No. 21- 3540

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DTN STAFFING, ET AL.
Petitioners,

v.

OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, ET AL.
Respondents.

PETITIONERS' MOTION FOR STAY PENDING REVIEW

Jessica Hart Steinmann
Josh Campbell
Rachel Jag
America First Policy Institute
1001 Pennsylvania Ave., NW
Suite 530
Washington, DC 20004
(571) 348-1802
jsteinmann@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com

Kris W. Kobach
Counsel of Record
Alliance for Free Citizens
P.O. Box 155
Lecompton, KS 66050
(913) 638-5567
kkobach@gmail.com

Counsel for Petitioners

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INTRODUCTION

This case involves constitutional and statutory challenges to an unprecedented and sweeping Occupation Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) that affects more than 80 million Americans, compelling them to take a COVID-19 vaccination or to be tested for the virus weekly at their own expense while being required to wear a mask at all times. The ETS mandates that employers of 100 or more employees must enforce this requirement upon their workforces or face heavy fines of $14,000 per violation. It is the largest standard ever promulgated by OSHA, in terms of the number of employees affected. Employers and employees must be in compliance by January 4, 2022. According to OSHA's estimate, this ETS will force 23 million Americans who have thus-far resisted getting the vaccine to do so.

If the ETS is not stayed, employee Petitioners will face a painful choice: either resign from their jobs, pay for weekly testing and wear a mask that serves as a scarlet letter, or take a vaccine that they do not wish to take. A stay is necessary to avoid irreparable harm to the liberties, and potentially the health, of these employees. The irreparable harm to employer Petitioners is equally significant. Employer Petitioners are certain to lose a large portion of their workforce when employees quit and seek work elsewhere with smaller companies. The loss of a

valuable employee cannot be repaired by stay months after the fact. Petitioners therefore ask this Court to stay the ETS until this Court's review is complete.[1]

BACKGROUND

On November 5, 2021, Respondents issued an ETS mandating vaccinations against COVID-19 in businesses of 100 or more employees, published in the Federal Register on November 5, 2021, 86 Federal Register 61402. Under the ETS, covered employers must implement and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose to either be vaccinated or undergo weekly COVID-19 testing and wear a face covering at work. *Id*. at 61439. Under that regime, unvaccinated employees must be tested for COVID-19 *at least* weekly; and employers are not required to pay for said testing or face coverings for those employees. *Id.* at 61484, 61532, 61541. Additionally, the ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination status, and maintain records of each employee's vaccination status. *Id*. at 61449. If employees test positive or receive a COVID-19 diagnosis, the ETS requires them to provide prompt notice to their employers, who must then remove them from the workplace, regardless of vaccination status. *Id*. at 61457.

[1] On November 6, 2021, the Fifth Circuit issued a "stay pending further action by this court." *BST Holdings, et al. v. OSHA, et al*. No. 21-60845. While that is welcome relief, Petitioners her request a stay for the duration of review.

Petitioners are DTN Staffing, a North Dakota corporation that provides healthcare staff to healthcare providers, its president, and several of its employees, as well as Miller Insulation Company, a North Dakota corporation that provides insulation services, its CEO, and several of its employees. All Petitioners are residents of North Dakota. None of the employee petitioners wish to receive the vaccination. Both corporations have over 100 employees. Neither wishes to force its employees to take a COVID-19 vaccine. Neither corporation can withstand the financial penalties that would be imposed by OSHA if it refused to comply with the ETS. At the same time, both corporations would suffer a devastating loss of employees if they complied with the ETS.

The Petition for Review in this case is brought pursuant to 29 U.S.C. § 655(f). Venue is proper in this Court because all Petitioners reside in the Eighth Circuit, in the District of North Dakota.

ARGUMENT

This Court should grant a stay pending review while it resolves the novel and complex issues presented by the ETS. Congress expressly provided for the challenge of ETSs "in the circuit wherein such person resides or has his place of business" and provided that a stay may be ordered by the court pending review. 29 USC § 655(f). The statutory right to immediate appellate review and, if ordered by the Court, a stay reflects Congress's acknowledgment that OSHA might attempt to

exceed its authority without submitting its standard to notice and comment beforehand. That is certainly true in the instant case, where the familiar four-factor test for a stay is easily satisfied.

