Nos. 21-7000 (lead), 21-4080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In RE: MCP No. 165; OSHA Rule on COVID-19 Vaccination and Testing, 86 Fed. Reg. 61, 402

RESPONSE IN OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO DISSOLVE STAY

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Respondents' motion to dissolve the stay issued by the Fifth Circuit, 6th Cir. No. 21-7000, doc. 69 (hereinafter "Respondents' Motion"), should be denied. The Fifth Circuit correctly decided that OSHA's Emergency Temporary Standard (the "ETS") should be stayed pending resolution of this case on its merits. *See BST Holdings v. OSHA*, __ F.4th__, No. 21-60845, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021). Petitioners Burnett Specialists, Choice Staffing, LLC, Staff Force, Inc., and LeadingEdge Personnel Services, Ltd., are staffing companies that offer services throughout Texas.[1]

As required by Fed. R. App. P. 18, Petitioners showed that: (1) they are likely to succeed on the merits of their constitutional claims; (2) they will be irreparably harmed by the ETS; (3) Respondents will not be harmed; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (discussing the four stay factors). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *DV Diamond Club of Flint, LLC v. SBA*, 960 F.3d 743, 746 (6th Cir. 2020). The Court should reject Respondents' request to lift the stay, and Respondents' alternative motion to allow the masking-and-testing requirement to take effect.

[1] As requested by the Court, and in the interest of judicial economy, Petitioners Burnett Specialists, Choice Staffing, and Staff Force (which filed a petition for review under the non-delegation doctrine) and Petitioner LeadingEdge (which filed a petition for review under the Commerce Clause) file this joint response to Respondents' motion to lift the stay.

I. The Fifth Circuit correctly held Petitioners' Commerce Clause and Nondelegation Doctrine challenges are likely to succeed on the merits.

After first holding that the ETS presented "grave statutory and constitutional issues," the Fifth Circuit subsequently held that the mandate "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." *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *8 (emphasis original). Regarding the Commerce Clause, the court noted that "the Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity." *Id.* at *21. As shown below in Section I.A, the court was correct and Respondents have failed to show otherwise. Regarding the non-delegation doctrine, it noted that "The nondelegation doctrine constrains Congress's ability to delegate its legislative authority to executive agencies." *Id.* at *8 n.8. Petitioners address the merits of their non-delegation claim in Section I.B. As shown, Petitioners have clearly "raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Certified Restoration Dry Cleaning Networkv. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007).

A. Petitioners' Commerce Clause challenge is likely to succeed.

Respondents commit three significant errors in addressing the Fifth Circuit's Commerce Clause analysis. Respondents' Motion at 18–20. First, they fail to apply, or even discuss, the well-established test for reviewing claims of federal power under the Commerce and Necessary and Proper Clauses. Second, their motion presents a theory of federal power that, if taken seriously, would create a general federal police power contrary to the Constitution's delegation of limited and enumerated powers. And third, Respondents point to cases that are inapplicable here.

1. Respondents' motion fails to address any of the considerations mandated by the Supreme Court in *Morrison*.

Respondents present the vaccine mandate as rationally related to employment activities and therefore well within Congress's Commerce Power. Respondents' Motion at 20. But the Supreme Court has long rejected such a cavalier rational basis approach to the Commerce Power in favor of a multi-consideration approach.[2]

In *Lopez*, 514 U.S. at 558-59, the Supreme Court laid out three categories of activities that fell within the Commerce Clause: (1) activities involving the "the channels of interstate commerce"; (2) activities involving "the instrumentalities of

[2] Indeed, the dissents in both *Lopez* and *Morrison* proposed a single-step rational basis approach to the Commerce Power and were soundly rejected. *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, Ginsburg, Stevens, Breyer, JJ., dissenting).

interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce…*i.e.*, those activities that substantially affect interstate commerce." The Court later clarified that the third category—the substantial effects test—is derived from the Necessary and Proper Clause, not the Commerce Clause alone. *See Gonzales v. Raich*, 545 U.S. 1, 5, 22 (2005); *id.* at 34 (Scalia, J., concurring).[3]

The first two *Lopez* categories are not at issue. The ETS does not regulate the channels of interstate commerce nor the instrumentalities of interstate commerce. It regulates the private healthcare decisions of employees—whether or not *intrastate*. The ETS therefore can be justified, if at all, only under the substantial effects test.

