, and it may not do so now. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted. *Sebelius*, 567 U.S. at 535. The ETS goes well beyond the Commerce Clause's interest in workplace safety, the sole domain that would be appropriate for an ETS, and instead tramples upon the police powers reserved to the States in an unlawful attempt to regulate public health. *BST*, 2021 WL 5279381 at *3 (the Commerce Clause and nondelegation doctrine do not permit OSHA to take over the public health role of the states).

OSHA's "authority to establish emergency standards pursuant to 29 U.S.C. § 655 (c) is an 'extraordinary power' that is to be 'delicately exercised' in only certain 'limited situations.'" *In re Intern. Chem. Workers Union*, 830 F.2d 369, 370 (DC Cir 1987). Emergency standards are viewed as "an 'unusual response' to

‘exceptional circumstances[,]’” *Id.* (quoting *Auchter*, 702 F.2d at 1155), and so, in the last fifty years, OSHA has issued just ten emergency temporary standards. *BST*, 2021 WL 5279381 at *1. Prior to this pandemic, OSHA last invoked its emergency temporary standard authority to lower workers’ exposure to asbestos in 1983, which was struck down because OSHA failed to demonstrate a grave risk. *See Asbestos Info. Ass’n/North Am. v. OSHA*, 727 F.2d 415, 417 (5th Cir. 1984). Employers have successfully challenged emergency standards involving pesticides, carcinogens, diving operations, benzene, and asbestos. *See Fla. Peach Growers Ass’n v. Dep’t of Labor*, 489 F.2d 120, 122 (5th Cir. 1974) (pesticides); *Dry Color Mfrs’ Ass’n v. Dep’t of Labor*, 486 F.2d 98 (3d Cir. 1973) (carcinogens); *Taylor Diving & Salvage Co. v. Dep’t of Labor*, 599 F.2d 622 (5th Cir. 1979) (diving operations); *API v. OSHA*, 581 F.2d 493 (5th Cir. 1978) (benzene); *Asbestos Info.*, 727 F.2d 415 (asbestos).

The instant ETS goes even further than the predecessors that were struck down. No other OSHA permanent or emergency temporary standard has attempted to protect workers across all job types and industries from exposure to a virus they are equally exposed to outside the workplace. This fact warrants even further increased scrutiny from the Court when examining the constitutionality of the ETS.

C. OSHA FAILED TO SATISFY THE REQUIREMENTS FOR AN EMERGENCY TEMPORARY STANDARD

Given the extraordinary nature of an emergency temporary standard, Congress required OSHA to satisfy a very high bar before adopting such a standard. *BST*, 2021 WL 5279381 at *4 (“the precision of this standard makes it a difficult one to meet”). In fact, OSHA frequently denies requests for emergency temporary standards because of what it views as “‘the extremely stringent judicial and statutory criteria for issuing’ an emergency standard[.]” *Pub. Citizen Health Research Group v Chao*, 314 F3d 143, 147 (3d Cir 2002) (quoting a letter from OSHA explaining its reasons for refusing to issue an emergency standard); *see also In re AFLCIO*, No. 20-1158, 2020 WL 3125324, at *1 (DC Cir June 11, 2020) (discussing OSHA’s denial of a request for an emergency standard). The emergency temporary standard must: “(1) address ‘substances or agents determined to be toxic or physically harmful’—or ‘new hazards’—in the workplace; (2) show that workers are exposed to such ‘substances,’ ‘agents,’ or ‘new hazards’ in the workplace; (3) show that said exposure places workers in ‘grave danger’; and (4) be ‘necessary’ to alleviate employees’ exposure to gravely dangerous hazards in the workplace.” *BST*, 2021 WL 5279381 at *4 (quoting 29 U.S.C. § 655(c)(1)); *In re AFLCIO*, 2020 WL 3125324, at *1 (“The agency is authorized to issue an ETS if it determines that ‘employees are exposed to grave danger’ from a new hazard in the workplace, and

an ETS is ‘necessary’ to protect them from that danger.”) Rather than adhere to these stringent requirements in promulgating the ETS, OSHA deviated from decades of precedent and its own historical understandings of the limitations of its powers.