In order to obtain a stay, the party seeking the stay must show that "(1) they are likely to succeed on the merits, (2) they will suffer irreparable injury unless the stay is granted, (3) no substantial harm will come to other interested parties, and (4) the stay will do no harm to the public interest." *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993); *see Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The court must "consider the relative strength of the four factors, balancing them all." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (citations omitted). Each of the four factors clearly favors a stay in this case.

I. Petitioners Are Likely to Succeed on the Merits

The ETS violates the United States Constitution as well as federal statute. Specifically, it suffers from the following defects:

1. The ETS is unconstitutional because it expands the reach of the Occupational Safety and Health Act beyond the Congressional power to regulate interstate commerce under Article I, Section 8.

2. The ETS fails to meet the heightened statutory standard of review under 29 U.S.C. § 655(f).

3. The ETS is unconstitutional because it violates the Free Exercise Clause of the First Amendment.

4. The ETS is unconstitutional because it violates the substantive liberty interest protected by the Fifth and Fourteenth Amendments.

Any one of these violations of the United States Constitution or federal law, on its own, would be sufficient to render the ETS invalid.

A. The ETS Breaches the Limits of the Commerce Power

Congress enacted the Occupational Health and Safety Act in 1970 as a regulation of commerce between the states, under Article I, Section 8, of the United States Constitution. As Congress stated in the Act's statement of findings and declaration of purpose and policy, it was an exercise of the commerce power:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.

29 U.S.C. § 651(b). Similarly, the Act "authoriz[es] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). To the extent that a standard promulgated by OSHA regulates commercial activities that "have a substantial effect on interstate commerce," it would be within the scope of the commerce power. *United States v. Darby*, 312 U.S. 100, 118-119 (1941). However, this ETS goes far beyond the regulation of activities affecting interstate commerce. As such it is unconstitutional.

This Court need not sift through cases of marginal relevance to reach this conclusion. The Supreme Court provided four-square guidance on the question presented in this case in *National Federal of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"). In *NFIB*, the Affordable Care Act's individual mandate requiring Americans to purchase health insurance was held to be outside of Congress's authority to regulate commerce because it forced individuals who did not want to purchase an item in commerce (health insurance) to purchase it nonetheless. As the Court noted, "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." *Id*. at 549. In the instant case, OSHA is doing the same thing: forcing individuals to purchase an unwanted product. Respondents may quibble that the COVID-19 vaccinations are subsidized by the federal government. But there is no denying that there is a purchase each time a vaccination occurs. The COVID-19 vaccinations cost up to $39.[2] The makers of the vaccines are paid for their products; and the consumers are making a subsidized purchase.

The Supreme Court explained that forcing individuals to make unwanted healthcare-related purchases is certainly not a regulation of commerce, since "[t]he

[2] Pursuant to contracts negotiated with the federal government, Pfizer is paid $39 for its two doses of its vaccine, Moderna is paid $32 for its two doses, and Johnson & Johnson is paid $10 for its single dose. John LaMattina, "Suprising Cost for Covid-19 Vaccine Administration," *Forbes*, April 15, 2021, available at https://www.forbes.com/sites/johnlamattina/2021/04/15/surprising-cost-for-covid-19-vaccine-administration/?sh=3b02fb71362e.

power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous." *NFIB*, 519 U.S. at 550. Here too, the ETS at issue is an attempt to create commerce in vaccinations where it otherwise would not exist.

Respondents might answer that if the unvaccinated remain unvaccinated, that could conceivably affect interstate commerce by generating future healthcare commercial activity if those individuals become infected with COVID-19. But the Supreme Court emphatically rejected this argument:

> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; others they simply fail to do it. 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.

Id. at 552. The same analysis applies here. The federal government may not force an individual to take a product that he does not wish to take under the guise of regulating commerce.

The Court went on to explain its holding, in words that are perfectly applicable in the case at bar:

> 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.

Id. at 554-555. Congress cannot use the Commerce Power to force people "to do things that would be good for them or good for society." *Id*. at 554. The Supreme Court's holding leads inexorably to the conclusion that ETS exceeds the federal government's authority under the Commerce Power. Petitioners are therefore likely to succeed on the merits of this claim.