In *United States v. Morrison*, 529 U.S. 598 (2000), the court laid out four considerations that, at a minimum,[4] courts should evaluate when applying the substantial effects test. Those considerations include: (1) the economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the regulation, which limits its application to matters affecting interstate commerce; (3) any findings in the regulation concerning the effect that the regulated activity has on

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[3] *See* Petitioner LeadingEdge's Stay Motion in the Fifth Circuit, 10-12, 17-20 (Attached as Ex. 1); *see also Terkel v. CDC*, 521 F. Supp. 3d 662, 670-72 (E.D. Tex. 2021).

[4] This list is not exhaustive. *Raich*, 545 U.S. at 39 (Scalia, J., concurring); *See NFIB*, 567 U.S. at 560.

interstate commerce; and (4) the attenuation of the link between the intrastate activity and its effect on interstate commerce. *Morrison*, 529 U.S. at 610-12.

The ETS fails each consideration. Ex. 1 at. 12-20. First, the ETS targets intrastate noneconomic activity—the decision to go unvaccinated. *Id*. at 12-15. Second, the ETS does not contain any jurisdictional element that limits its application to individuals engaged in interstate activities. *Id*. at 15. Third, the ETS contains no findings *whatsoever* regarding interstate commerce or whether the ETS is essential to some broader regulation of interstate commerce. *Id*. at 16. And finally, to the extent it makes a commerce argument at all, the ETS requires the piling of inference upon inference to reach its conclusions regarding economic effects. *Id*. at 16-17. The Fifth Circuit therefore rightly concluded that Petitioners' claims had a substantial likelihood of success on the merits. *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *24.

OSHA's motion to dissolve the stay does not address these arguments. Indeed, it does not discuss *any* of the *Morrison* considerations. This failure to grapple with the controlling constitutional standard is sufficient by itself to deny OSHA's motion.

2. Respondents' theory of federal authority would equally justify a federal police power.

OSHA's argument, in a nutshell, is that the federal government may regulate vaccination under the Commerce Clause because it has chosen to do so indirectly,

by requiring that its mandate be enforced by employers. Respondents' Motion at 18–19.

This argument has two fatal flaws. First, it ignores well-established law that under the Constitution, "what cannot be done directly cannot be done indirectly." *Cummings v. Missouri*, 71 U.S. 277, 325 (1866). OSHA lists several examples of workplace regulations that the government has imposed through employers. Respondents' Motion at 18–19. In each of those instances, the activity regulated was one that the federal government could likely have imposed on the employee directly. *See id*. For example, OSHA notes that federal law requires aviation employers to ensure that their pilots pass certain exams. Respondents' Motion at 19. But the government could have imposed those same safety requirements on the pilots directly because those commercial pilots are flying planes (instrumentalities of interstate commerce) in interstate commerce, on a channel of interstate commerce. *See Lopez*, 514 U.S. at 558-59. Requiring employers to enforce mandates in that scenario does not expand federal power; it merely regulates indirectly activity that could be regulated directly. By contrast, the government here has no authority to mandate private employee vaccinations directly, so it cannot do so indirectly by commandeering employers to carry out Administration policy.

More importantly, OSHA's theory of federal power has no inherent limiting principle that would prevent it from creating a general federal police power. Under

OSHA's argument, it can mandate whatever private activity it wants, if it does so through employers and dresses it up as a workplace safety regulation. But under that theory, all manner of private non-economic activities in the home would be subject to federal regulation.

For example, hepatitis is a highly contagious disease. *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). OSHA has therefore adopted workplace safety protocols for healthcare facilities to protect healthcare workers from transmission. *Id*. But hepatitis may also be transmitted through unprotected sex. A healthcare employee's decision to have unprotected sex in his own home could therefore increase his risk of infection and therefore the risk that individuals in his workplace are exposed to hepatitis. By OSHA's logic, this tangential relationship to workplace safety converts that worker's intimate choices into "economic activities" subject to federal regulation. Likewise, poor sleep can also detract from workplace safety. And as any parent knows, allowing one's child to crawl into bed with you if she has a nightmare can affect one's quality of sleep. Under OSHA's conception of federal power, that parenting decision would become subject to federal regulation simply because of its downstream effects on workplace safety.

Supreme Court precedent conclusively forecloses such a limitless view of the commerce power. *Lopez*, 514 U.S., at 584 (Thomas, J., concurring) (Courts "always

have rejected readings of the Commerce Clause … that would permit Congress to exercise a police power."). At a minimum, the troubling implications of OSHA's theory of federal power raise "serious, substantial, difficult" questions going to the merits, thus warranting a stay. *See Certified Restoration*, 511 F.3d at 543.

