No. 21-7000 (lead), 21-4027, -4028, -4031, -4032, -4033, -4080, -4083, -4084, -4085, -4086, -4087, -4088, -4089, -4090, -4091, -4092, -4093, -4094, -4095, -4096, -4097, -4099, -4100, -4101, -4102, -4103
MCP No. 165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: OSHA RULE ON COVID-19 VACCINATION AND TESTING, 86 FED. REG. 61402

On Petitions for Review

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING REVIEW

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ARGUMENT

This Court should grant a stay pending review. Petitioners herein address the arguments presented by Respondents. In particular, Petitioners focus on the claim *that other Petitioners have not raised*—that the ETS is unconstitutional because it violates the substantive due process liberty interest protected by the Fifth Amendment. *See* Section I.D., below.

I. Petitioners Are Likely to Succeed on the Merits

A. The ETS Breaches the Limits of the Commerce Power

The Supreme Court provided dispositive guidance on the question presented in this case in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"). As the Court stated, "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." *Id*. at 549. The same analysis applies here.

Surprisingly, in their one-page discussion of the Commerce Power, *Respondents completely fail to mention the NFIB precedent*. *See* Gov't Resp., *Bentkey Servs.*, No. 21-4027, at 30-31. Instead, they mention the 80-year-old Commerce Power case of *United States v. Darby*, 312 U.S. 100 (1941)—a decision issued long before the last quarter-century of cases limiting the scope of the power, beginning with *United States v. Lopez*, 514 U.S. 549 (1995). Respondents rely on the aging *Darby* holding to make their only argument, namely that the ETS is

within the Commerce Power's ambit because it is a "means of stemming the workplace spread of a deadly disease whose effects on interstate commerce are well established." Gov't Resp., *Bentkey Servs.*, 31.

However, that very argument was rejected in *NFIB*:

> Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.
> …
> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

NFIB at 552, 554-555. The same is true here. Just as the federal government may not point to the impact on commerce of the failure to purchase health insurance, so too the federal government may not point to the impact on commerce of the failure to take a vaccine. Given this controlling precedent that Respondents failed to address it is likely that Petitioners will succeed.

B. The ETS Fails to Meet the OSHA Heightened Standard of Review

Because this statutory claim appears in virtually all of the cases in this consolidated case, Petitioners will not dwell extensively on it here. However, two particularly detrimental flaws in the government's Response must be highlighted.

First, as Petitioners have pointed out, the ETS fails to account for natural immunity derived from previously having COVID. More than 100 studies have demonstrated that natural immunity is superior to the protection provided by the vaccines.[1] The ETS could have been designed to allow employees with natural immunity to opt out, perhaps by taking an antibody test to show that they possess the antibodies that fight COVID.

Respondents' answer is inadequate. They concede that natural immunity provides protection from COVID. Gov't Resp., *Bentkey Servs.*, 24. But then Respondents assert that the natural immunity of some people may be stronger than that of others. *Id*. Assuming *arguendo* that their assertion is true, it still does not answer the argument. We also know that the immunity conferred by vaccines is stronger in some than in others, as demonstrated by the millions of breakthrough cases. And we know that it decreases over time. Yet the ETS accepts the inconsistent immunity of the vaccinated, but disregards the more robust immunity of those with natural immunity. Moreover, Respondents offer no answer to the numerous empirical and clinical studies showing natural immunity to be *superior*, particularly in stopping the variants of COVID.[2] Respondents have therefore

[1] *106 Research Studies Affirm Naturally Acquired Immunity to Covid-19*, BROWNSTONE INSTITUTE (Oct. 17, 2021), *available at* https://brownstone.org/articles/79-research-studies-affirm-naturally-acquired-immunity-to-covid-19-documented-linked-and-quoted/.

[2] For example, in Israel the vaccinated had a 13.06-fold greater risk of infection from the Delta variant than did those with natural immunity. The vaccinated were also at greater risk of requiring hospitalization. Sivan Gazit, et al., *Comparing SARS-CoV-2 Natural Immunity to*

offered no showing of necessity in treating those with natural immunity as if they have no immunity at all. Respondents' disregarding of these many studies also disproves their claim that the OSHA record was "comprehensive." *See* Gov't Resp., *Bentkey Servs.*, 29. A notice and comment period would have allowed commenters to present the many studies ignored by OSHA.

Second, Petitioners pointed out in their Motion that the ETS is perfectly irrational in its application of the mask requirement. Employees who test negative—who by definition cannot spread COVID—are required to wear a mask, while vaccinated co-workers (who have not tested negative) need not wear a mask. This argument was ignored completely by Respondents. Further, the ETS mask requirement does not stipulate that any particular variety of mask is an adequate preventative, as compared to other masks, compounding its irrationality.

