

Nos. 21-7000 (lead), 21-4157

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

*IN RE: MCP NO. 165., OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION RULE ON COVID-19 VACCINATION AND TESTING, 86
FED. REG. 61402*

**IDAHO LEGISLATURE'S OPPOSITION TO
DISSOLVING STAY OF ENFORCEMENT**

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INTRODUCTION

The 66th Idaho Legislature, Scott Bedke in his official capacity as Speaker of the Idaho House of Representatives, and Chuck Winder in his official capacity as President Pro Tempore of the Idaho Senate (collectively, the “Idaho Legislature”), submit this response in opposition to Respondents’ Emergency Motion to Dissolve Stay, [Dkt. 69] (“Respondents’ Motion”) and in support of the Opposition of Petitioners Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming to Dissolving Stay of Enforcement (“State Petitioners’ Opposition”), [Dkt. 311], filed on December 7, 2021. The Idaho Legislature urges this Court to deny Respondents’ Motion.

The Idaho Legislature is vested with the legislative authority of the state of Idaho and is empowered to enact laws concerning the “health, welfare and morals” of Idaho citizens. *See, e.g., Berry v. Koehler*, 369 P.2d 1010, 1013 (Idaho 1961) (“The Legislature, under the broad field of ‘police power’, may enact laws concerning the health, welfare and morals of the people.”). The emergency temporary standard issued by the Occupational Health and Safety Administration (“OSHA”) entitled “COVID-19 Vaccination and Testing: Emergency Temporary Standard” and published in the Federal Register on November 5, 2021 at Volume 86, pages

61402 through 61555 (“OSHA ETS”), infringes on those rights. The stay ensures that this infringement does not disrupt the upcoming legislative session of the Idaho Legislature. Therefore, this Court should maintain the stay on enforcement of the OSHA ETS during the pendency of this case.

ARGUMENT

The stay entered by the Fifth Circuit in *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), is legally correct and the Respondents’ Motion to dissolve that stay should be denied. Stays pending appeal are analyzed under a four-factor test: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The primary inquiry is whether the parties opposing the Respondents’ Motion have a likelihood of success on the merits that warrants a stay, and the Petitioners’ Opposition demonstrates that likelihood of success. State Petitioners’ Opp., 2–20 [Dkt. 311].

Principles of federalism and constitutional limitations on government action are essential, even during the unprecedented challenges posed by the ongoing pandemic. *See Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S.

Ct. 2485, 2490 (2021) (“[E]ven in pursuit of desirable ends,” “our system does not permit agencies to act unlawfully.”); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”). The stay issued by the Fifth Circuit directly ensures those fundamental principles of law remain enforced as the Idaho Legislature shortly heads into its upcoming legislative session.

A. The Idaho Legislature’s duty to pass legislation for the health and safety of Idaho citizens will be harmed if this Court dissolves the stay.

If this Court dissolves the stay, the OSHA ETS will cause significant disruption of the Idaho Legislature’s upcoming legislative session, above and beyond the general intrusion on the state’s sovereign authority posed by the emergency standard. The Idaho Legislature is a part-time legislative body that will return to session in early January and needs the stability and certainty provided by the stay to guide lawmaking in the area of public health.¹ If the stay is lifted, the Idaho Legislature will spend its narrow window of lawmaking in the context of the OSHA ETS that will force the Idaho Legislature to: 1) reverse course and substantially modify its legislative priorities once this matter is fully adjudicated; and 2) potentially force the Idaho Legislature to reconvene if that adjudication happens after adjournment

¹ Article III, Section 8 of the Idaho Constitution states that “sessions of the legislature shall be held annually . . . commencing on the second Monday of January”

sine die, which typically occurs in late spring. This is no small matter, considering the number of legislative proposals in the Idaho Legislature for pandemic-related concerns.

The Idaho Legislature has been actively engaged in lawmaking in response to the pandemic and its response in the January 2022 session will be cabined by OSHA's claim of field preemption if the stay is lifted and the OSHA ETS becomes effective before or during the session. The Idaho Legislature's recent activity, during a highly unusual, brief session in November 2021 following OSHA's issuance of the OSHA ETS, illustrates how the OSHA ETS affected the Idaho legislative process. It is briefly summarized below:

| Bill Number² | Summary/Purpose³ | Last Action⁴ |
|--------------------------------|--|--|
| SJM 105 | Idaho Legislature strongly opposes the Biden Administration vaccine mandate for large employers | Adopted by both chambers and delivered to the Idaho Secretary of State |
| HB 410 | Ensures the individual rights of employees to not be discriminated against in the work force because of their medical status or their vaccination status | Reported out of Ways and Means Committee |
| HB 411 | Protects individuals from forced or coerced vaccination, immunization, genetic modulation, or inoculation | Referred to Health and Welfare Committee |

² SJM=Senate Joint Memorial; HB=House Bill; SB=Senate Bill.

