

No. 21A\_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

*IN RE: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
INTERIM FINAL RULE: COVID-19 VACCINATION AND TESTING; EMERGENCY  
TEMPORARY STANDARD 86 FED. REG. 61402, ISSUED ON NOVEMBER 5, 2021*

---

EMERGENCY APPLICATION FOR AN ADMINISTRATIVE STAY AND STAY OF  
ADMINISTRATIVE ACTION, AND ALTERNATIVE PETITION FOR WRIT OF  
CERTIORARI BEFORE JUDGMENT

---

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 2

TABLE OF AUTHORITIES ..... 3

PARTIES TO THE PROCEEDING BELOW ..... 8

OPINIONS BELOW ..... 13

JURISDICTION ..... 14

STATEMENT ..... 14

REASONS TO GRANT THE APPLICATION ..... 17

*I. THE COURT SHOULD STAY THE VACCINE MANDATE’S ENFORCEMENT  
        PENDING REVIEW*..... 18

        A. PETITIONER IS LIKELY TO PREVAIL ON THE MERITS ..... 19

        B. BETTEN WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.... 29

        C. A STAY WILL NOT SUBSTANTIALLY HARM OSHA..... 31

        D. A STAY IS IN THE PUBLIC INTEREST ..... 31

*II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI  
        BEFORE JUDGMENT AND DECIDE THIS CASE ON AN EXPEDITED  
        BASIS* ..... 41

*III. THE COURT SHOULD ISSUE AN IMMEDIATE ADMINISTRATIVE  
        STAY*..... 42

*IV. CONCLUSION*..... 42

**TABLE OF AUTHORITIES**

**CASES**

*Am. Dental Ass’n v. Sec’y of Labor*,  
984 F.2d 823 (7th Cir. 1993)----- 23

*API v. OSHA*,  
581 F.2d 493 (5th Cir. 1978)----- 21

*Asbestos Info. Ass’n/North Am. v. OSHA*,  
727 F.2d 415 (5th Cir. 1984)----- 21

*Betten Chevrolet, Inc. v. Occupational Health and Safety Administration*,  
No. 21-4114, ECF No. 52 (Nov. 23, 2021) (Declaration of Bryan Betten) ----- 33

*BST Holdings, LLC v. Occupational Safety & Health Admin.*,  
No. 21-60845, 2021 WL 5279381, 17 F.4<sup>th</sup> 604 (5th Cir. Nov. 12, 2021). -----passim

*BST Holdings, LLC v. Occupational Safety & Health Admin.*,  
No.21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021)----- 14

*Clinton v. City of N.Y.*,  
524 U.S. 417 (1998) ----- 39

*Dep’t of Commerce v. New York*,  
No. 18-966 (U.S., Jan. 25, 2019) (Petition for Writ of Certiorari Before Judgment).  
----- 47

*Dry Color Mfrs’ Ass’n v. Dep’t of Labor*,  
486 F.2d 98 (3d Cir. 1973) ----- 21

*Fla. Peach Growers Ass’n v. Dep’t of Labor*,  
489 F.2d 120 (5th Cir. 1974)----- 21

*Free Enterprise Fund v. Public Company Accounting Oversight Bd.*,  
561 U.S. 477 (2010) ----- 11

*In re AFLCIO*,  
No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) ----- 22, 24

*In re Intern. Chem. Workers Union*,  
830 F.2d 369 (D.C. Cir. 1987) ----- 20

*Indus. Union Dep’t, AFL-CIO*,

448 U.S. 607 (1980) .....	23
<i>Int'l Union, United Auto., Aerospace, &amp; Agr. Implement Workers of Am., UAW v. Donovan,</i> 590 F. Supp. 747 (D.D.C. 1984), adopted, 756 F.2d 162 (D.C. Cir. 1985) .....	23
<i>Marbury v. Madison,</i> 5 U.S. (1 Cranch) 137 (1803). .....	11
<i>Maryland v. Wirtz,</i> 392 U.S. 183 (1968). .....	11
<i>Nat'l Fed'n of Indep. Bus. v. Sebelius,</i> 567 U.S. 519 (2012) .....	18
<i>Nken v. Holder,</i> 556 U.S. 418 (2009). .....	17
<i>Nken v. Mukasey,</i> 555 U.S. 1042 (2008). .....	39
<i>Pub. Citizen Health Research Group v Chao,</i> 314 F.3d 143 (3d Cir. 2002) .....	21
<i>Public Citizen Health Research Group v. Auchter,</i> 702 F.2d 1150 (D.C.Cir.1983) .....	20
<i>Public Health And Medical Professionals For Transparency v. FDA,</i> Case No. 4:21-cv-01058-P (N.D. Tx.) Dkt. No. 20 .....	34
<i>RECO Equip., Inc. v. Wilson,</i> No. 20-4312, 2021 U.S. App. LEXIS 32413 (6th Cir. Oct. 28, 2021) .....	28
<i>Taylor Diving &amp; Salvage Co. v. Dep't of Labor,</i> 599 F.2d 622 (5th Cir. 1979) .....	21
<u>STATUTES</u>	
29 U.S.C. §651 .....	17, 18
29 USC § 655 .....	passim
42 U.S.C. § 247d-6d .....	36, 37
5 U.S.C. § 706 .....	28

REGULATIONS

29 C.F.R. § 1910.1030 ----- 22

86 Fed. Reg. 32,376 ----- 24

86 Fed. Reg. 61,402 ----- 11, 18, 24, 30

OTHER AUTHORITIES

*200+ GE employees, union members stage walk-out in Schenectady Friday protesting vaccine mandate,*  
WIVB. ----- 28

*400 workers out, 1,900 exempt after Henry Ford COVID vaccine mandate,* Michigan Radio ----- 28

*Biden Announces New Vaccine Mandates that Could Cover 100 Million Americans,* CNN ----- 11

*Breakthrough Infections of SARS-CoV-2 Gamma Variant in Fully Vaccinated Gold Miners, French Guiana*  
Emerging Infectious Diseases ----- 40

*Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections,*  
medRxiv ----- 39

*Evaluation of the mRNA-1273 Vaccine against SARS-CoV-2 in Nonhuman Primates,* N Engl J Med ----- 32

*Huntington Ingalls Rolls Back Vaccine Mandate for Shipyard Workers,*  
The Maritime Executive ----- 28

*Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States,*  
Eur J Epidemiol. ----- 33

*Natural Infection vs Vaccination: Which Gives More Protection?*  
Israel National News ----- 40

*Necessity of COVID-19 vaccination in previously infected individuals,*  
medRxiv ----- 38

*Nosocomial outbreak caused by the SARS-CoV-2 Delta variant in a highly vaccinated population,*

<i>Israel</i> .....	32
<i>Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts,</i> MMWR Morb Mortal Wkly Rep .....	31
<i>Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo,</i> The White House Briefing Room. ....	18
<i>Primary exposure to SARS-CoV-2 protects against reinfection in rhesus macaques,</i> Science .....	32
<i>Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel,</i> medRxiv .....	40
<i>Quantifying the risk of SARS-CoV-2 reinfection over time,</i> Reviews of Medical Virology .....	39
<i>Quits levels and rates by industry and region, seasonally adjusted,</i> U.S. Bureau of Labor Statistics .....	28
<i>Remarks by President Biden on Fighting the COVID-19 Pandemic,</i> The White House Briefing Room .....	17, 25
<i>SARS-CoV-2 antibody-positivity protects against reinfection for at least seven months with 95% efficacy,</i> EClinical Medicine .....	39
<i>Shedding of Infectious SARS-CoV-2 Despite Vaccination,</i> medRxiv .....	32
<i>Southwest Airlines won't fire unvaccinated employees: 'It makes no sense',</i> Fox 7 Austin .....	28
<i>The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine - United States,</i> MMWR Morb Mortal Wkly Rep .....	31
<i>The Situation Room,</i> CNN .....	31