C. The ETS Burdens the Free Exercise of Religion

As is explained in Petitioners' Motion, the ETS has a disproportionately adverse impact on Petitioners Haws and Ortiz as Christians whose sincerely-held religious beliefs forbid them from being vaccinated. The alternative option of weekly testing severely burdens their exercise of their faith by forcing them to pay for the tests themselves.

Vaccine-Induced Immunity, MedRxiv (2021), *available at* https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.full-text.

To this argument, Respondents offer only one response. They say that "[t]he Standard 'does not require' petitioners to pay for testing," and that there is no proof that petitioners would have to pay for testing themselves. Gov't Resp., *Bentkey Servs.*, 34 (*quoting* ETS Pmbl., 86 Fed. Reg. 61532). Respondents evidently failed to read carefully Petitioners' Motion in *this* case, where Petitioners have provided that proof. Petitioner Jamie Fleck declared that "it would not be feasible" for DTN Staffing to pay for weekly testing of unvaccinated employees, because "[i]n addition to the cost of the tests, [they] would have to hire three additional employees to track the testing results." Therefore, "[t]he enormous expense would be cost-prohibitive for the corporation." Fleck Decl., ¶ 14. The cost of testing would therefore have to be paid by the employees. Petitioner Haws is employed by DTN Staffing. Haws Decl., ¶ 2. Similarly, Miller Insulation would not be able to shoulder the cost of weekly testing of all of the employees who remained unvaccinated: "If we mandated testing, then we would lose hundreds of thousands of dollars each year, which we cannot afford." Miller Decl. ¶ 9. Employees would have to pay for their own tests. Petitioner Ortiz is employed by Miller Insulation. Ortiz Decl. ¶ 2. In short, Petitioners here provide the proof that Respondents claim was lacking in the *Bentkey Services* case.

In addition, Respondents do not deny the enormous cost of weekly testing that Petitioners point out. Those tests can add up to approximately $7,696 annually.

Pet. Mot. fn 7. A regulation that makes the practice of religious beliefs more expensive imposes a burden on the exercise of religion. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 710 (2014). Here, Haws and Ortiz must bear an expensive burden for exercising their religious beliefs.

As Petitioners explained in their Motion, the ETS cannot survive the second prong of strict scrutiny because it is not narrowly tailored. Petitioners list multiple less-restrictive ways of advancing the government's interest. But Respondents offer no answer. Petitioners are therefore likely to prevail on this claim.

D. The ETS Denies Fifth Amendment Liberty Interests

The individual Petitioners in this case assert a substantive liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments that is infringed by the ETS. This liberty interest has been described by the Supreme Court in two ways—as the right "to bodily integrity," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), *Rochin v. California*, 342 U.S. 165 (1952), and the right to refuse unwanted medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278-279 (1990); *Vacco v. Quill*, 521 U.S. 793, 807 (1997). Any government restriction on this liberty interest must survive the two-part test of strict scrutiny. The restriction must serve an "essential" or "overriding" state interest. *Riggins v. Nevada,* 504 U.S. 127, 135 (1992). And the government must

demonstrate that the means chosen were "necessary significantly to further" that interest. *Sell v. United States*, 539 U.S. 166, 179 (2003).

Respondents' *only* answer to this claim is simply to cite the 116-year-old case of *Jacobson v. Massachusetts*, 197 U.S, 11 (1905), and declare that "the Supreme Court held that a state can constitutionally require members of the public to be vaccinated against smallpox…." Gov't Resp., *DTN Staffing*, 2. Respondents do not even bother to explain how their ETS could survive the two-part test of strict scrutiny. Respondents make a fatal mistake by placing all of their eggs in the *Jacobson* basket, for three reasons.

First, the *Jacobson* holding is of little relevance in the modern jurisprudential era because it was decided before the development of strict scrutiny analysis and the definition of the fundamental rights that trigger strict scrutiny. As the Second Circuit recently held in a COVID-related case, the lower court's "reliance on *Jacobson* was misplaced. …*Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny [and] was decided before the First Amendment was incorporated against the states…." *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635 (2020). As Justice Gorsuch recently noted, "*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and entirely different kind of restriction." *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 70

(2020) (Gorsuch, J., concurring). This Court too has recognized, with specific reference to *Jacobson*, "the challenge of reconciling century-old precedent with the Supreme Court's more recent constitutional jurisprudence." *Adam & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925 (2020). Respondents do not even attempt to explain why the antiquated line of reasoning in *Jacobson* still applies in the context of the ETS today.[3]