1. THE VIRUS IS NOT A TOXIC OR PHYSICALLY HARMFUL SUBSTANCE

To date, OSHA has successfully enforced just one normal standard relating to vaccination, its Bloodborne Pathogens standard, which was a broader set of regulations to create policies to protect certain healthcare employees who are specifically at risk of infection due to their work. *See* 29 C.F.R. § 1910.1030(c)(1)(ii). In contrast to the ETS, the Bloodborne Pathogens standard applies to a narrow subset of healthcare workers, offers workers the right to refuse, and was issued only after notice and comment rulemaking. *See* 29 C.F.R. § 1910.1030(f)(2)(iv). However, even the Bloodborne Pathogens standard was found to be partially unlawful because it initially applied to sites not controlled by the employer subject to the rule. *Am. Dental Ass’n v. Sec’y of Labor*, 984 F.2d 823, 830 (7th Cir. 1993).

Prior to this instant ETS, OSHA never declared an airborne virus to be a “substance[] or agent[] determined to be toxic or physically harmful” or a “new hazard” within the meaning of 29 U.S.C. § 655 (c)(1). That is likely because nothing in the language of that section indicates that a virus would fall within its ambit. The

statute applies to toxic or poisonous substances, not an airborne virus widely present throughout society. *BST*, 2021 WL 5279381 at *5. Nor can COVID-19 be considered a “new hazard” as it has been spreading widely throughout the world for nearly two years. *Id.* OSHA is attempting to shoehorn COVID-19 into the statutory definition, but the two do not truly match up, and therefore, there is no need for an emergency temporary standard.

2. OSHA HAS FAILED TO SHOW EVIDENCE OF GRAVE DANGER

Next, OSHA must show that it is addressing a “grave danger.” 29 U.S.C. § 655 (c)(1); *UAW v. Donovan*, 590 F. Supp. 747, 749-50 (D.D.C. 1984). OSHA has not shown that COVID-19 is a grave danger that requires an emergency remedy now, or one that cannot wait for the normal notice and comment procedure. The grave danger requirement is a higher bar than the significant risk requirement applicable to promulgating a normal standard. *Donovan*, 590 F. Supp. at 755-56; *see also Indus. Union Dep’t, AFL-CIO*, 448 U.S. 607, 640 n.45 (1980) (noting the distinction between the standard for risk findings in permanent standards and ETSs).

OSHA previously determined “in June 2020 that an emergency temporary standard ... was ‘not necessary’ to ‘protect working people from occupational exposure to infectious disease, including COVID-19.’” *BST*, 2021 WL 5279381 at *1 (quoting *In re AFLCIO*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June

11, 2020)). Thereafter, in June 2021, OSHA revised its conclusion stating that COVID-19 only posed a grave danger to workplaces providing healthcare services. *See* 86 Fed. Reg. 32,376 (June 21, 2021). In November 2021, the instant ETS reversed this, declaring that COVID-19 poses a grave danger to all unvaccinated workers in all indoor workplaces. 86 Fed. Reg. 61,402 (III)(A). The only material difference between June and November 2021 was that the President directed OSHA to declare COVID-19 a grave danger.

Furthermore, a “grave danger” only necessitates an emergency temporary standard where the new regulations are “to take immediate effect.” 29 U.S.C. § 655 (c)(1). Here, the White House itself established that there is no need for immediate action. First, President Biden declared the need for these requirements on September 9, 2021, but then it took over two months for OSHA to release the ETS. Furthermore, on November 4, 2021, the White House delayed the requirement for federal contractors to be vaccinated until after the holidays (pushing off the December 8th deadline until January 4th).⁵ If the ETS can wait months to be implemented, then it does not address a danger requiring “immediate” action.