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

1. The Standard of Review is Higher Than That of the APA

An ETS issued by OSHA must meet a statutory standard of review that is more demanding than the familiar Administration Procedure Act (APA)standard: "[W]e must take a 'harder look' at OSHA's [ETS] action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the APA." *Asbestos Info. Association/North Am. v. OSHA*, 727 F.2d 415, 421 (5th Cir. 1984); *American Fed'n of Labor v. OSHA*, 965 F.2d 962 (11th Cir. 1992) (courts take a hard look at ETSs, citing *Asbestos*). "The standard under which we review OSHA's new [ETS]

is whether the Agency's action is 'supported by substantial evidence in the record considered as a whole.' 29 U.S.C. § 655(f))." *Id*. Among the thresholds that an ETS must clear is a heightened reasonableness standard. An ETS "requires that [Courts] inquire into whether OSHA 'carried out [its] essentially legislative task in a manner *reasonable* under the state of the record before [it].'" *Asbestos*, 727 F.2d at 421 (citing, inter alia, *Aqua Slide 'n' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 838 (5th Cir.1978) Included in this review are an assessment of gravity and necessity. "[T]he gravity and necessity requirements lie at the center of proper invocation of the ETS powers." *Asbestos*, 727 F.2d at 424.

Emergency temporary standards are to be used only in extreme circumstances, unlike those in the case at bar. Courts around the country have largely taken a dim view of OSHA's use of ETSs, especially since they are not subject to notice and comment. "The last time OSHA issued an ETS [before 2021] was in 1983 and that one was overturned because OSHA couldn't meet the statutory threshold requirements for issuance. Indeed, OSHA has lost more ETS cases in federal courts than it [has] won for this same reason." U.S. Representative Bradley Byrne, *Opening Statement at Hearing on Workplace Safety During COVID-19*, Committee on Education and Labor, May 28, 2020.

Further, ETSs are supposed to be delicate measures due to their burdens on industry: "[T]he ETS statute is not to be used merely as an interim relief measure,

but treated as an extraordinary power to be used only in 'limited situations' in which a grave danger exists, and then, to be 'delicately exercised.'" *Asbestos*, 727 F.2d at 422. (*citing Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 at 1155 (D.C.Cir.1983)). *See also Dry Color Manufacturers' Ass'n*, 486 F.2d at 104 n. 9a (3d Cir.1973)). This ETS is not delicate in any sense; rather, it is an overbroad and abusive measure that exploits the minimal procedural hurdles of an ETS.

2. The ETS Fails to Meet the Standard for Multiple Reasons

Many facets of the ETS are manifestly unreasonable. Each of these reasons is sufficient, in and of itself, to justify a stay. First, the ETS is not actually an *emergency* standard, as evidenced by OSHA's own dilatory approach. COVID-19 first began to affect the country in January of 2020.[3] Yet OSHA waited until nearly two years into the pandemic to issue its "emergency" standard. This indicates strongly that the ETS is nothing more than an effort to short-circuit the notice and comment requirements of a normal OSHA standard. It addresses a virus that is neither new nor imminent. "The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to

[3] Health and Human Services Secretary Alex Azar, Determination that a Public Health Emergency Exists, effective January 27, 2020 (official "determin[ation] that a public health emergency exists and has existed since January 27, 2020, nationwide") available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger." *Asbestos*, 727 F.2d at 422.

Second, the 100-or-more-employee threshold is plainly arbitrary. The COVID-19 virus does not pose a special danger to businesses with over 100 or more employees. OSHA's justifications for the threshold are threadbare assertions, such as that businesses this size have better record keeping capabilities and can absorb the financial shock of this rule better than those below this number. ETS at 61488, 61496. This use of arbitrary, round-number standards does not represent reasoned rule-making. *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992) (generic rulemaking invalidated). For example, a business that has been utilizing effective social-distancing and telework policies with 100 employees would face the burdensome ETS, whereas a slightly smaller company utilizing no such policies would not be subject to it.