³ <https://legislature.idaho.gov/sessioninfo/2021/legislation/minidata/#house> (last accessed on Dec. 8, 2021).

⁴ *Id.* All measures were introduced on November 15, 2021 and last acted upon on November 15 or 16, 2021.

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| HB 412 | Prohibits discrimination based on immunization or vaccination status | Passed the House, referred to Senate State Affairs Committee |
| HB 413 | Prohibits employers from requiring vaccination of employees without consent | Referred to Business Committee |
| HB 414 | Prohibits the government, employer or any other entity from questioning or requesting additional information from an employee who claims a religious exemption to an otherwise required medical treatment | Passed the House, referred to Senate State Affairs Committee |
| HB 415 | Adds medical, religious, philosophical, and natural immunity exemptions for employees from vaccine requirements in the workplace | Passed the House, sent to the Senate |
| HB 416 | Prohibits licensing boards or authorities from denying a license, requiring vaccination history, or disciplining a licensee based on vaccination status | Reported out of Business Committee |
| HB 417 | Clarifies that injuries arising from employer-mandated vaccinations shall be compensable under the Idaho workers compensation laws | Passed the House, referred to Senate State Affairs Committee |
| HB 418 | Any litigation resulting from legislation regarding federal policy on immunizations must be defended by the Attorney General, and not outside counsel | Referred to State Affairs Committee |
| HB 419 | Prevents Idaho citizens from being terminated from their employment because of their personal decisions regarding vaccination | Passed the House, referred to Senate State Affairs Committee |
| HB 420 | Restores the requirement for parental consent for minors to receive specific medical treatment | Referred to Health and Welfare Committee |
| HB 421 | Provides that individuals will not be required to provide proof of vaccination or negative test results in order to apply or receive services provided by the state, enter a government venue, or be hired or maintain employment with the state | Passed the House, sent to the Senate |

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| HB 422 | Prevents an employer from mandating that current employees receive a vaccination as a condition of continued employment | Reported out of Business Committee |
| HB 424 | No private or public entity shall be entitled to condition access on the revelation of personal medical information including vaccinations. Health care providers may not use personal medical information to deny access to care | Referred to Health and Welfare Committee |
| HB 425 | Employers may not refuse employment or discriminate based on immunity passport or vaccination status. Public accommodations may not exclude or refuse to serve a person based on vaccination status. A health care facility can make reasonable accommodation measures for an unvaccinated employee for health and safety reasons, but not to deny employment | Referred to State Affairs Committee |
| HB 426 | Prohibits discrimination based on immunization status or the possession of an immunity passport. Makes it unlawful for any employer to refuse employment or discriminate in any way based on immunity passport or vaccination status. Public accommodations may not exclude or refuse to serve a person based on vaccination status. A health care facility can make reasonable accommodation measures for an unvaccinated employee for health and safety reasons, but not to deny employment | Referred to State Affairs Committee |
| HB 427 | Protects an employee's medical privacy including inoculation and immunization status | Reported out of Business Committee |
| HB 428 | A federal vaccine mandate does not trump a parent's right to oversee the fundamental affairs of their child, including those who are 14 years old and older | Referred to Health and Welfare Committee |
| HB 429 | Provides exemption for children attending or participating in programs at public schools from mandates for mask wearing or | Passed the House, referred to Senate State Affairs Committee |

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| | other medical interventions for medical, religious, or personal reasons | |
| HR 430 | Prohibit the state of Idaho, an employer, a political subdivision, or an officer of the state from mandating face masks or other face covering to prevent or slow the spread of a contagious or an infectious disease | Referred to State Affairs Committee |
| HR 431 | No entity can compel vaccinations of any individuals who object to vaccinations | Referred to Health and Welfare Committee |
| HR 432 | No immunizations that have not been granted full approval by the FDA | Referred to Health and Welfare Committee |
| HR 434 | Prohibits local officials from being ordered to enforce federal actions regarding immunizations, inoculations or injections that violate the Idaho or U.S. Constitution | Referred to Health and Welfare Committee |
| SB 1222 | Requires expenditure of federal COVID-19 funds for various purposes including costs associated with vaccinations and testing | Referred to State Affairs Committee |
| SB 1223 | Bans discrimination against employees who choose to not receive vaccinations, and for other purposes | Referred to State Affairs Committee |
| SB 1224 | Enumerates three exemptions (medical, religious, and natural immunity) for employees from employer-required COVID-19 vaccinations | Referred to State Affairs Committee |
| SB 1225 | Allows an employee to not consent to employer-required COVID-19 vaccinations | Referred to State Affairs Committee |