⁵ Maddie Bender, *White House delays Covid-19 vaccine mandates for contractors*, STAT (Nov. 4, 2021), <https://www.statnews.com/2021/11/04/white-house-delays-covid-19-vaccine-mandates-for-federal-employees-contractors/>.

3. OSHA HAS FAILED TO SHOW NECESSITY

In addition to showing that it must immediately address a grave danger, OSHA must also show that the ETS is “is necessary to protect employees from such danger.” 29 U.S.C. § 655 (c)(1). OSHA has provided no evidence that vaccination and testing is necessary to protect employees of all workplaces, regardless of industry, workplace settings, and exposure to non-employees.

To the contrary, President Biden has stated that testing, masking, adequate ventilation, social distancing, and vaccination is adequate for children to be safe in schools.⁶ Likewise, the ETS permits businesses that employ fewer than 100 employees to not require vaccines or masking. Even though the Administration believes that these measures could keep school children and workplaces with fewer employees safe, the ETS asserts these same measures are inadequate for workplace safety in larger companies in other industries nationwide. This is illogical -- changing a company from 99 employees to 100 employees does not change any purported need for vaccination, nor is there a substantive distinction between schoolchildren in a classroom and employees in a room in other industries.

⁶ *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28 pm EDT), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

In addition, the science shows that vaccination does not prevent transmission of COVID-19. (*Infra* § IV(A).) If the goal of the ETS is to prevent the spread of the virus, but the vaccine does not prevent that spread, then how is vaccination a necessary measure for a vast swath of the American population?

D. THE ETS VIOLATES THE ADMINISTRATIVE PROCEDURES ACT

The Administrative Procedures Act (“APA”) requires this Court to set aside the ETS on the grounds that it is arbitrary and capricious, an abuse of discretion, and contrary to constitutional power. 5 U.S.C. § 706. The ETS lacks narrow tailoring by failing to account for industry-specific norms, workplace, and employee characteristics, and exposure to non-employees. Further, OSHA failed to take into consideration that vaccinated individuals are capable of contracting and spreading COVID-19. (*Infra* § IV(A).)

The OSH Act authorizes OSHA to protect employees from exposure *in the workplace*; this ETS is an abuse of discretion because it is an attempt to protect employees from a virus they are exposed to through participation in society. Therefore, the APA requires the ETS be set aside.

II. PETITIONER WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

If the stay is not extended, Petitioner will suffer irreparable harm: (i) the injury of losing a substantial portion of Petitioner's workforce is an identifiable harm, *see* ECF No. 52 (Nov. 23, 2021); and (ii) the harm will be immediate because data from the Bureau of Labor Statistics reflects 4.4 million workers quit their jobs in September 2021, surpassing the previous record of 4.3 million in August 2021.⁷ Additionally, several large employers have experienced employee walkouts, including Southwest Airlines,⁸ General Electric,⁹ and the Henry Ford Health System.¹⁰ Newsweek reported that "working class Americans" are refusing the vaccine, and reported that the American Trucking Associations could lose 37 percent

⁷ *Economic News Release, Quits levels and rates by industry and region, seasonally adjusted*, U.S. Bureau of Labor Statistics (November 12, 2021), available at <https://www.bls.gov/news.release/jolts.t04.htm>.

⁸ *Southwest Airlines won't fire unvaccinated employees: 'It makes no sense'*, Fox 7 Austin (October 23, 2021), available at <https://www.fox7austin.com/news/southwest-airlines-wont-fire-unvaccinated-employees-it-makes-no-sense>.

⁹ Singleton, Mikhaela, *200+ GE employees, union members stage walk-out in Schenectady Friday protesting vaccine mandate*, WIVB, available at <https://www.wivb.com/news/new-york/albany-capital-region/200-ge-employees-union-members-stage-walk-out-in-schenectady-friday-protesting-vaccine-mandate/>.