*Truck Drivers, Facing Shortages, Expect More to Quit Over Biden Vaccine Mandate,*  
Newsweek----- 29

*Weekly National Influenza and COVID-19 Surveillance Report,*  
Public Health England ----- 38

*What to Know About Breakthrough Infections and the Delta Variant,*  
The New York Times----- 38

*White House delays Covid-19 vaccine mandates for contractors,*  
STAT ----- 25

*Working-Class Americans Are Standing Up for Themselves—and the Left Is Denouncing Them / Opinion,*  
Newsweek----- 28

## **PARTIES TO THE PROCEEDING BELOW**

The petitioners below includes the applicant here: Betten Chevrolet, Inc. Other petitioners below include: AAI, Inc.; Aaron Abadi; Aaron Janz; AFT Pennsylvania; American Bankers Association; American Family Association, Inc.; American Federation of Labor-Congress of Industrial Organizations; American Road and Transportation Builders Association; American Trucking Associations, Inc.; Answers in Genesis, Inc.; Asbury Theological Seminary; Associated Builders and Contractors of Alabama, Inc.; Associated General Contractors of America, Inc.; Bentkey Services, LLC, d/b/a Daily Wire; Beta Engineering, LLC; Brad Miller; Brick Industry Association; BST Holdings, LLC; Burnett Specialists; Cambridge Christian School, Inc.; Choice Staffing, LLC; Christian Employers Alliance ; Christopher L. Jones; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho Senate; Corey Hager; Cox Operating, LLC; David John Loschen; Denver Newspaper Guild, Communications Workers of America, Local 37074, AFL-CIO; Dis-Tran Steel, LLC; Dis-Tran Packaged Substations, LLC; Doolittle Trailer Manufacturing, Inc.; Doyle Equipment Manufacturing Company; DTN Staffing, Inc.; Fabarc Steel Supply, Inc.; FMI – The Food Industry Association; Georgia Highway Contractors Association; Georgia Motor Trucking Association; Greg Abbott, Governor of Texas; Gulf Coast Restaurant Group, Inc.; Guy Chemical Company, LLC; Heritage Foundation; Home School Legal Defense Association, Inc.; HT Staffing, Ltd.; Independent Bankers Association; Independent Electrical Contractors – FWCC, Inc.; International Foodservice Distributors Association; International Warehouse and Logistics

Association; Jamie Fleck; Jasand Gamble; Job Creators Network; Julio Hernandez Ortiz; Kentucky Petroleum Marketers Association; Kentucky Trucking Association; King's Academy; Kip Stovall; Lawrence Transportation Company; Leadingedge Personnel Services, Ltd.; Louisiana Motor Transport Association; Massachusetts Building Trades Council; Media Guild of the West, the News Guild-Communications Workers of America, AFL-CIO, Local 39213; MFA, Inc.; MFA Enterprises, Inc.; MFA Oil Company; Michigan Association of Convenience Stores; Michigan Petroleum Association; Michigan Retailers Association; Michigan Trucking Association; Miller Insulation Company, Inc.; Mississippi Trucking Association; Missouri Farm Bureau Services, Inc.; Missouri Farm Bureau Insurance Brokerage, Inc.; National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO; National Association of Convenience Stores; National Association of Home Builders; National Association of Wholesaler-Distributors; National Federation of Independent Business; Natural Products Association; National Propane Gas Association; National Retail Federation; North America's Building Trades Unions; Oberg Industries, LLC; Ohio Grocers Association; Ohio Trucking Association; Optimal Field Services, LLC; Pan-o-Gold Banking Company; Phillips Manufacturing & Tower Company; Plastic Corporation; Rabine Group of Companies; Republican National Committee; Riverview Manufacturing, Inc.; Robinson Paving Co.; RV Trosclair, LLC; Ryan Dailey; Sadie Haws; Samuel Albert Reyna; Scotch Plywood Company, Inc.; Scott Bedke, in his official capacity as Speaker of the Idaho House of Representatives; Service

Employees International Union Local 32BJ; Sheriff Sharma; Signatory Wall and Ceiling Contractors Alliance; Sioux Falls Catholic Schools, d/b/a Bishop O’Gorman Catholic Schools; Sixarp, LLC; Sixty-Sixth Idaho Legislature; Southern Baptist Theological Seminary; Staff Force, Inc.; Tankcraft Corporation; Tennessee Chamber of Commerce and Industry; Tennessee Grocers and Convenience Store Association; Tennessee Manufacturing Association; Tennessee Trucking Association; Terri Mitchell; Texas Trucking Association; Tony Pugh; Tore Says LLC; Trosclair Airline, LLC; Trosclair Almonaster, LLC; Trosclair and Sons, LLC; Trosclair & Trosclair, Inc.; Trosclair Carrollton, LLC; Trosclair Claiborne, LLC; Trosclair Donaldsonville, LLC; Trosclair Houma, LLC; Trosclair Judge Perez, LLC; Trosclair Lake Forest, LLC; Trosclair Morrison, LLC; Trosclair Paris, LLC; Trosclair Terry, LLC; Trosclair Williams, LLC; Union of American Physicians and Dentists; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; United Food and Commercial Workers International Union, AFL/CIO-CLC; Waterblastings, LLC; Wendi Johnston; Word of God Fellowship, Inc. d/b/a Daystar Television Network; and the States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.

The respondents, who were also the respondents below, are the Occupational Safety and Health Administration; the Department of Labor; Douglas L. Parker, in his official capacity as Assistant Secretary of Labor of Occupational Safety and Health; James Frederick, in his official capacity as Deputy Assistant Secretary of Labor of the Occupational Safety and Health Administration; Martin J. Walsh, in his official capacity as the Secretary of Labor; Joseph R. Biden, President of the United States; and the United States of America.

The following parties were proposed intervenors below: Chuck Winder, in his official capacity as President Pro Tempore of the Idaho State Senate; Scott Bedke, in his official capacity as Speaker of the House of Representatives of the State of Idaho; Jose A. Perez; and Nancy C. Perez.

**TO THE HONORABLE BRETT KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT-**

The Government envisions an America unrecognizable by the Framers of our Constitution in issuing the *COVID-19 Vaccination and Testing; Emergency Temporary Standard* (“ETS”), 86 Fed. Reg. 61402 (Nov. 5, 2021). It sees an America where a non-elected federal agency can use the commerce clause to usurp quintessential state police powers, like the authority to regulate health and safety, simply because the President disagrees with how the states are using that authority. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” The Federalist No. 45, at 293. While Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy, courts have “always recognized that the power to regulate commerce, though broad indeed, has limits.” *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). Otherwise, the nation must ask itself, “[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Sometimes “the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent” for the Government’s action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted). According to the Government’s logic, the Commerce Clause allows forced medical treatment in order to hold a job under the guise of activities that substantially affect interstate commerce. This type of general

regulation of public health is well beyond the scope of interstate commerce and is unsupported by historical precedent.