3. Respondents' reliance on *Comstock* and *Darby* is misplaced.

Finally, Respondents point to *United States v. Comstock*, 560 U.S. 126 (2010) and *United States v. Darby*, 312 U.S. 100 (1941), but those cases are so removed from the regulation at issue here that their inclusion merely serves to establish what a significant departure OSHA's vaccine mandate is from common practice.*Comstock* was not a Commerce Clause case and did not involve workplace safety, vaccinations, or public health. The question presented was whether a law allowing "the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released" was a necessary and proper exercise of the federal government's authority to regulate its prisons. *Comstock*, 560 U.S. at 129. The Court concluded that it was, because when acting as a "custodian of its prisoners" the federal government "has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose." *Id*. at 142. OSHA points to a stray line of *dicta* from *Comstock* where the Court noted that the "federal custodian" power hypothetically would also include the authority to temporarily refuse to release a "federal prisoner

[who] is infected with a communicable disease" until the threat of infecting the general public is diminished. *Id*. But it should go without saying that the federal government's authority to regulate *federal prisoners* lawfully confined as a criminal punishment within *a federal prison* is a startlingly inapt measure of the scope of federal authority over citizens in a free society.

OSHA similarly overstates the holding in *Darby*. In OSHA's telling, *Darby* stands for the general proposition that "regulations of employment conditions [are] within Congress's commerce power." Respondents' Motion at 18. This is not so.

First, even if *Darby* had made such a general pronouncement, subsequent cases have made clear that OSHA regulations are subject to the heightened multi-consideration approach articulated in *Lopez/Morrison*. *See, e.g.*, *United States v. Kung-Shou Ho*, 311 F.3d 589, 599 (5th Cir. 2002) (applying the four *Morrison* considerations to an OSHA regulation). More importantly, *Darby* did not make the broad holding OSHA suggests. *See Gen. Tobacco & Grocery v. Fleming*, 125 F.2d 596, 601 (6th Cir. 1942) (noting narrow scope of *Darby*).

Darby involved a challenge to a federal law that: (1) prohibited selling goods in interstate commerce that were manufactured in substandard conditions; (2) set the wage and hour requirements for employees producing goods for transport in interstate commerce; and (3) required that manufacturers selling goods in interstate commerce keep paperwork to determine compliance with these laws. 312 U.S. at

112, 117, 124. The Court upheld the first provision as a valid exercise of Congress's Commerce Power because it merely regulated the sale of certain goods across state lines. *Id*. at 113. The Court upheld the second and third provisions as an extension of the Commerce Power under the Necessary and Proper Clause, because the Court deemed those provisions as essential mechanisms for enforcing the ban on selling certain goods across state lines. As the court explained:

> most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business…*it would be practically impossible*, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce.

Id. at 118 (emphasis added). Because of this practical impossibility, the Court held that the federal government may regulate the production of goods within a shop producing goods for interstate commerce, even if some goods will never be shipped interstate, because the intrastate goods are "so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled." *Id*. at 121.[5]

[5] There is good reason to believe that *Darby* was overly broad as an original matter. *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 594 (Thomas, J. concurring). But as a court of appeals, this Court is obliged to follow Supreme Court precedent and cannot reach that issue. Even read broadly, *Darby*

A similar argument carried the day over sixty-years later in *Raich*, 545 U.S. at 1. Relying on *Darby* and *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court in *Raich* upheld a federal ban on possession of marijuana, because it was essential to the enforcement of prohibition on trafficking marijuana across state lines. As the Court noted, marijuana is fungible, and as such, intrastate marijuana is indistinguishable from interstate marijuana. 545 U.S. at 22. Banning the possession of all marijuana was therefore necessary to the enforcement of the ban on interstate trafficking. *Id*.

Darby, *Raich*, and *Wickard* were controversial for their breadth when they were decided, and generally mark the outermost boundary of the Commerce Power as supplemented by the Necessary and Proper Clause. *See NFIB*, 567 U.S. at 552 (referencing *Wickard* as "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity"); *Lopez*, 514 U.S., 556-557 (referencing *Darby* and *Wickard* as the cases at the "outer limits" of federal power).