¹⁰ Wells, Kate, *400 workers out, 1,900 exempt after Henry Ford COVID vaccine mandate*, Michigan Radio (October 5, 2021), available at <https://www.michiganradio.org/health/2021-10-05/400-workers-out-1-900-exempt-after-henry-ford-covid-vaccine-mandate>.

of its workforce.¹¹ A finding of irreparable harm is appropriate even when the value of the loss is especially difficult to quantify. This Court recently found a likelihood of irreparable harm when quantifying the “harm with any level of precision would be impossible.” *RECO Equip., Inc. v. Wilson*, No. 20-4312, 2021 U.S. App. LEXIS 32413, at *13 (6th Cir. Oct. 28, 2021).

The harm to Petitioner of losing 20 to 30 percent of his workforce combined with the workforce shortage would be catastrophic to Petitioner’s business, particularly during the holidays. December is a critical month for automotive dealers – Petitioner needs to clear out 2021 inventory to make room for model year changeovers and December is critical to transitioning the showrooms to highlight new models and meeting year-end sales goals. The harm to Petitioner of disrupting the status quo constitutes a sufficient showing of a likelihood of irreparable harm.

Further, there is no monetary recovery that will make Petitioner whole for these losses. *See, e.g. Ala. Ass’n of Realtors*, 141 S. Ct. at 2489-2490 (noting irreparable harm from similar administrative overreach).

¹¹ Rouhandeh, Alex J., *Truck Drivers, Facing Shortages, Expect More to Quit Over Biden Vaccine Mandate*, Newsweek (November 4, 2021), available at <https://www.newsweek.com/truck-drivers-facing-shortages-expect-more-quit-over-biden-vaccine-mandate-1646003>.

III. A STAY WILL NOT SUBSTANTIALLY HARM OSHA

Respondents will suffer no harm by an extension of the stay. OSHA will continue its mission unaffected and will remain in the same posture regarding COVID-19 safety. If OSHA had attempted to use notice and comment rulemaking to promulgate a Standard in the first place, OSHA would have more time and resources available to focus on workplace safety instead of costly litigation.

IV. A STAY IS IN THE PUBLIC INTEREST

A. COVID-19 VACCINES DO NOT PREVENT INFECTION OR TRANSMISSION

The ETS states that it was needed “to protect unvaccinated employees of large employers ... from the risk of contracting COVID-19 by strongly encouraging vaccination.” 86 Fed. Reg. 61,402 (Summary). However, even if every employee in a workplace was vaccinated, the virus would still be able to infect employees and spread to others because the COVID-19 vaccines do not prevent infection and transmission of the SARS-CoV-2 virus. They only reduce symptoms after infection.

The clinical trials for the COVID-19 vaccines were only designed to measure effectiveness against the symptoms of the infection – not against contracting the

virus or transmitting the infection to others.¹² However, after millions of people were vaccinated, the CDC's Director acknowledged that the vaccines do not "prevent transmission"¹³ which is why the CDC recommends that vaccinated individuals wear masks indoors.

The CDC's conclusion resulted from, among other things, a study of an outbreak in Massachusetts where 74% of those infected were fully vaccinated for COVID-19, and those vaccinated individuals had on average more virus in their nose than the unvaccinated individuals who were infected.¹⁴ This finding was confirmed by an outbreak among 42 patients in a hospital setting where "39 were fully vaccinated," the "index case was a fully vaccinated," and "all transmission between patients and staff occurred between masked and vaccinated individuals." The study

¹² Sara E. Oliver, *et al.*, *The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine - United States, December 2020* MMWR Morb Mortal Wkly Rep (December 18, 2020) <https://pubmed.ncbi.nlm.nih.gov/33332292/>.

¹³ The Situation Room, CNN (August 5, 2021) available at <https://twitter.com/CNNSitRoom/status/1423422301882748929>.