Because the petitioners will likely prevail on the merits, and because they have satisfied the remaining stay pending review factors, this Court should stay the ETS. See App. A-39–A-57 (Larsen, J., dissenting); App. B-6–B-32 (Sutton, C.J., dissenting from the denial of initial hearing *en banc*); App. B-33–B-42 (Bush, J., dissenting from the denial of initial hearing *en banc*). The Court should also enter an administrative stay immediately, allowing it time to review the filings in this emergency posture. Absent a stay, the ETS will take full effect on January 4, 2022. In addition, and in the alternative, the Court should treat this application as a petition for certiorari before judgment and grant immediate review of the ETS’s legality.

#### **OPINIONS BELOW**

The Fifth Circuit stayed the ETS pending review. Its decision is published at *BST Holdings, LLC v. Occupational Safety & Health Admin.*, No. 21-60845, 2021 WL 5279381, 17 F.4<sup>th</sup> 604 (5th Cir. Nov. 12, 2021). The Sixth Circuit denied initial *en banc* hearing on December 15, 2021. Its order, and several opinions respecting the order, are not yet published in the Federal Reporter. *See* Appendix B. The Sixth Circuit dissolved the stay on December 17, 2021. Its opinion is not yet published. *See* Appendix A.

## JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. §§1331 and 2101(f). It has authority to grant certiorari before judgment under 28 U.S.C. § 1254(1).

## STATEMENT

On September 9, 2021, President Biden announced his intent to impose a nationwide vaccination mandate.<sup>1</sup> After previously refusing to mandate vaccinations, the Occupational Safety and Health Administration (“OSHA”), on November 5, 2021, issued the President’s requested vaccination mandate in the form of an emergency temporary standard. 86 Fed. Reg. 61,402.

The ETS mandated that all employers with 100 or more employees “develop, implement, and enforce a mandatory COVID-19 vaccination policy” and required such employers to force workers who refuse to provide proof of vaccination to “undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination.” 86 Fed. Reg. 61,402, 61,520.

Each employer must: “determine the vaccination status of each employee”; “require each vaccinated employee to provide acceptable proof of vaccination status”; “maintain a record of each employee’s vaccination status”; and “preserve acceptable proof of vaccination.” *Id.* at 61552. Employees who refuse to vaccinate must obtain an

---

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

approved test once every seven days a test that employers may require employees to pay for. *Id.* at 61530, 61532. Employers must “keep” unvaccinated employees who do not produce test results “removed from the workplace.” *Id.* at 61532. And employers must maintain a record of test results. *Id.* Unvaccinated employees must be required to wear masks at work, except in extraordinarily limited circumstances. *Id.* at 61553. The ETS gave employers until December 6 to comply with most of the standard’s requirements. *Id.* at 61554. Employers have until January 4 to comply with weekly testing requirements for not-fully-vaccinated employees. *Id.*

In implementing the ETS, OSHA effectively deputized America’s larger employers to become the nation’s vaccine police, whether they want to or not. Any employer that refuses to comply could face monetary penalties that OSHA describes as “high enough to motivate the very large employers who are unlikely to be deterred by penalty assessments of tens of thousands of dollars[.]” *Id.* at 61, 444.

In the week following November 5, 2021, several petitioners filed Petitions for Review in various courts of appeals pursuant to 29 U.S.C. § 655(f). The Fifth Circuit, on November 6, 2021, stayed the ETS “pending adequate judicial review of the petitioners’ underlying motions for a permanent injunction,” and ordered that “OSHA take no steps to implement or enforce the [Standard] until further court order.” *BST Holdings, LLC v. Occupational Safety & Health Admin.*, No.21-60845, 2021 WL 5166656 (5th Cir. Nov. 6, 2021) (per curiam). Less than a week later, the Fifth Circuit issued a written opinion, reaffirming the initial stay after “having conducted ... [an]

expedited review.” *BST Holdings, LLC v. Occupational Safety & Health Admin.*, No. 21-60845, 2021 WL 5279381, at \*9, 17 F.4<sup>th</sup> 604 (5th Cir. Nov. 12, 2021).

On November 16, pursuant to 28 U.S.C. § 2112 (a), the Judicial Panel on Multidistrict Litigation consolidated and transferred the pending petitions to the Sixth Circuit. On November 23, OSHA moved the Sixth Circuit to dissolve the stay. *See Respondents’ Emergency Motion to Dissolve Stay*, No. 21-7000, Doc. 69 (6th Cir.). On December 17, 2021, after the Sixth Circuit denied petitions for an initial *en banc* hearing, *see* App. B, a divided Sixth Circuit panel granted OSHA’s motion and dissolved the stay. App. A. Judge Larsen dissented. App.A-39–A-57 (Larsen, J., dissenting).

Petitioner, Betten Chevrolet, Inc. (“**Betten**”) is a General Motors automobile dealership incorporated under the laws of Michigan with a principal place of business in Michigan. Betten started operations in 1961 and now employs over 100 employees, making it subject to the OSHA ETS. Betten will be adversely affected by the ETS because, *inter alia*, it faces a shortage of full-time employees, and many current and prospective employees do not want to be forced to receive the COVID-19 vaccine or be subject to and pay for weekly testing and forced to wear a mask.

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

though testing and masking is offered as an alternative to vaccination, the testing and masking requirement still creates an incentive for employees to leave Betten and move to a position that does not require the financial or intrusive burden of testing and masking.

Not only will Betten lose long-standing and highly trained employees, but Betten will be forced to use up existing staff resources, including potentially hiring new staff, to implement the administrative requirements pursuant to the OSHA ETS, which places a financial and administrative burden on Betten.

Additionally, Betten will likely bear the cost of worker's compensation premium increases for employee injuries caused by the COVID-19 vaccine mandated as a condition of employment. Thus, the ETS makes it more difficult to hire new employees and retain current employees in an already tight labor market.

### **REASONS TO GRANT THE APPLICATION**

The OSHA ETS is an unconstitutional exercise of legislative power vested in Congress and should be set aside pursuant to the Administrative Procedures Act (“APA”) and the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“**the OSH Act**”). The ETS unlawfully regulates public health under the guise of workplace safety by carving out a federal police power traditionally reserved to the States (*infra* § I(A)(1)). The use of the OSH Act, passed pursuant to the Commerce Clause power, is limited to activities that substantially affect interstate commerce

(*infra* § I(A)(1)). The regulation of public health, a quintessential state function, is well beyond the scope of interstate commerce.

The ETS's goal of protecting workplace safety is also undermined by, *inter alia*, the CDC Director's admission that COVID-19 vaccines do not prevent transmission of the virus (*infra* § I(D)(1)), the fact that the ETS fails to account for workers with natural immunity (*infra* § I(D)(3)), and the lack of legal resource for those who suffer adverse events (*infra* § I(D)(2)). As such, the ETS is the product of an unconstitutional exercise of legislative power by an executive agency, and the Court should stay enforcement of the ETS pending final judgment. In addition, the Court should grant certiorari before judgment and resolve this case on an expedited basis.

#### **I. THE COURT SHOULD STAY THE VACCINE MANDATE'S ENFORCEMENT PENDING REVIEW**

Courts consider the following four factors in determining whether a stay of an agency rule is warranted: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The first two factors "are the most critical." *Id.* at 434. Each factor favors a stay.

