

No. 21A248

In the Supreme Court of the United States

BST HOLDINGS, LLC, ET AL.,
Applicants,

v.

DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, ET AL.,

On Emergency Application for a Writ of Stay

To the Honorable Brett Kavanaugh,
Associate Justice of the United States and
Circuit Justice for the Sixth Circuit

**RESPONSE OF NORTH DAKOTA EMPLOYERS AND
EMPLOYEES IN SUPPORT OF
EMERGENCY APPLICATION FOR WRIT OF STAY**

QUESTION PRESENTED

Did the Occupational Safety and Health Administration (OSHA) exceed its lawful authority by issuing an ETS that mandates a vaccination policy for all workplaces with at least 100 employees?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners DTN Staffing, Inc., Miller Insulation Company, Inc., Aaron Janz, Brad Miller, Corey Hager, Jamie Fleck, Julio Hernandez Ortiz, Sadie Haws, Sheriff Sharma, and Wendi Johnston (“North Dakota employers and employees”) herein respond to the Emergency Application for Writ of Stay filed by BST Holdings, LLC, *et al.* on December 18, 2021. Petitioners brought their own Petition for Review of OSHA’s Emergency Temporary Standard (ETS) at issue in this matter in the Eighth Circuit of the U.S. Court of Appeals, before the cases were consolidated and transferred to the Sixth Circuit.

Other Petitioners below included: AAI, Inc.; Aaron Abadi; 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; Betten Chevrolet, Inc.; 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; 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; 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; Jasand Gamble; Job Creators Network; 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; Mississippi Trucking Association; Missouri Farm Bureau Services, Inc.; Missouri Fam 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; 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; 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; 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; 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; and Word of God Fellowship, Inc. d/b/a Daystar Television Network.

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.

RULE 29.6 STATEMENT

Supreme Court Rule 29.6 requires Petitioner North Dakota employers and employees hereby submit the following corporate-disclosure statement.

1. Petitioners have no parent corporation other than Miller Insulation Company, Inc., whose parent corporation is Miller Enterprises, Inc.

2. No publicly held corporation owns any portion of Petitioners, and Petitioners are not a subsidiary or an affiliate of any publicly owned corporation.

TABLE OF CONTENTS

Table of Contents	vi
Table of Authorities	vii
Introduction	1
Statement of Facts	1
Argument	2
I. Applicants Will Likely Prevail on Merits	2
A. The ETS Burdens the Free Exercise of Religion.....	2
B. The ETS Denies Fifth Amendment Liberty Interests.....	5
C. The ETS Breaches the Limits of the Commerce Power.....	10
D. The ETS Fails to Meet the Statutory Standard of Review.....	13
II. Irreparable Harm to North Dakota Employers and Employees	17
III. The Balance of Hardships Favors a Stay	18
IV. A Stay is in the Public Interest	19
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Agudath Isr. v. Cuomo</i> , 983 F.3d 620, 635 (2020).....	8
<i>American Fed’n of Labor v. OSHA</i> , 965 F.2d 962 (11th Cir. 1992).....	13, 14
<i>Aqua Slide ’n’ Dive Corp. v. Consumer Prod. Safety Comm’n</i> , 569 F.2d 831, 838 (5th Cir.1978).....	14
<i>Asbestos Info. Association/North Am. v. OSHA</i> , 727 F.2d 415, 421 (5th Cir. 1984).....	13, 14
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682, 710 (2014).....	3
<i>Cruzan v. Director, Missouri Dept. of Health</i> , 497 U.S. 261, 278-279 (1990).....	5, 6
<i>Hilton v. Braunskill</i> , 481 U.S. 770, 776 (1987).....	2
<i>Industrial Union Department v. API</i> , 448 U.S. 607 (1980).....	14
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).....	8, 9
<i>Lynch v. Donnelly</i> , 465 U.S. 668, 673 (1984).....	3
<i>National Federation of Independent Businesses v. Sebelius</i> , 567 U.S. 519 (2012).....	10, 11, 12, 13
<i>Nken v. Holder</i> , 556 U.S. 418, 434 (2009).....	2
<i>Riggins v. Nevada</i> , 504 U.S. 127, 135 (1992).....	5, 6
<i>Rochin v. California</i> , 342 U.S. 165 (1952).....	5
<i>Roman Cath. Diocese v. Cuomo</i> , 141 S. Ct. 63, 70 (2020).....	8
<i>Sell v. United States</i> , 539 U.S. 166, 179 (2003).....	6, 7
<i>Tandon v. Newsom</i> , 141 S. Ct. 1294, 1296 (2021).....	4
<i>Texas v. United States</i> , 787 F.3d 733, 768 (5th Cir. 2015).....	19
<i>United States v. Darby</i> , 312 U.S. 100, 118-119 (1941).....	10
<i>United States v. Lee</i> , 455 U.S. 252, 257 (1982).....	3
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 720 (1997).....	5, 6, 9

Statutes and Regulations

29 U.S.C. § 651(b).....	10
29 U.S.C. § 655(f).....	14
86 Fed. Reg. 61402 (Nov 5, 2021).....	<i>passim</i>
Administrative Procedure Act.....	13
Occupational Health and Safety Act in 1970.....	10

Constitutional Provisions

First Amendment to the United States Constitution.....	1, 3, 4, 8
Fifth Amendment to the United States Constitution.....	1, 5
Fourteenth Amendment to the United States Constitution.....	5
U.S. Const. art. I, §8, cl. 3.....	1, 10