Second, the *Jacobson* Court itself specifically pointed out that if there had been a constitutionally protected right at issue, the decision would have been different. The Court noted that "even if based on the acknowledged police power of a state," a public health measure "must always yield in case of conflict with … any right which [the Constitution] gives or secures." *Jacobson* at 25. Although the constitutional liberty interests in refusing unwanted medical treatment and in bodily integrity were not yet recognized by the Court in 1905, they are now. As the Court explained in 1997, beginning in 1923, "the 'liberty' specially protected by the Due Process Clause" was interpreted to protect eight specific fundamental rights beyond those enumerated in the Bill of Rights. *Glucksberg* at 720. Among those constitutionally protected rights were the right to bodily integrity and the

[3] In addition, the danger present by smallpox a century ago was much greater. The smallpox case mortality rate is 30%, compared to the COVID-19 case mortality rate in the United States of only 1.6%. See Joel Bremen, et al., Diagnosis and Management of Smallpox, NE J. Med. 2002, 346:1300-1308, available at https://www.nejm.org/doi/10.1056/NEJMra020025; Mortality Analyses—Johns Hopkins Coronavirus Resource Center at https://coronavirus.jhu.edu/data/mortality.

right to refuse unwanted medical treatment. *Id*. Therefore, according to *Jacobson* itself, the existence of a constitutionally protected interest changes the outcome. The passage of time has therefore changed the direction of the *Jacobson* holding.

Third, if Respondents are going to argue that *Jacobson* remains a "binding decision," then they must take *all* of *Jacobson*, not just the portions they like. *See* Resp. Br. 2. Respondents pointedly fail to mention something else that the *Jacobson* Court said—namely that the federal government has no constitutional role in mandating vaccinations. As the *Jacobson* Court put it:

> The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. *They are matters that do not ordinarily concern the National Government*. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take….

197 U.S. at 38 (emphasis added). In short, Respondents should be careful what they ask for. Reliance on *Jacobson* does not advance their case. In any event, the precedent is no longer applicable for the reasons mentioned above.

Finally, Respondents fail to explain how the ETS can survive strict scrutiny. As Petitioners' Motion explains, the ETS fails on the second prong of the analysis—it is not "necessary significantly to further" that interest. *Sell*, 539 U.S. at 179. For all of these reasons, Petitioners are likely to prevail on this claim.

II. Petitioners Face Irreparable Harm Absent a Stay

Petitioner corporations face devastating and irreparable consequences if the ETS is not stayed. In particular, they would lose huge percentages of their workforces. In response, Respondents simply assert, "These fears are poorly substantiated and likely inflated." Gov't Resp., *Bentkey Servs.*, 41. It appears that Respondents have failed to review the facts presented in this particular case, where those costs are well-substantiated.

Compliance with the ETS would likely cause DTS Staffing to lose 40-50 percent of its workforce. Miller Insulation would likely lose over 25 percent of its workforce. Fleck Decl. ¶ 10, Miller Decl. ¶¶ 5, 8. Consequently, DTN staffing would likely lose $9-12 million in the coming year. Fleck Decl. ¶ 12. Miller Insulation would likely suffer losses exceeding $1 million. Miller Decl. ¶ 10.

Respondents also fail to address the injuries faced by the employee Petitioners in this case. Petitioners Haws and Ortiz would be forced to choose between their jobs and freely exercising their religious faith without a $7,600 fee in the form of testing costs. Haws Decl. ¶ 6; Ortiz Decl. ¶ 4. And if an employee submits to the coercion and is vaccinated against his will, the vaccine cannot be reversed. It is irreparable. To these injuries, Respondents offer no response.

III. The Balance of Hardships Favors a Stay

The economic loss and the loss of constitutionally protected liberties suffered by Petitioners are not matched by any comparable hardship on the part of Respondents. Recognizing that the government itself suffers no injury if the ETS is delayed while this Court adjudicates the matter, Respondents argue that an asserted increased health of the public resulting from the ETS's vaccine mandate should be weighed in their favor.

However, Respondents' argument is highly speculative and is directed at the wrong inquiry. They offer no basis for predicting what number of employees would succumb to the pressure and get vaccinated, nor do they offer any basis for their unsubstantiated claim of health gains stemming from those vaccinations occurring sooner rather than later. *More importantly, they do not attempt to determine how many vaccinations or tests would occur during the relatively short period of review by this court*—and that is the relevant number here, not how many might occur over the course of years. The question is not what injuries might the government suffer from a permanent stay. Rather, the question is what injuries might the government suffer during a stay pending review. For these reasons, the balance of hardships clearly favors Petitioners.

CONCLUSION

For these reasons, this Court should stay the ETS pending review.

Respectfully submitted,

November 29, 2021

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November 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2021, I caused a copy of this Reply to be served on Respondents by operation of the Court's CM/ECF system.

November 29, 2021

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