Third, the ETS is not accompanied by a proper cost-benefit analysis that fully accounts for the adverse economic impact of the ETS. "The protection afforded to workers should outweigh the economic consequences to the regulated industry." *Asbestos,* 727 F.2d at 423 (*citing*, *American Petroleum Institute v. OSHA*, 581 F.2d 493, 502-03 (5th Cir.1978) *aff'd sub nom Industrial Union*

Department v. API, 448 U.S. 607 (1980)). Yet OSHA appears to admit that its own data is inadequate:

> [T]here is *not* an abundance of evidence about whether employees have actually left or joined an employer based on a vaccine mandate…. OSHA has examined the best available evidence it could locate in the timeline necessary to respond with urgency to the grave danger addressed in this ETS. Based on [OSHA's polling], OSHA is persuaded that the net effect of the OSHA ETS on employee turnover will be relatively small.

ETS at 61474-75 (emphasis added). Contrary to OSHA's assertions, as Petitioners' declarations describe, the ETS will have a destructive impact upon their businesses, as large percentages of the workforce will likely quit working for companies with 100 or more employees. *See infra*, section II.

Fourth, OSHA has failed to tailor the ETS to a specific industry or sector. No specific industry is regulated here. In every previous ETS known to Petitioners, ETSs were tailored to a specific business setting or industry, e.g., peach farming. Here, however, the ETS applies to every business with 100 or more employees, irrespective of the particulars of that industry. *See, e.g., Fla. Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120 (5th Cir. 1974) (respondent failed to show by substantial evidence that agricultural workers were exposed to a grave danger from exposure to pesticides.).

ETSs are expressly reserved for "limited situations;" whereas here, the opposite is the case. *Asbestos,* 727 F.2d at 422. OSHA's failure to cabin its rule to

limited situations creates irrational and disparate impacts across the nation, especially those in less-risky regions. Consequently, OSHA has failed to provide a cognizable risk/benefit analysis within a limited industry or industries, and has failed to account for the varying context of diverse states. *Asbestos*, 727 F.2d at 423.

Fifth, the ETS is unreasonable because of its failure to explain why its approach is superior to alternatives. This is most evident in its failure to account for natural immunity derived from previously having the virus. Numerous studies have demonstrated that natural immunity is superior to the protection provided by the COVID-19 vaccines.[4] The ETS could have been designed in a more sophisticated way, allowing employees who possess natural immunity to opt out. The ETS also could have been designed to simply require social distancing and regular testing, with no vaccine mandate.

Sixth, the ETS is irrational in its application of the mask requirement. *See* ETS at 61450-61456. The ETS requires employees who choose not to take the vaccine to be tested weekly. As soon as they test *negative*, however, they are required to *wear a mask*, while vaccinated co-workers (who have not tested negative) need not wear a mask. The mask regime is perfectly irrational. If the

[4] *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/.

most effective use of a mask is to prevent an infected person from spreading the virus,[5] then the employees who have *not* presented a negative test result should be the ones wearing masks, since vaccinated persons can become infected with COVID-19 and can transmit the virus to others.[6]

C. The ETS Burdens the Free Exercise of Religion

The ETS has a disproportionately adverse impact on Petitioners Haws and Ortiz as Christians whose sincerely-held religious beliefs forbid them from receiving the vaccine. It places them in the position of having to choose between their religious beliefs and their jobs. The alternative option of weekly testing and mask wearing severely burdens their exercise of her religious faith. It unfairly treats them differently from vaccinated employees who do not hold the same religious beliefs by: (1) requiring them to wear masks at all times while at work, marking them with a virtual scarlet letter, and (2) forcing them to pay for weekly COVID-19 testing themselves. Employees who refuse the vaccine must pay dearly to exercise their religious beliefs; they must test weekly, and their employers are

[5] *See* FDA guidance at https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/face-masks-barrier-face-coverings-surgical-masks-and-respirators-covid-19 ("Face masks . . . may help prevent people who have COVID-19 from spreading the virus to others.")
[6] CDC Director Rochelle Walensky has stated: "[U]nlike with other variants, vaccinated people infected with Delta can transmit the virus." Emily Kopp, *CDC Report Shows Vaccinated People Can Spread COVID-19*, ROLL CALL, July 30, 2021, available at https://www.msn.com/en-us/news/us/cdc-report-shows-vaccinated-people-can-spread-covid-19/ar-AAML2bE.

not required to cover that cost. Those tests can be extremely expensive, adding up to approximately $7,696 annually.[7]

The Free Exercise Clause of the First Amendment requires accommodation, not merely tolerance, of all religions and forbids hostility toward any. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Further, the Supreme Court has held that the "exercise of religion" involves not only belief and profession but the performance of, or abstention from, physical acts that are engaged in for religious reasons. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 710 (2014). Thus, a law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion. *Id*.; *see also*, *United States v. Lee*, 455 U.S. 252, 257 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise rights"). Here, Haws and Ortiz will have to bear an expensive burden for refusing to receive the vaccine. A virtual tax is imposed on their exercise of religion.