**A. PETITIONER IS LIKELY TO PREVAIL ON THE MERITS**  
**1. PUBLIC HEALTH AND SAFETY IS LEFT TO THE STATES AND OSHA'S ETS EXCEEDS CONGRESS' AUTHORITY**

The ETS is a gross intrusion into the States' police powers and unconstitutionally extends the Commerce Clause beyond recognition. The Tenth Amendment states that any powers not delegated by the Constitution to the federal government are reserved to the States or the people. Historically the police powers, including the power to regulate public health, safety and welfare, are an archetypal part of those powers that the Framers reserved to the States. *See Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1088 (9th Cir. 2021); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561 (1906). *See also Smith v. Turner*, 48 U.S. 283 (1849) (the States may pass quarantine and health laws in the exercise of police powers and that such laws are not regulations of commerce); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (the States' authority is distinctly recognized to enact quarantine and "health laws of every description.").

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

Nevertheless, in a September 9, 2021, speech,<sup>2</sup> President Biden revealed the true intent of the ETS, stating: “I’m announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health.” This type of general regulation of public health is well beyond the scope of interstate commerce. 29 U.S.C. §§ 651 *et seq.* On more than one occasion, the Supreme Court has reigned in similar attempts by the federal government to expand the Commerce Clause into a general police power, because that police power is reserved to the States. *See United States v. Lopez*, 514 U.S. 549, 567 (1995); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (“people, for reasons of their own, often fail to do things that would be good for them or good for society” but the Government may not use the Commerce Clause to compel citizens to buy vegetables).

The idea that the Government intended to use the ETS as a means to trample on the traditional police powers of the state is not merely theoretical. The ETS makes this goal explicit. In describing the events leading up to OSHA issuing the ETS, the agency specifically noted with alarm that, “an increasing number of states have promulgated Executive Orders or statutes that prohibit workplace vaccination policies that require vaccination or proof of vaccination status[.]” 86 Fed. Reg. 61,402-01, 61,432. It also noted that certain states have banned mask mandates in workplaces. *Id.* OSHA made clear that the ETS was intended to halt this trend of

---

<sup>2</sup> *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28pm EDT), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

states enforcing their traditional police powers in the area of vaccinations as they see fit. *Id.* at 61,506 (stating that it was “OSHA’s intent to preempt all inconsistent State and local requirements that relate to the issues addressed by this ETS”), 61,508 (describing how state restrictions on vaccine mandates “serve as a barrier to OSHA’s implementation of this ETS” and are therefore preempted).

Not only is the ETS an unconstitutional power grab under the guise of workplace safety, but on November 9, 2021, the White House openly defied the Fifth Circuit’s temporary injunction preventing implementation of the ETS. *See BST Holdings, L.L.C. v Occupational Safety and Health Admin.*, No. 21-60845, 2021 WL 5279381, at \*9, 17 F.4<sup>th</sup> 604 (5th Cir. Nov. 12, 2021) (“*BST*”) (reaffirming injunction). At a press gathering that day, Principal Deputy Press Secretary Karine Jean-Pierre explicitly stated they “continue to advocate” to “push businesses to move forward with their policies now.”<sup>3</sup> Ms. Jean-Pierre made this statement even though the Fifth Circuit’s order directed that the government “take no steps to implement or enforce the Mandate until further court order.” *BST*, 2021 WL 5279381 at \* 9.

## **2. THE ETS EXCEEDS THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970**

OSHA has never been permitted to issue an emergency temporary standard this broad, and it may not do so now. If no enumerated power authorizes Congress

---

<sup>3</sup> *Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre and Commerce Secretary Gina Raimondo*, The White House Briefing Room (November 9, 2021, 1:15pm EDT), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/09/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-and-commerce-secretary-gina-raimondo/>.

to pass a certain law, that law may not be enacted. *Sebelius*, 567 U.S. at 535. The ETS goes well beyond the Commerce Clause’s interest in workplace safety, the sole domain that would be appropriate for an ETS, and instead tramples upon the police powers reserved to the States in an unlawful attempt to regulate public health. *BST*, 2021 WL 5279381 at \*3 (stating that the Commerce Clause and nondelegation doctrine would not permit OSHA to take over the traditional public health role of the states).

OSHA’s “authority to establish emergency standards pursuant to 29 U.S.C. § 655 (c) is an ‘extraordinary power’ that is to be ‘delicately exercised’ in only certain ‘limited situations.’” *In re Intern. Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (quoting *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir.1983)). With this in mind, emergency standards are viewed as “an ‘unusual response’ to ‘exceptional circumstances.’” *Id.* (quoting *Auchter*, 702 F.2d at 1155). Reflecting this extraordinary nature, in total over the last fifty years, OSHA has issued just ten emergency temporary standards. *BST*, 2021 WL 5279381 at \*1. Prior to the present pandemic, OSHA last invoked its emergency temporary standard authority to lower workers’ exposure to asbestos in 1983, which the Fifth Circuit struck down because OSHA failed to demonstrate a grave risk over the six-month period necessary to promulgate regulations. *See Asbestos Info. Ass’n/North Am. v. OSHA*, 727 F.2d 415, 417 (5th Cir. 1984). In fact, employers have successfully challenged emergency standards on five occasions involving pesticides, carcinogens, diving operations, benzene and asbestos. *See Fla. Peach Growers Ass’n v. Dep’t of*

*Labor*, 489 F.2d 120, 122 (5th Cir. 1974) (pesticides); *Dry Color Mfrs' Ass'n v. Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973) (carcinogens); *Taylor Diving & Salvage Co. v. Dep't of Labor*, 599 F.2d 622 (5th Cir. 1979) (diving operations); *API v. OSHA*, 581 F.2d 493 (5th Cir. 1978) (benzene); *Asbestos Info.*, 727 F.2d 415 (asbestos).

The instant ETS is unique. No other OSHA permanent standard or emergency temporary standard has been promulgated with the claimed goal of protecting workers across all job types and industries from exposure to a virus they are equally exposed to outside the workplace. This fact warrants even further increased scrutiny from the Court when examining the constitutionality of the ETS.

### **3. OSHA FAILED TO SATISFY THE REQUIREMENTS FOR AN EMERGENCY TEMPORARY STANDARD**

Given the extraordinary nature of an emergency temporary standard, Congress required OSHA to satisfy a very high bar before adopting such a standard. *BST*, 2021 WL 5279381 at \*4 (“the precision of this standard makes it a difficult one to meet”). In fact, OSHA itself frequently denies requests for emergency temporary standards because of what it views as “the extremely stringent judicial and statutory criteria for issuing’ an emergency standard[.]” *Pub. Citizen Health Research Group v Chao*, 314 F.3d 143, 147 (3d Cir. 2002) (quoting a letter from OSHA explaining its reasons for refusing to issue an emergency standard); *see also In re AFLCIO*, No. 20-1158, 2020 WL 3125324, at \*1 (D.C. Cir. June 11, 2020) (discussing OSHA’s denial of a request for an emergency standard). Those stringent statutory criteria require that the emergency temporary standard must: “(1) address ‘substances or agents determined to be toxic or physically harmful’ – or ‘new hazards’– in the workplace; (2)

show that workers are exposed to such ‘substances,’ ‘agents,’ or ‘new hazards’ in the workplace; (3) show that said exposure places workers in ‘grave danger’; and (4) be ‘necessary’ to alleviate employees’ exposure to gravely dangerous hazards in the workplace.” *BST*, 2021 WL 5279381 at \*4 (quoting 29 U.S.C. § 655(c)(1)); *In re AFLCIO*, 2020 WL 3125324, at \*1 (“The agency is authorized to issue an ETS if it determines that ‘employees are exposed to grave danger’ from a new hazard in the workplace, and an ETS is ‘necessary’ to protect them from that danger.”) Here, the instant ETS does not meet these requirements.