This ETS goes well beyond those outer limits. First, unlike the regulations in *Darby*, the ETS is not limited to companies that sell fungible commodities across state lines. *See Gen. Tobacco*, 125 F.2d at 601 (holding *Darby* did not apply to a business not engaged in interstate commerce). Second, unlike *Darby*, the ETS does

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does not apply to the facts in this case and this Court should not expand non-originalist precedent where unnecessary. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 543 (6th Cir. 2021) (Bush, J. concurring).

not regulate the workplace directly, but instead regulates private, non-economic, out-of-work conduct because of its incidental effects on workplace safety. Finally, unlike *Darby*, *Raich*, or *Wickard*, OSHA provides no argument or findings that its regulation of local activity is essential to a prohibition on shipping certain goods across state lines. *See Raich* 545 U.S. 1, 12 n.20, 21 (laying out congressional findings and noting the record evidence in *Wickard*). Indeed, the ETS is not tied to the shipment of goods at all. To the contrary, the ETS explicitly *excludes* employees most connected with the interstate shipment of goods—truckers. *See* 86 Fed. Reg. 61402, 61551. OSHA's conclusory reliance on *Darby* is therefore misplaced.

In short, OSHA's ETS marks an unprecedented expansion of federal power that trenches on individual liberty at the expense of traditional state police power . The Fifth Circuit was quite right to pump the brakes while courts can determine whether this novel power-grab is constitutional.

B. Petitioners' challenge under the nondelegation doctrine is likely to succeed.

Respondents similarly failed to engage the nondelegation doctrine, which was cited by the Fifth Circuit as a probable basis for holding the ETS unconstitutional. *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *8. . Respondents' Motion at 21–22. Under the nondelegation doctrine, Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy*, 139 S. Ct. at 2123 (internal quotation marks omitted). The Constitution vests "[a]ll legislative powers"

in Congress, U.S. Const. Art. I § 1, and prohibiting Congress's delegation of its legislative authority to another branch of government "is rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Congress cannot "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). The ETS statute does exactly this, because it gives OSHA the power to write laws, but does not define key terms, provide a policy, or give meaningful boundaries.

1. The ETS is a legislative Act.

The power to determine the "legislative policy and its formulation and promulgation as a defined and binding rule of conduct" is legislative. *Yakus v. United States*, 321 U.S. 414, 424 (1944). Tellingly, OSHA itself refers to its determinations regarding the ETS as "essentially legislative." 86 Fed. Reg. at 61403. The statute allegedly giving OSHA authority to issue ETSs is capacious. It allows OSHA to bypass normal rulemaking procedures if it determines "employees are exposed to grave danger" from "substances," "agents," or "new hazards," and that an ETS is "necessary to protect employees from" that danger. 29 U.S.C. § 655(C). Here, the President set the legislative policy of "substantially increas[ing] the number of Americans covered by vaccination requirements," *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*,

https://www.whitehouse.gov/covidplan/, and then set binding rules, effective immediately, and enforced with the threat of large fines. That is a legislative act.

2. The ETS contains no "intelligible principle."

When Congress delegates its legislative authority, it must give an intelligible principle to which the Executive must conform, and it must make "clear to the delegee the general policy he must pursue and the boundaries of [his] authority." *Gundy*, 139 S. Ct. at 2123, 2129 (internal quotations omitted) (alteration in *Gundy*). Congress did no such thing here. Failing to delineate these powers removes our "greatest security against tyranny—the accumulation of excessive authority in a single branch." *Mistretta*, 488 U.S. at 381. There is no intelligible principle for at least three reasons.

First, key words and phrases in the statute are not defined. The meanings of "grave danger," "substances or agents," and "new hazards" are vital in determining whether OSHA can trigger the need for a nationwide ETS. By failing to provide any guidance to aid this determination, yet Congress has merely expressed "vague aspirations" and left OSHA with unlimited discretion to decide whether the requisite conditions for an ETS exists.

Second, the Act does not give OSHA meaningful boundaries for deciding what is "necessary to protect employees," and it allows the rule to go into effect without a notice-and-comment rulemaking procedure. *Id.* Congress must provide

"boundaries of [its] delegated authority." *Mistretta*, 488 U.S. at 373. These boundaries must "meaningfully constrain[]" executive discretion. *Touby v. United States*, 500 U.S. 160, 166 (1991). Here, the requirement that the ETS be "necessary" to protect employees from the stated emergency is inadequate under the nondelegation doctrine. Other than that one word, there is no constraint on OSHA's discretion. This distinguishes the ETS statute from statutes like the one in *Touby*, where the Attorney General could temporarily schedule a drug if he found "doing so is 'necessary to avoid an imminent hazard to the public safety.'" 500 U.S. 160, 166 (1991) (quoting 21 U.S.C. § 811(h)(1)). To make that finding, congress gave the Attorney General numerous factors to consider and required him to publish a 30-day notice. *Id.* at 166–67.