¹⁴ Brown CM, *et al.*, *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts*, MMWR Morb Mortal Wkly Rep (August 6, 2021) <https://pubmed.ncbi.nlm.nih.gov/34351882/>.

concluded that this “outbreak exemplifies the high transmissibility of the SARS-CoV-2 Delta variant among twice vaccinated and masked individuals.”¹⁵

Another study of infections across 36 counties in Wisconsin observed high viral load in 68% of the fully vaccinated individuals and in 63% of the unvaccinated individuals.¹⁶ The standout observation was that among those who were asymptomatic, 29% of the unvaccinated subjects had high viral load, while 82% of the fully vaccinated subjects had high viral load.

A paper published in September 2021 out of the Harvard Center for Population and Development Studies further confirms that vaccination does not lower the spread of COVID-19.¹⁷ It stated that:

At the country-level, there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases in the last 7 days.... In fact, the trend line suggests a marginally positive association such that countries with higher percentage of population fully vaccinated have **higher COVID-19 cases** per 1 million people.

¹⁵ Pnina Shitrit *et al.*, *Nosocomial outbreak caused by the SARS-CoV-2 Delta variant in a highly vaccinated population, Israel, July 2021*, Eurosurveillance (September 30, 2021) <https://pubmed.ncbi.nlm.nih.gov/34596015/>.

¹⁶ Riemersma, Kasen *et al.*, *Shedding of Infectious SARS-CoV-2 Despite Vaccination*, MedRxiv (August 24, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v4.full.pdf>.

¹⁷ S. V. Subramanian and Akhil Kumar, *Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States*, *Eur J Epidemiol.* (Sept.30, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/> (emphasis added).

The paper had a similar finding for U.S. counties, wherein higher vaccination did not equate to less cases.

These papers establish that OSHA's justification for the ETS, to prevent the spread of the virus, and thereby lessen the risk of employees contracting COVID-19, is not supported by the science because the vaccines do not prevent infection or transmission, therefore. The ETS cannot achieve its stated goals.

B. VACCINE MANUFACTURERS ARE IMMUNE FROM LIABILITY

OSHA is mandating that millions of workers receive vaccines even though the manufacturers of these vaccines cannot be held liable for injuries. In March 2020, the Health and Human Services Administration (“HHS”) invoked the Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6d, to grant pharmaceutical companies and vaccine administrators complete immunity from liability for injuries caused by their COVID-19 vaccine products. Thus, if an employee is injured by the vaccine, they have no recourse against the vaccine manufacturers, administrators, or the FDA, but if the employee refuses the vaccine, he can be fired from his job.

Incredibly, the vaccine manufacturers also cannot be sued for willful misconduct regarding their COVID-19 vaccines unless HHS and DOJ agree to bring

such a claim. 42 U.S.C. § 247d-6d(c)(5). However, HHS has been promoting this vaccine widely. Hence, any admission by HHS that willful misconduct occurred would be an admission that it failed in its duties, thus creating a moral hazard whereby the only entities that can expose wrongdoing has an incentive to never do so.

At the same time, the FDA has refused to release the data underlying the licensure of the Pfizer vaccine, despite its repeated promise of “full transparency.”¹⁸ As part of a recent Freedom of Information Act litigation, the FDA admitted “that there are more than 329,000 pages potentially responsive to Plaintiff’s FOIA request” seeking the documents used to approve Pfizer’s vaccine, yet proposed to release just 500 pages per month. *See Public Health And Medical Professionals For Transparency v. FDA*, Case No. 4:21-cv-01058-P (N.D. Tx.) Dkt. No. 20. At that rate, the data will not be fully released until 2076.

It is unconscionable that while the federal government protects vaccine manufacturers from any financial liability for injuries and prevents independent scientists from reviewing the data Pfizer submitted to the FDA, it seeks to eliminate the right of Americans to earn a living if they refuse to receive these vaccines.