**i. THE VIRUS IS NOT A TOXIC OR PHYSICALLY HARMFUL SUBSTANCE**

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

Prior to the instant ETS, OSHA had never declared an airborne virus to be a “substance[] or agent[] determined to be toxic or physically harmful” or a “new hazard” within the meaning of 29 U.S.C. § 655 (c)(1). That is not surprising because nothing

in the language of that section indicates that a virus would fall within the section's ambit. The language of the statute suggests it applies to toxic or poisonous substances, but not to an airborne virus widely present throughout society at large, and not particular to any workplace. *BST*, 2021 WL 5279381 at \*5. Nor can COVID-19 be considered a “new hazard[;]” it has been spreading widely throughout the world for nearly two years. *Id.* Instead, it seems more like OSHA is attempting to force and stretch the statutory definition to fit COVID-19, but the two do not truly match up. As it is not a “new hazard,” there is no need for any emergency temporary standard.

**ii. OSHA HAS FAILED TO SHOW EVIDENCE OF GRAVE DANGER**

Next, OSHA must show that it is addressing a “grave danger.” 29 U.S.C. § 655 (c)(1); *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am., UAW v. Donovan*, 590 F. Supp. 747, 749-50 (D.D.C. 1984), adopted, 756 F.2d 162 (D.C. Cir. 1985). OSHA has not shown that COVID-19 is a grave danger that requires an emergency remedy now, or one that cannot wait for the normal notice and comment procedure. The grave danger requirement is a higher bar than the significant risk requirement applicable to promulgating a normal standard. *Donovan*, 590 F. Supp. at 755-56; *see also Indus. Union Dep't, AFL-CIO*, 448 U.S. 607, 640 n.45 (1980) (noting the distinction between the standard for risk findings in permanent standards and ETSs).

OSHA previously determined “in June 2020 that an emergency temporary standard ... was ‘not necessary’ to ‘protect working people from occupational exposure to infectious disease, including COVID-19.’” *BST*, 2021 WL 5279381 at \*1 (quoting

*In re AFLCIO*, No. 20-1158, 2020 WL 3125324, at \*1 (D.C. Cir. June 11, 2020)). Thereafter, in June 2021, OSHA revised its conclusion stating that COVID-19 only posed a grave danger to workplaces providing healthcare services. *See* 86 Fed. Reg. 32,376 (June 21, 2021). However, in November 2021 it reversed itself entirely, declaring that COVID-19 actually posed a grave danger to all unvaccinated workers in all indoor workplaces. 86 Fed. Reg. 61,402 (III)(A). The major difference between June and November 2021 is that during the intervening time the President directed OSHA to declare that a grave danger existed for all workplaces with 100 or more employees.

Furthermore, a “grave danger” only necessitates an emergency temporary standard if there is need for new regulations addressing that danger “to take immediate effect.” 29 U.S.C. § 655 (c)(1). Here, the White House itself established that there is no need for immediate action. First, as noted, President Biden declared the need for these requirements on September 9, 2021, but then it took over two months for OSHA to release the ETS. Furthermore, the White House has delayed the requirement for federal contractors to be vaccinated until after the holidays (first pushing off the December 8<sup>th</sup> implementation deadline until January 4<sup>th</sup><sup>4</sup> and then again delaying until January 18<sup>th</sup>).<sup>5</sup> Likewise, on November 30, 2021, OSHA

---

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

<sup>5</sup> *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, Safer Federal Workforce Task Force (Updated November 10, 2021), *available at* <https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors%20Safer%20Federal%20Workforce%20Task%20Force%2020211110.pdf>.

“extended the comment period for the” ETS “to Jan. 19, 2022.”<sup>6</sup> Presumably, it took these actions to avoid backlash associated with terminating a large portion of the workforce prior to the gift-giving season. However, if the ETS can wait months to be implemented, then it is hard to see how it requires “immediate” action. Instead, if the rule can wait for months, this appears a more appropriate topic for the, at best, normal rulemaking, not an emergency standard.

### iii. OSHA HAS FAILED TO SHOW NECESSITY

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

To the contrary, President Biden has stated that a combination of testing, masking, adequate ventilation, social distancing and vaccination is adequate for children to be safe from COVID-19 in schools.<sup>7</sup> Likewise, the ETS permits businesses that employ fewer than 100 employees to not require vaccines or even masking. Even

---

<sup>6</sup> Press release, *US Department of Labor extends comment period for COVID-19 vaccination and testing emergency temporary standard*, OSHA (Nov. 30, 2021) available at <https://www.osha.gov/news/newsreleases/national/11302021>.

<sup>7</sup> *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House Briefing Room (September 9, 2021, 5:28 pm EDT), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

though the Administration apparently believes that these measures could keep school children and workplaces with fewer employees safe, the ETS asserts these same measures are inadequate for workplace safety in larger companies in other industries nationwide. This is illogical at best, there is nothing about a company going from 99 employees to 100 employees that should change the necessity of vaccination, nor is there a substantive distinction between school children in a classroom and employees in a single room in other industries. The ETS, for example, is not limited to workplaces where individuals are tightly clustered; it treats a massive Amazon warehouse, where most employees are spread out over a huge area, the same as a meat packing plant where workers stand cheek to jowl. It simply applies to all companies over 100 employees, largely regardless of their configuration.

In addition, as discussed below, the science shows that vaccination does not prevent transmission of COVID-19. (*Infra* § I(D)(1).) If the whole goal of the ETS is to prevent the spread of the virus, but the vaccine does not prevent that spread, then how is vaccination a necessary measure for a vast swath of the American population.

This disjointed logic reveals the true intent to regulate the public health by unconstitutionally usurping state police powers.

#### **4. THE ETS VIOLATES THE ADMINISTRATIVE PROCEDURES ACT**

The Administrative Procedures Act (“APA”) requires this Court to set aside the ETS on the grounds that it is arbitrary and capricious, an abuse of discretion, and contrary to constitutional power. 5 U.S.C. § 706. The ETS lacks narrow tailoring by failing to account for industry-specific norms, workplace and employee characteristics,

and exposure to non-employees. Further, as discussed below, OSHA failed to take into consideration that vaccinated individuals are still capable of contracting and spreading COVID-19. (*Infra* § I(D)(1)).

The OSH Act authorizes OSHA to protect employees from exposure *in the workplace*, however this ETS is an abuse of discretion because it is an attempt to protect employees from a virus that they are equally exposed to through participation in society. Moreover, the assumption that all businesses with 100 employees are engaging in interstate commerce lacks justification and is an unlawful extension of its enabling statute and the Commerce Clause. For these reasons, the APA requires this ETS be set aside.