Third, the authority claimed by OSHA is grossly disproportionate to the amount of guidance provided by Congress. *See Schechter Poultry*, 295 U.S. at 531–35; *Whitman*, 531 U.S. at 475. The more power a statute gives to an agency, the less discretion in how to wield it is acceptable. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). "Narrow, interstitial delegations of authority" are acceptable, *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021), but Congress "must provide substantial guidance"

when giving the Executive the power to set "standards that affect the entire national economy," *Whitman*, 531 U.S. at 475.

Here, OSHA is claiming that the Act confers to the Executive the power to order 80 million Americans to inject themselves with an irreversible vaccine under threat of losing their livelihood or regularly undergo and pay for unwanted medical tests. *See Path Out of the Pandemic*; 86 Fed. Reg. 61407. It is difficult to conceive of a more sweeping claim of authority than this.

II. Petitioners will be irreparably harmed.

Petitioners will be irreparably harmed by the ETS. As explained in their motions for stay, the ETS will impose overwhelming financial penalties, is administratively unworkable, puts Petitioners at risk of losing employees and business opportunities, and puts them in the position of navigating a new difficult legal landscape. Ex. 1 at 20–23; Ex. 2 at 16–21. Petitioners, even if they eventually prevail in this case, will never be made whole. "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. U.S. Environmental Protection Agency* 829 F.3d 405, 433 (5th Cir. 2016) (internal quotation omitted). When considering this prong, "it is not so much the magnitude but the irreparability that counts." *Enter. Int'l v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985).

The Fifth Circuit correctly found Petitioners would face irreparable harm, noting that companies would experience financial effects of a lost or suspended employee, would have to undertake compliance costs, and would have to divert resources, or else face stiff financial penalties from OSHA. *BST Holdings*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *24–25. Respondents dismiss the compliance costs as "speculative" and criticize the court for not citing any record evidence. Respondents' Motion at 42-43. They further accuse the court of relying on evidence not before the court and wave away the burden of administrating a testing program for unvaccinated workers as "ordinary compliance costs" for which Petitioners could seek a variance if the ETS "were truly infeasible."[6] *Id.* at 43.

But the evidence the Fifth Circuit considered was attached to Petitioners' motions for a stay. *See* Decl. of D'Ambrosio (Ex. 3); Decl. of Cantu (Ex. 4); Decl. of Potocki (Ex. 5); Declaration of Yarbrough (Ex. 6). Petitioners each maintain a small amount of dedicated office staff, most of their employees are either temporary workers or "temp-to-hire" workers. Ex. 3 at ¶ 2; Ex. 4 at ¶ 3; Ex. 5 at ¶ 2. These employees may be people seeking immediate work, looking to re-enter the workforce, looking to enter a new field, or who simply enjoy the flexibility of

[6] The promise of a variance is illusory, as it requires the Secretary to determine "the proponent of the variance" has provided employment "which are as safe and healthful as those which would prevail if he complied with the standard." 29 U.S.C. § 655(d). That is, the requirement for a variance does not consider infeasibility.

temporary employment. Ex. 3 at ¶ 7; Ex. 4 at ¶ 5; Ex. 5 at ¶ 4-5. Many of these positions are entry-level, and employees are particularly mobile. Ex. 3 at ¶ 7; Ex. 4 at ¶ 5; Ex. 5 at ¶ 4. Even under Respondents' estimated cost—$94 per unvaccinated employee, Respondents' Motion at 44—that amount is multiple that of an entry-level employee's hourly wage. That is cost prohibitive, whether paid for by employees or employers.

Further, the Fifth Circuit correctly held that "the loss of constitutional freedoms for even minimal periods of time unquestionably constitutes irreparable injury." *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *24 (internal quotation omitted). The violation of constitutional rights alone is enough to establish irreparable injury. *See Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Respondents' attempt to cabin constitutional irreparable injury solely to individual rights is inconsistent with case law. "[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *N.L.R.B. v. Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring).