Respondents will doubtless argue that the ETS is a neutrally-applicable rule which does not target any religion, and therefore is not subject to heightened

[7] Frequent tests that are not medically necessary are unlikely to be covered by insurance policies. The cost per test ranges from $20 to $1,419, with the median cost being $148. Janet Nguyen, How Much Does a COVID Test Cost? Marketplace, October 11, 2021, available at https://www.marketplace.org/2021/10/11/how-much-does-a-covid-19-test-cost/. At the median of $148 per test, the annual cost would be $7,696.

scrutiny. However, this case does not fit into the neutrally-applicable-rule category so easily. As the Supreme Court recently noted, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. … It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021)(internal citations omitted). In that case, COVID-19 restrictions on gatherings had a greater burden on religious gatherings than on secular gatherings. The same may be said in the instant case. All employees covered by the ETS must make a coerced decision whether to receive a COVID-19 vaccination. That coerced decision places a much greater burden on an employee who has sincerely-held religious convictions against the vaccination than it does on an employee who has no such religious beliefs. Accordingly, strict scrutiny applies.

Assuming arguendo that imposing a mandatory COVID-19 vaccination requirement on private companies with over 100 employees is supported by a compelling government interest, the ETS still fails strict scrutiny because it is not narrowly tailored. As the Supreme Court held in the same case: "narrow tailoring requires the government to show that measures less restrictive of the First

Amendment activity could not address its interest in reducing the spread of COVID." *Tandon,* 141 S. Ct. at 1296-97. There are multiple less-restrictive ways of advancing that interest, such as (1) regular testing of employees funded by the government, without a vaccination requirement, or (2) workplace social distancing and hand-washing requirements. Petitioners are therefore likely to prevail on this claim.

D. The ETS Denies Fifth Amendment Liberty Interests

All of the individual Petitioners possess an additional fundamental right that is infringed by the ETS. That right is the substantive liberty interest that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Over the past century the Supreme Court has recognized multiple liberty interests that trigger strict or heightened scrutiny. As Chief Just Rehnquist summarized in 1997, "the 'liberty' specially protected by the Due Process Clause" has been interpreted to protect eight specific fundamental rights beyond those enumerated in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Two of those rights are at stake in the instant matter: the right "to bodily integrity," *id*.; *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).

The right to bodily integrity was recognized in *Rochin* with the Supreme Court's recognition that a detainee could not be forced to take an emetic drug against his consent. *Rochin*, 342 U.S. at 173-174. It was further developed in *Riggins v. Nevada*, 504 U.S. 127, 135 (1992), where the Court held that only an "essential" or "overriding" state interest could overcome a person's "interest in avoiding involuntary administration" of antipsychotic drugs. The Court again applied heightened scrutiny when this right was infringed in *Sell v. United States*, 539 U.S. 166, 179 (2003) (involuntary administration of antipsychotic drugs could only be sustained if state demonstrated that it was "necessary significantly to further" state interest).

The right to refuse unwanted medical treatment mandated by the government has been given an equally high level of constitutional protection. It was recognized by the Court in *Cruzan*: "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." 497 U.S. at 278. As the Court later commented: "The right assumed in *Cruzan* … was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions." *Glucksberg*, 521 U.S. at 725.

Clearly, the right to refuse an unwanted vaccination falls squarely within both the right to bodily integrity and the right to refuse unwanted medical treatment. When the government restricts this right, its actions must survive strict scrutiny. In *Sell*, the Court applied a version of strict scrutiny, placing the burden on the government to demonstrate an "essential" or "overriding" state interest. 539 U.S. at 178-79 (*citing Riggins*, 504 U.S. at 134, 135). The government must then demonstrate that the means chosen were "necessary significantly to further" that interest. *Id*. at 179.