## **B. BETTEN WILL SUFFER IRREPARABLE INJURY ABSENT A STAY**

If the stay is not extended, Betten will suffer irreparable harm. First, the injury of losing a substantial portion of Betten's workforce is quantifiable. *See Betten Chevrolet, Inc. v. Occupational Health and Safety Administration*, No. 21-4114, ECF No. 52 (Nov. 23, 2021) (Declaration of Bryan Betten). Second, the harm will be immediate because data from Bureau of Labor Statistics reflects 4.4 million workers quit their jobs in September 2021 and another 4.1 million quit in October 2021.<sup>8</sup>

---

<sup>8</sup> *Economic News Release, Quits levels and rates by industry and region, seasonally adjusted*, U.S. Bureau of Labor Statistics (December 8, 2021), available at <https://www.bls.gov/news.release/jolts.t04.htm>.

Additionally, several large employers have experienced consequences of employee walkouts, including Southwest Airlines,<sup>9</sup> General Electric,<sup>10</sup> and the Henry Ford Health System.<sup>11</sup> Newsweek reported that “working class Americans” are refusing the vaccine,<sup>12</sup> and reported that the American Trucking Associations could lose 37 percent of its workforce.<sup>13</sup> Working class Americans is precisely the demographic that Betten employs. The testing and masking option does not alleviate Betten’s injury because employees are able to seek employment through one of twelve local competing automotive dealerships that are not governed by the ETS. A finding of irreparable harm is appropriate even when the value of the loss is especially difficult or speculative. This Court recently found a likelihood of irreparable harm when quantifying the “harm with any level of precision would be impossible.” *RECO*

---

<sup>9</sup> *Southwest Airlines won't fire unvaccinated employees: 'It makes no sense'*, Fox 7 Austin (October 23, 2021), available at <https://www.fox7austin.com/news/southwest-airlines-wont-fire-unvaccinated-employees-it-makes-no-sense>.

<sup>10</sup> Singleton, Mikhaela, *200+ GE employees, union members stage walk-out in Schenectady Friday protesting vaccine mandate*, WIVB, available at <https://www.wivb.com/news/new-york/albany-capital-region/200-ge-employees-union-members-stage-walk-out-in-schenectady-friday-protesting-vaccine-mandate/>.

<sup>11</sup> Wells, Kate, *400 workers out, 1,900 exempt after Henry Ford COVID vaccine mandate*, Michigan Radio (October 5, 2021), available at <https://www.michiganradio.org/health/2021-10-05/400-workers-out-1-900-exempt-after-henry-ford-covid-vaccine-mandate>.

<sup>12</sup> *Id.*

<sup>13</sup> Rouhandeh, Alex J., *Truck Drivers, Facing Shortages, Expect More to Quit Over Biden Vaccine Mandate*, Newsweek (November 4, 2021), available at <https://www.newsweek.com/truck-drivers-facing-shortages-expect-more-quit-over-biden-vaccine-mandate-1646003>.

*Equip., Inc. v. Wilson*, No. 20-4312, 2021 U.S. App. LEXIS 32413, at \*13 (6th Cir. Oct. 28, 2021).

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

### **C. A STAY WILL NOT SUBSTANTIALLY HARM OSHA**

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

### **D. A STAY IS IN THE PUBLIC INTEREST**

#### **1. COVID-19 VACCINES DO NOT PREVENT INFECTION OR TRANSMISSION**

OSHA stated in the ETS that it was issuing the new standard “to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19 by strongly encouraging vaccination.” 86 Fed. Reg. 61,402 (Summary). However, the science has shown that the vaccines do not prevent individuals from contracting COVID-19. Even if every employee in a workplace was

vaccinated, the virus would still be able to infect employees and spread to others. This is because the COVID-19 vaccines do not prevent infection and transmission of the SARS-CoV-2 virus. They only reduce symptoms after infection.

The clinical trials for the COVID-19 vaccines were only designed to measure effectiveness against the symptoms of the infection – not against contracting the virus or transmitting the infection to others.<sup>14</sup> However, after millions of people were vaccinated, the CDC’s Director, Dr. Walensky, acknowledged that the COVID-19 vaccines do not “prevent transmission.”<sup>15</sup> This is why the CDC recommends that vaccinated individuals wear masks indoors.

The CDC’s conclusion that the COVID-19 vaccine does not prevent transmission resulted from, among other things, a study it conducted after an outbreak in Barnstable County, Massachusetts. In that study, the CDC found that 74% of those infected in the outbreak were fully vaccinated for COVID-19, and that vaccinated individuals had on average more virus in their nose than the unvaccinated individuals that were infected.<sup>16</sup>

---

<sup>14</sup> Sara E. Oliver, *et al.*, *The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine - United States, December 2020* MMWR Morb Mortal Wkly Rep (December 18, 2020) <https://pubmed.ncbi.nlm.nih.gov/33332292/>.

<sup>15</sup> The Situation Room, CNN (August 5, 2021) *available at* <https://twitter.com/CNNSitRoom/status/1423422301882748929>.

<sup>16</sup> Brown CM, *et al.*, *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts*, MMWR Morb Mortal Wkly Rep (August 6, 2021) <https://pubmed.ncbi.nlm.nih.gov/34351882/>.

Dr. Anthony Fauci has recognized this as failure of the vaccines as well: “Vaccination has also been unable to prevent ‘breakthrough’ infections, allowing subsequent transmission to other people even when the vaccine prevents severe and fatal disease.”<sup>17</sup>

Similarly, COVID-19 vaccines could *not* fully block viral infection and replication in the nose of monkeys upon viral exposure,<sup>18</sup> which was confirmed by nasal, throat, and anal swabs.<sup>19</sup> This finding was again confirmed by an outbreak among 42 patients in a hospital setting where “39 were fully vaccinated,” the “index case was a fully vaccinated,” and “all transmission between patients and staff occurred between masked and vaccinated individuals, as experienced in an outbreak from Finland.” The study concluded that this “outbreak exemplifies the high transmissibility of the SARS-CoV-2 Delta variant among twice vaccinated and masked individuals.”<sup>20</sup>

Another study of infections across 36 counties in Wisconsin by the CDC and Wisconsin’s Department of Health Services observed high viral load in 68% of the

---

<sup>17</sup> Morens, D., Taubenberger, J., and Fauci, A, *Universal Coronavirus Vaccines – An Urgent Need*, The New England Journal of Medicine (December 15, 2021) <https://www.nejm.org/doi/full/10.1056/NEJMp2118468>.

<sup>18</sup> Kizzmekia S. Corbett, Ph.D, *et al.*, *Evaluation of the mRNA-1273 Vaccine against SARS-CoV-2 in Nonhuman Primates*, N Engl J Med (July 28, 2020) <https://pubmed.ncbi.nlm.nih.gov/32722908/>.

<sup>19</sup> Wei Deng, *et al.*, *Primary exposure to SARS-CoV-2 protects against reinfection in rhesus macaques*, Science (August 14, 2020) <https://pubmed.ncbi.nlm.nih.gov/32616673/>.

<sup>20</sup> Pnina Shitrit *et al.*, *Nosocomial outbreak caused by the SARS-CoV-2 Delta variant in a highly vaccinated population, Israel, July 2021*, Eurosurveillance (September 30, 2021) <https://pubmed.ncbi.nlm.nih.gov/34596015/>.

fully vaccinated individuals and in 63% of the unvaccinated individuals.<sup>21</sup> This reflects that the vaccinated individuals will shed virus and will do so at the same rate as the unvaccinated individuals. This finding was unsurprising as the CDC had long admitted the vaccine does not prevent transmission. But the standout observation was that among those who were asymptomatic (meaning no symptoms but yet infectious), 29% of the unvaccinated subjects had high viral load, while 82% of the fully vaccinated subjects had high viral load.