In fact, courts frequently find irreparable injury for structural constitutional violations. This Court upheld injunctive relief based on a Commerce Clause violation in *Tyson Foods v. McReynolds*, 865 F.2d 99, 100 (6th Cir. 1989), and granted injunctive relief based on a Supremacy Clause violation in *L.P. Acquisition*

Co. v. Tyson, 772 F.2d 201, 208-09 (6th Cir. 1985). *See also Trans World Airlines v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (same); *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d. 1046, 1053 (9th Cir. 2009) (a "constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm"). Likewise, the Northern District of California found irreparable harm when a plaintiff alleged a California statute violated the Commerce Clause. *Citicorp Serv., Inc. v. Gillespie*, 712 F. Supp. 749, (N.D. Cal. 1989) ("[C]ourts in the Ninth Circuit have presumed irreparable harm from an alleged violation of constitutional rights."). The Eastern District of Philadelphia found federal conditions violating the Spending Clause to constitute an irreparable constitutional harm. *City of Phila. v. Sessions*, 280 F. Supp. 3d 579, 565-57 (E.D. Pa. 2017). And the District of Oregon found Tenth Amendment violations to be "irreparable constitutional injuries." *Oregon v. Trump*, 406 F. Supp. 940, 974 (D. Ore. 2019). At a minimum, Respondents' position that, for the purposes of irreparable harm, Commerce Clause and nondelegation doctrine violations are "different in kind" from individual rights is unfaithful to constitutional first principles and decades of federal precedent.

Additionally, Respondents' distinction between individual rights and the rights at issue here—to be free from burdensome regulations that violate the Commerce Clause and nondelegation doctrine—is nonsensical. Whichever constitutional provision the government is violating makes little difference to the

businesses that bear the cost of Respondents' unconstitutional actions. Like all Americans, Petitioners have a right to be free from unconstitutional regulations, and the Court should reject Respondents' attempt to paint the ETS as "different in kind" than other constitutional violations.

This is only made more important by the fact that money damages are not available in this case. "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) *rev'd on other grounds* 562 U.S. 134 (2011). Plaintiffs are barred by sovereign immunity from collecting money damages from Respondents. *See Modoc Lassen Indian Hous. Auth. v. United States HUD*, 881 F.3d 1181, 1195 (10th Cir. 2017).

Indeed, in the case Respondents rely on, *Brown v. Sec'y, U.S. Dept. of Health & Human Servs.*, 4 F.4th 1220, 1225 (11th Cir. 2021), "the possibility that adequate compensatory or other corrective relief will be available at a later date weigh[ed] heavily against a claim of irreparable harm." *Brown*, 4 F.4th at 1226 (internal quotations omitted). The exact opposite is true here, where all efforts to comply with Respondents' unconstitutional ETS will never be recouped and their hypertechnical attempt to limit irreparable injury to "deprivation of individual rights" should be roundly rejected. Instead, the Court should concur with the Fifth Circuit and

recognize that the violation of the Constitution's structural constraints necessarily creates irreparable harm.

III. Respondents will not be harmed.

As the Fifth Circuit correctly concluded, any interest OSHA may claim in enforcing an unlawful ETS is "illegitimate." *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *25. Further, the White House recently announced it will not enforce its mandate for federal workers until next year. Rebecca Shabad, Shannon Pettypiece, and Kelly O'Donnell, *Biden administration won't take action against unvaccinated federal workers until next year*, NBC News (Nov. 29, 2021), https://www.nbcnews.com/politics/white-house/biden-administration-delay-enforcement-federal-worker-vaccine-mandate-until-next-n1284963. This despite the fact the deadline already passed on November 22, 2021. *Id.* Waiting to act against its own employees for not complying with a vaccine mandate is a tacit admission by the government that the urgency it urges here is overblown. The Court should follow the federal government's lead, stay enforcement of the ETS, and allow the parties to resolve the legal issues before this Court in an orderly manner.

IV. The public interest favors a stay.

Finally, the Fifth Circuit was correct to find in Petitioners' favor that the public interest favors a stay. *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *25-26. "There is generally no public interest in the perpetuation of unlawful agency

actions." *State v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights," *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), and "the Government does not have an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3rd Cir. 2003) (internal quotations omitted). Issuing a stay will also preserve our federal order, where it is the primary province of the States to regulate public health and safety. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Until this case is decided on the merits, as the President himself noted, vaccinated workers are "highly protected from severe illness" even in breakthrough cases. *Path Out of the Pandemic*. Accordingly, workers that want to be protected from severe illness can be and have already dramatically lowered their risk of contracting a rare breakthrough case. Therefore, the unvaccinated pose little risk to vaccinated individuals while the merits of the ETS are considered by this Court.

V. Conclusion.

The Court should deny Respondents' motion to dissolve the stay and its alternative motion to implement the burdensome testing requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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