¹⁸ <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-announces-advisory-committee-meeting-discuss-second-covid-19-vaccine>.

C. NATURAL IMMUNITY IS SUPERIOR TO VACCINE-INDUCED IMMUNITY

The ETS makes no allowances for those previously infected with COVID-19 (“**naturally immune individuals**”). 86 Fed. Reg. 61,402-01, 61,421. However, naturally immune individuals have superior protection from becoming infected with and transmitting SARS-CoV-2 when compared to individuals vaccinated for Covid-19. Due to this superior immunity, those who have already had and recovered from COVID should not be required to vaccinate or test pursuant to the ETS.

Every peer reviewed study has found that naturally immune individuals have far greater than 99% protection from COVID-19, and this immunity does not wane.¹⁹ In contrast, the COVID-19 vaccine provides, at best, 95% protection and this immunity wanes rapidly.²⁰ And, while vaccinated individuals readily transmit the virus, that is not the case for naturally immune individuals.²¹

¹⁹ Horowitz, Daniel, *Horowitz: Israeli government data shows natural immunity from infection much stronger than vaccine- induce immunity | Opinion*, Blaze Media (July 14, 2021), available at <https://www.theblaze.com/op-ed/horowitz-israeli-government-data-shows-natural-immunity-from-infection-much-stronger-than-vaccine-induced-immunity>.

²⁰ Einav G. Levin, M.D., *et al.*, *Waning Immunity Humoral Response to BNT162b2 Covid-19 Vaccine over 6 months*, The New England Journal of Medicine (October 6, 2021) <https://www.nejm.org/doi/full/10.1056/NEJMoa2114583>.

²¹ Letter from Centers for Disease Control and Prevention to Siri & Glimstad LLP (November 5, 2021) available at <https://www.sirillp.com/wp-content/uploads/2021/11/21-02152-Final-Response-Letter-Brehm-1.pdf>.

While the U.S. does not publish data on natural immunity, the U.K.'s official government COVID-19 data shows a probable reinfection rate of **0.025%** through August 19, 2021 during Delta.²² In contrast, this same data shows, through September 2, 2021, a vaccine breakthrough rate for Delta infections of **23%**. Numerous studies affirm that natural immunity provides greater protection.²³

D. THE SUPREME COURT HAS CLEARLY INDICATED THAT THE PUBLIC INTEREST INVOLVES FOLLOWING THE LAW

Finally, and significantly, while the public may have an interest in addressing COVID-19, “our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490, quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 5827 (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).

²²*Weekly National Influenza and COVID-19 Surveillance Report*, Public Health England (August 19, 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1012240/Weekly_Flu_and_COVID-19_report_w33.pdf at 17-18, 21.

²³ E.g., Sivan Gazit, *et al.*, *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, medRxiv (August 25, 2021) <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1>; Rosenberg, David, *Natural Infection vs Vaccination: Which Gives More Protection?* Israel National News, (July 13, 2021), available at <https://www.israelnationalnews.com/News/News.aspx/309762>; Nicolas Vignier, *et al.*, *Breakthrough Infections of SARS-CoV-2 Gamma Variant in Fully Vaccinated Gold Miners, French Guiana, 2021*, *Emerging Infectious Diseases* (July 21, 2021) <https://pubmed.ncbi.nlm.nih.gov/34289335/>.

V. CONCLUSION

Petitioner requests this Court extend the current stay ordered by the Fifth Circuit Court of Appeals on November 6, 2021, until at least after the Court issues an order on the pending petitions for initial hearing *en banc*, and, we submit, until the end of this Court's review of this matter, as well as deny the Respondents' Motion to Lift the Stay.

Dated: November 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 5,198 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b). 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 it has been prepared in proportionally spaced typeface 14-point Times New Roman font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I caused a copy of this Motion for Extension of Stay and Opposition to Respondents' Motion to Lift Stay, to be served on all parties by the Court CM/ECF system.

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