A paper published in September 2021 further confirms that vaccination does not lower the spread of COVID-19, as can be seen by its title: “Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States.”<sup>22</sup> It found that:

At the country-level, there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases in the last 7 days.... In fact, the trend line suggests a marginally positive association such that countries with higher percentage of population fully vaccinated have **higher COVID-19 cases** per 1 million people. Notably, Israel with over 60% of their population fully vaccinated had the highest COVID-19 cases per 1 million people in the last 7 days.<sup>23</sup> (emphasis added).

---

<sup>21</sup> Riemersma, Kasen et al., *Shedding of Infectious SARS-CoV-2 Despite Vaccination*, MedRxiv (August 24, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v4.full.pdf>.

<sup>22</sup> S. V. Subramanian and Akhil Kumar, *Increase in COVID-19 are unrelated to level of vaccination across 68 countries and 2,497 counties in the United States*, [Eur J Epidemiol.](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/) (Sept.30, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/>.

<sup>23</sup> *Id.*

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

These papers establish that OSHA's justification for the ETS, to prevent the spread of the virus, and thereby lessen the risk of employees contracting COVID-19, is not supported by the most recent science. Because the vaccines do not prevent infection and do not prevent transmission, vaccination for COVID-19 is a self-protecting measure, at best, and therefore, the ETS will never achieve its stated goals.

OSHA asserts several times that "unvaccinated workers are being hospitalized with COVID-19 every day and many are dying." OSHA fails to acknowledge let alone explain how the ETS will prevent this as vaccinated individuals are also being hospitalized with COVID-19 every day and many are dying.<sup>24</sup> The ETS will not prevent both groups from being hospitalized and dying. Since COVID-19 vaccines do not stop infection and transmission, there is no, "ensuring employees do not transmit a deadly virus to each other" as OSHA asserts.

## **2. VACCINE MANUFACTURERS ARE IMMUNE FROM LIABILITY**

OSHA's dictate is authoritarian because it is mandating that millions of workers receive vaccines even though the companies that manufactured and sold the

---

<sup>24</sup> Lapid, Nancy, *Breakthrough infections raise health, death risk; vaccine passports without testing allow cases to be missed*, Yahoo! News (November 19, 2021), available at <https://news.yahoo.com/breakthrough-infections-raise-health-death-192154873.html>; Syal, M.D., Akshay, *Hospitalizations rising among fully vaccinated in U.S., Fauci says*, ABC News (November 17, 2021), available at <https://www.nbcnews.com/health/health-news/hospitalizations-rising-fully-vaccinated-us-fauci-says-rcna5907>.

vaccines cannot be held liable for injuries. In March 2020, Health and Human Services (“HHS”) Secretary Alex Azar invoked the Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6d (“PREP Act”), to grant pharmaceutical companies complete immunity from liability for injuries caused by their COVID-19 vaccine products. Vaccine manufacturers cannot be sued, vaccine administrators cannot be sued, the FDA cannot be sued, and employers cannot be sued for having mandated the vaccine as a condition of employment. 42 U.S.C. § 247d-6d. Thus, if an employee is injured by the vaccine, they have no recourse against any of these entities, but if the employee refuses the vaccine, he can be fired from his job.

Incredibly, the vaccine manufacturers also cannot even be sued for willful misconduct regarding their COVID-19 vaccines unless HHS and the Department of Justice agree to bring such a claim. 42 U.S.C. § 247d-6d(c)(5). However, HHS has been promoting this vaccine widely and the Biden Administration now seeks to mandate that vast swaths of the American population receive the vaccine. Hence, any admission by HHS that willful misconduct occurred would be an admission that HHS failed in its duties, thus creating a moral hazard whereby the only entities that can expose wrongdoing has an incentive to never do so.

It is unconscionable that while the federal government protects vaccine manufacturers from any financial liability for injuries, it seeks to eliminate the right of Americans to earn a living if they refuse to receive this liability-free product that at best only protects them. That should not be.

Compounding the foregoing, the FDA has refused to release the data underlying the licensure of the Pfizer vaccine, despite its repeated promise of “full transparency”<sup>25</sup> with regard to Covid-19 vaccines, including reaffirming “the FDA’s commitment to transparency”<sup>26</sup> when licensing Pfizer’s Covid-19 vaccine. As part of a recent case brought under the Freedom of Information Act, the FDA admitted “that there are more than 451,000 pages potentially responsive to Plaintiff’s FOIA request” seeking the documents used to approve Pfizer’s vaccine. *See Public Health and Medical Professionals For Transparency v. FDA*, Case No. 4:21-cv-01058-P (N.D. Tx.) Dkt. No. 20. However, the FDA has proposed to release just 500 pages per month. At that rate will fully release the data submitted to Pfizer to license its COVID-19 vaccine by the year 2096. Meaning the executive branch wants to mandate Pfizer’s vaccine on Americans, give Pfizer complete immunity to liability for injuries caused to Americans by its vaccine, but prevent Americans and independent scientists from reviewing the data Pfizer submitted to the FDA during most of their lifetimes.

### **3. THE ETS FAILS TO ACCOUNT FOR WORKERS WITH NATURAL IMMUNITY**

OSHA’s ETS makes no mention of or allowances for those previously infected with COVID-19 (“**naturally immune individuals**”). 86 Fed. Reg. 61,402-01, 61,421. This is despite the fact that naturally immune individuals have superior protection

---

<sup>25</sup> <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-announces-advisory-committee-meeting-discuss-second-covid-19-vaccine>.

<sup>26</sup> <https://www.fda.gov/news-events/press-announcements/fda-authorizes-booster-dose-pfizer-biontech-covid-19-vaccine-certain-populations>.

from becoming infected with and transmitting SARS-CoV-2 when compared to individuals who were vaccinated for Covid-19. Due to this superior immunity in those who have already had and recovered from COVID, they should not be required to vaccinate or test pursuant to the ETS.

Every single peer reviewed study has found that naturally immune individuals have far greater than 99% protection from having COVID-19, and this immunity does not wane.<sup>27</sup> In contrast, the COVID-19 vaccine provides, at best, 95% protection and this immunity wanes rapidly.<sup>28</sup> And, while vaccinated individuals readily transmit the virus, that is not the case for naturally immune individuals.<sup>29</sup>

While the U.S. does not publish data on natural immunity, the U.K.'s official government COVID-19 data shows a **probable reinfection rate** of 0.025% through August 19, 2021 during Delta.<sup>30</sup> In contrast, this same data shows, through

---

<sup>27</sup> Horowitz, Daniel, *Horowitz: Israeli government data shows natural immunity from infection much stronger than vaccine-Induce immunity / Opinion*, Blaze Media (July 14, 2021), available at <https://www.theblaze.com/op-ed/horowitz-israeli-government-data-shows-natural-immunity-from-infection-much-stronger-than-vaccine-induced-immunity>.

<sup>28</sup> Einav G. Levin, M.D., *et al.*, *Waning Immunity Humoral Response to BNT162b2 Covid-19 Vaccine over 6 months*, The New England Journal of Medicine (October 6, 2021) <https://www.nejm.org/doi/full/10.1056/NEJMoa2114583>.