In this case, the ETS does not force every employee to take the vaccine; but it does severely burden the right to say no. As noted *supra*, the cost of testing imposes a penalty of approximately $7,696 per year upon those who exercise their constitutionally-protected liberty interest. In addition to being forced to pay this expense, such employees are also compelled to wear masks even though they have tested negative for COVID-19—a completely pointless requirement that serves as a scarlet letter identifying them to other employees and customers.

Assuming *arguendo* that Respondents' government interest in reducing the incidence and severity of COVID-19 is essential, they would nonetheless falter on the second prong of the test: that the means chosen is both necessary and that it significantly furthers the interest. As stated *supra*, the mandatory vaccination regime of the ETS is not necessary, since there are less restrict alternatives such as

(1) regular testing of employees funded by the government, without a vaccination requirement, or (2) workplace social distancing and hand-washing requirements. Respondents also must demonstrate that the ETS regime will *significantly* further that interest—a difficult burden to meet. The information presented by Respondents in the issuance of the ETS is purely speculative, regarding the hoped-for success of the regime. For these reasons, individual Petitioners are likely to prevail on their liberty interest claim.

II. Petitioners Face Irreparable Harm Absent a Stay

Corporation Petitioners face devastating and irreparable consequences if the ETS is not stayed. Compliance with the ETS would likely cause DTS Staffing to lose 40-50 percent of its workforce. Miller Insulation would likely lose more than 25 percent of its workforce. Fleck Decl. ¶ 10, Miller Decl. ¶¶ 5, 8. As a result, their revenues would drop precipitously; 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. Moreover, Petitioner corporations are ill-equipped to implement or enforce compliance with the ETS mandate. Fleck Decl. ¶ 13.

Individual Petitioners face severe and irreparable injuries as well. Petitioners Haws and Ortiz would be forced to choose between their jobs and freely exercising their religious faith. Haws Decl. ¶ 6; Ortiz Decl. ¶ 4. Petitioners

at DTN staffing would likely be forced to quit their jobs and suffer financial hardship. Johnston Decl. ¶ 8; Sharma Decl. ¶ 7. Petitioners at Miller Insulation would face the same hardship or the expense of weekly testing. Janz Decl. ¶ 10, Miller Decl. ¶ 9. And if an employee submits to the coercion and is vaccinated against his will, the vaccine cannot be reversed. It is irreparable.

A stay in necessary to prevent these immediate injuries from occurring.

III. The Balance of Hardships Favors a Stay

The economic loss and the loss of liberty suffered by Petitioners is not matched by any comparable hardship on the part of Respondents. OSHA suffers no injury if the ETS is delayed while this Court adjudicates the matter. This is demonstrated by the fact that OSHA *delayed twenty-two months after the pandemic hit the United States before issuing the ETS*. Moreover, vaccines were already widely available when the new Administration took office in January 2021. If this ETS was needed so urgently, why wait until November 5, 2021, to issue it? Respondents' lack of urgency was further demonstrated when the president announced it on September 9, but OSHA did not issue the ETS until nearly two months later. The minimal additional delay while this Court considers the weighty constitutional and statutory questions at stake does not injure Respondents.

In addition, private companies that favor the ETS would suffer no injury whatsoever from a stay, since they are free to implement the regime of the ETS on

their own, without compulsion from OSHA. For these reasons, the balance of hardships is not even close. It clearly favors Petitioners.

IV. A Stay is in the Public Interest

A stay is in the public interest, which favors preserving the status quo and protecting the economic survival of affected companies and the liberties of their employees while this Court decides the complex constitutional and statutory questions at issue. A stay that "maintains the separation of powers and ensures that a major new policy undergoes notice and comment" is also in the public interest. *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). A stay is particularly justified given that this is the broadest ETS ever issued in the history of OSHA, affecting millions of employees in irreversible ways.

CONCLUSION

For all of the reasons above, this Court should stay the ETS pending review.

Respectfully submitted,

November 9, 2021

/s/ Kris W. Kobach

Kris W. Kobach
Counsel of Record
Alliance for Free Citizens
P.O. Box 155
Lecompton, KS 66050
(913) 638-5567
kkobach@gmail.com

Jessica Hart Steinmann
Josh Campbell
Rachel Jag
America First Policy Institute
1001 Pennsylvania Ave., NW
Suite 530
Washington, DC 20004
(571) 348-1802
jsteinmann@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com