The Idaho Legislature's leaders have publicly stated that these legislative efforts will continue when the Legislature returns to session in January:

People deserve the right to make medical decisions on their own, without the intervention of their government or their employer. January 10th is getting closer each day and the members of the House Republican Caucus stand ready to again put forward legislation to preserve the medical privacy rights of Idahoans on day one of the session.

Quote from House Majority Caucus Chair Megan Blanksma, Idaho House & Senate Issue Joint Memorial of Opposition to Vaccine Mandates, November 18, 2021 <https://idahohouserepublicancaucus.com/wp-content/uploads/2021/12/11-18-2021-House-Senate-Sine-Die-Joint-Memorial-final.pdf> (last accessed on Dec. 8, 2021).

Simply put, the Idaho Legislature is actively engaged in promoting the health and safety of the citizens of Idaho, and the stay in this case is essential to prevent OSHA's overreach from interfering with those efforts.

B. The OSHA ETS infringes upon the Idaho Legislature's police powers and its duty to enact laws related to public health.

The OSHA ETS directly intrudes upon the Idaho Legislature's authority to enact laws concerning the "health, welfare and morals" of Idaho citizens. *See, e.g., Berry*, 369 P.2d at 101). Generally, a state "suffers a form of irreparable injury" whenever it is prevented from "effectuating" laws "enacted by representatives of its people." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). The Tenth Amendment to the Constitution reserves powers to the States and the people that are not delegated to the Federal Government. That reservation includes the States' police powers. *United States v. Constantine*, 296 U.S. 287, 295–96 (1935). The OSHA ETS, which preempts the Idaho Legislature from exercising its police power, is an affront to the Tenth Amendment. *See New York v. United States*, 505

U.S. 144, 175 (1992) (the federal government violates the Tenth Amendment when it “cross[es] the line distinguishing encouragement from coercion”).

The Supreme Court’s decision on the scope of state police powers in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is pertinent today. There the Court considered an appeal from a decision of the Massachusetts Supreme Court finding that the Commonwealth’s mandatory smallpox vaccination program was constitutional. Massachusetts’ authority to enact the statute “is commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution.” *Id.* at 25; accord *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (“The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad . . .”).

While a state’s police power must yield if it is in conflict with the powers of the federal government as granted to it by the U.S. Constitution, *Jacobson*, 197 U.S. at 25, such is not the case here. Were this Court to favor OHSA’s interpretation of its power to mandate vaccinations in Idaho, it would “practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease.” *Id.* at 44–45. *Jacobson* further

instructs that “[t]he safety and health of the people of [a state] are, in the first instance, for that [state] to guard and protect. They are matters that do not ordinarily concern the National Government.” *Id.* at 38.

This Court has considered the *Jacobsen* decision in the context of the current pandemic and found it persuasive. “All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts.” *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125, 127 (6th Cir. 2020) (citing *Jacobson*, 197 U.S. at 29). “This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own.” *Id.* (citations omitted.) The Court added that while the power “is not absolute,” “in the case of a public health crisis like the one presented by COVID-19, [] ‘[Idaho’s] latitude must be especially broad.’” *Id.* at 128 (citing *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Mem.) (Roberts, C.J., concurring in the denial of injunctive relief)). And “[s]haping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people.” *Id.* at 129. OSHA agrees. *See Resp’ts’ Opp’n to Stay Mot.*, ECF 64, at 2-3 (citing *Jacobsen* for the principle that state officials can mandate vaccinations to meet the legitimate state (not federal)

end of protecting its citizens.). It is therefore in the public interest that the stay remain in place and that the Idaho Legislature be allowed to do its job—enacting laws for the health and welfare of Idaho citizens.

CONCLUSION

For the reasons set forth above, the Idaho Legislature respectfully requests that this Court deny Respondents’ Motion to dissolve the stay issued by the Fifth Circuit.

December 9, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 3,064 words. *See* Fed. R. App. P. 35(b)(2)(A).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/William G. Myers III

William G. Myers III

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, the foregoing brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/William G. Myers III _____

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