<sup>29</sup> Letter from Centers for Disease Control and Prevention to Siri & Glimstad LLP (November 5, 2021) available at <https://www.sirillp.com/wp-content/uploads/2021/11/21-02152-Final-Response-Letter-Brehm-1.pdf>.

<sup>30</sup> *Weekly National Influenza and COVID-19 Surveillance Report*, Public Health England (August 19, 2021), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1012240/Weekly\\_Flu\\_and\\_COVID-19\\_report\\_w33.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1012240/Weekly_Flu_and_COVID-19_report_w33.pdf) at 17-18.

September 2, 2021, a **vaccine breakthrough rate** for Delta infections of **23%**.<sup>31</sup> This is in line with the director of the CDC, Dr. Walensky's, statement that, "A modest percentage of people who are fully vaccinated will still get Covid-19 if they are exposed to the virus that causes it."<sup>32</sup>

The following studies are consistent with the UK data and confirm that reinfections are exceedingly rare as well as confirm the durability of natural immunity:

1. Cleveland Clinic study of 52,238 health care workers over a five-month period found that none of the previously infected who remained *unvaccinated* contracted SARS-CoV-2 despite a high background rate of COVID-19 in the hospital.<sup>33</sup>
2. Ireland's Health Information & Quality Authority review of 11 cohort studies involving over 600,000 total recovered COVID-19 patients with followed up over 10 months found that that reinfection was "an uncommon event" and that there was "no study reporting an increase in the risk of reinfection over time."<sup>34</sup>
3. WHO and Weill Cornell Medicine-Qatar study analyzed the population-level risk of reinfection based on whole genome sequencing, tracking 43,044 individuals for up to 35 weeks, and found that just 0.02% experienced reinfection (an estimated risk of <1 reinfection (0.66) per

---

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *What to Know About Breakthrough Infections and the Delta Variant*, The New York Times, available at <https://www.nytimes.com/article/covid-breakthrough-delta-variant.html>.

<sup>33</sup> Nabin K. Shrestha, *et al.*, *Necessity of COVID-19 vaccination in previously infected individuals*, medRxiv (June 19, 2021) <https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v3>.

<sup>34</sup> Eamon Murchu, *et al.*, *Quantifying the risk of SARS-CoV-2 reinfection over time*, *Reviews of Medical Virology* (May 27, 2201) <https://pubmed.ncbi.nlm.nih.gov/34043841/>.

10,000 person-weeks) with no evidence of waning immunity during the over seven month follow-up period.<sup>35</sup>

On the other hand, the rate of breakthrough cases in vaccinated individuals is multiple times higher than the rate of reinfections. The following studies affirm that natural immunity provides greater protection:

1. Maccabi Healthcare and Tel Aviv University study of 42,000 previously infected and 62,000 fully vaccinated individuals found that the fully vaccinated individuals were 8 times more likely to be hospitalized, 13 times more likely to get infected, and 27 times more likely to have symptoms, concluding that “natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 [Pfizer] two-dose vaccine-induced immunity.”<sup>36</sup>
2. Israeli Health Ministry review of 835,792 individuals found that the vaccinated had 6.72 times the rate of infection as compared to the previously infected.<sup>37</sup>
3. A nation-wide study of over 6 million individuals in Israel found that vaccine immunity had an efficacy of 92.8% for documented infection, 94.2% for hospitalization, and 94.4% for severe illness, but that naturally immune individuals had a higher rate of protection in all three of these categories.<sup>38</sup>

Moreover, while the risk of reinfection has not increased over time (see studies cited above), the risk of breakthrough infections is increasing over time. This is

---

<sup>35</sup> Laith J. Abu-Raddad, *et al.*, *SARS-CoV-2 antibody-positivity protects against reinfection for at least seven months with 95% efficacy*, *EClinical Medicine* (April 28, 2021) <https://pubmed.ncbi.nlm.nih.gov/33937733/>.

<sup>36</sup> *Id.*

<sup>37</sup> Rosenberg, David, *Natural Infection vs Vaccination: Which Gives More Protection?* *Israel National News*, (July 13, 2021), available at <https://www.israelnationalnews.com/News/News.aspx/309762>.

<sup>38</sup> Yair Goldberg, *et al.*, *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, *medRxiv* (April 24, 2021) <https://www.medrxiv.org/content/10.1101/2021.04.20.21255670v1>.

because the protection from natural immunity remains stable whereas vaccine immunity is rapidly waning.

**II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT AND DECIDE THIS CASE ON AN EXPEDITED BASIS**

In lieu of granting a stay, the Court should consider this application as a petition for a writ of certiorari before judgment and hear the case on the merits. *See Nken v. Mukasey*, 555 U.S. 1042 (2008). Under this Court's Rule 11, "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

COVID-19 vaccination generally, and mandates in particular, are some of the most hotly addressed issues in America today. Likewise, it is important for this Court to settle whether a federal agency can use the power granted to it by Congress under the Commerce Clause to institute such a sweeping usurpation of state's traditional police powers. Moreover, the ETS affects millions of workers, many of whom will be forced out of their current jobs. Thus, the public importance of the questions raised by this appeal is beyond dispute.

In light of the public importance of the issues involved, and the number of petitioner employers across the United States, the entire case, qualifies for certiorari review before judgment. *See Clinton v. City of N.Y.*, 524 U.S. 417, 455 (1998) (Scalia, A., dissenting). Further, without granting certiorari before judgment, "this Court would not be able to review" the "important dispute" regarding the ETS's legality

“until next Term at the earliest.” *Petition for Writ of Certiorari Before Judgment, Dep’t of Commerce v. New York*, No. 18-966 at 16, (U.S., Jan. 25, 2019).

### III. THE COURT SHOULD ISSUE AN IMMEDIATE ADMINISTRATIVE STAY

Betten respectfully requests an immediate administrative stay to prevent OSHA from enforcing the ETS. A stay will ensure that the Court has adequate time to review filings in this case while simultaneously preventing irreversible harm that would otherwise occur during the interim. The Court should therefore enter an administrative stay to maintain the status quo while the Court determines whether to grant a stay pending review, a writ of certiorari before judgment, or both. Issuing an administrative stay is particularly appropriate here, given that a stay had already been in place for weeks before the panel abruptly lifted it. Requiring businesses to take steps to implement the Mandate now, while many employers are understaffed due to the holidays, and pending this Court’s decision would have significant destabilizing effects across the economy.

### IV. CONCLUSION

The Court should stay the ETS pending review, grant certiorari before judgment, or both.

Dated: December 20, 2021

Respectfully submitted,

/s/Thomas Bruns  
Counsel of Record  
THOMAS BRUNS  
Bruns Connell Volmar  
Armstrong, LLP  
2750 Ashwood Dr.,

AARON SIRI  
ELIZABETH A. BREHM  
URSULA SMITH  
Siri & Glimstad LLP  
200 Park Avenue,  
17th Floor

CHRISTOPHER WIEST  
Chris Wiest Attorney at  
Law, PLLC  
25 Town Center Blvd,  
Ste. 104

Ste. 202  
Cincinnati, OH 45241  
[Tel.] (212) 532-1091  
tbruns@bcvalaw.com

New York, NY 10166  
[Tel.] (212) 532-1091  
aaron@sirillp.com  
ebrehm@sirillp.com  
usmith@sirillp.com

Crestview Hills, KY  
41017  
[Tel.] (513) 257-1895  
chris@cwiestlaw.com

*Attorneys for Petitioner*  
BETTEN CHEVROLET, INC.