Other Authorities

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/>.....15

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>.....17

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>.....16

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/>.....3

Joel Bremen, et al., *Diagnosis and Management of Smallpox*, NE J. Med. 2002, 346:1300-1308, available at <https://www.nejm.org/doi/10.1056/NEJMra020025>.....8

John LaMattina, “Surprising 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>.....11

Mortality Analyses—Johns Hopkins Coronavirus Resource Center at <https://coronavirus.jhu.edu/data/mortality>.....9

Sivan Gazit et al., *Comparing SARS-CoV-2 Natural Immunity to Vaccine-Induced Immunity*, MedRxiv (2021), available at <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.full-text>.....15

INTRODUCTION

Petitioner North Dakota employers and employees support the Emergency Application filed by BST Holdings, LLC, *et al.*, and the arguments therein.

However, Petitioner North Dakota employers and employees advanced additional claims below that were not made by Applicants. Specifically, Petitioners maintain that the ETS violates the United States Constitution in the following respects:

1. The ETS violates the liberty interests of employees, in violation of the Fifth Amendment; and
2. The ETS violates employees' free exercise of religion, in violation of the First Amendment.

Those claims, on both of which the government must prevail if the ETS is to be sustained, are presented herein in argument sections I.A. and I.B. North Dakota employers and employees also present additional arguments in support of two of the claims that were made by Applicants, namely that the ETS unconstitutionally exceeds the limits of the Commerce Power and the ETS exceeds OSHA's statutory authority. Those arguments are presented in sections I.C. and I.D. below.

STATEMENT OF FACTS

The factual background contained in the Emergency Application of BST Holdings, LLC, *et al.* is accurate.

ARGUMENT

In deciding whether to issue a stay, this Court considers “four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors “are the most critical.” *Id.* All four factors strongly support the issuance of a stay.

I. Applicants Will Likely Prevail on the Merits.

A. The ETS Burdens the Free Exercise of Religion

The ETS disproportionately impacts 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 ETS’s alternative option of weekly testing and mask wearing also severely burdens the exercise of their religious faith. It unfairly treats them differently from vaccinated employees who do not hold the same religious beliefs by (1) forcing them to pay for weekly COVID-19 testing themselves and (2) requiring them to wear masks at all times while at work marking them with a virtual scarlet letter. Employees who refuse the vaccine must pay dearly to exercise their religious beliefs, and their employers are not required to cover that cost. Those tests can be extremely expensive, adding up to

approximately \$7,696 annually.¹

The Free Exercise Clause of the First Amendment requires government accommodation, not merely tolerance, of all religions and forbids hostility toward any. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Further, 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 to make the practice of religious beliefs more expensive in the context of one’s employment 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.

The Government will doubtless argue that the ETS is a neutrally-applicable rule that does not target any religion, and therefore is not subject to heightened scrutiny. However, this case does not fit into the neutrally-applicable-rule category so easily. “[G]overnment regulations are not neutral and generally

¹ 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.

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 or not 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. “[N]arrow 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.” *Id.* 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, (2) workplace social distancing and hand-washing requirements, or (3) a system that allows employees with natural immunity to present a positive antibodies test

result in lieu of being vaccinated. The ETS fails even to consider these less-restrictive alternatives. Petitioner North Dakota employees are therefore likely to prevail on this claim.

B. The ETS Denies Fifth Amendment Liberty Interests

All employees affected by the ETS possess an additional fundamental right that the ETS infringes. That right is a substantive liberty interest 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 Justice 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, *Glucksberg*, 521 U.S. at 720; *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 holding 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 related right to refuse unwanted medical treatment mandated by the government has been given an equally high level of constitutional protection. It was recognized 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.

The right to refuse an unwanted vaccination falls squarely within both the right to refuse unwanted medical treatment and the right to bodily integrity. 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—an utterly pointless requirement that serves as a scarlet letter identifying them to other employees and customers.

Assuming *arguendo* that the Government’s 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 significantly furthers the interest. As stated *supra*, the mandatory vaccination regime of the ETS is not necessary because there are less restrictive alternatives such as (1) regular testing of employees funded by the government, without a vaccination requirement, (2) workplace social distancing and hand-washing requirements, or (3) a system that allows employees with natural immunity to present a positive antibodies test result in lieu of being vaccinated. The Government also must demonstrate that the ETS regime will *significantly* further that interest—a difficult burden to meet. The information presented by the Government in the issuance of the ETS is purely speculative regarding the hoped-for success of the vaccine mandate.

The Government may answer that the 116-year-old case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the Supreme Court held that a state could constitutionally require members of the public to be vaccinated against smallpox, supports the ETS mandate in the instant case. However, the *Jacobson* case fails to provide adequate support for the ETS for three reasons.

First, the *Jacobson* holding is of little relevance in the modern jurisprudential era because it was decided before the development of strict scrutiny analysis and the definition of the fundamental rights that trigger strict scrutiny. As the Second Circuit recently held in a COVID-related case, the lower Court’s “reliance on *Jacobson* was misplaced.... *Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny [and] was decided before the First Amendment was incorporated against the states....” *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635 (2020). As Justice Gorsuch recently noted, “*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and entirely different kind of restriction.” *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). *Jacobson*’s antiquated line of reasoning simply cannot be transposed to the analysis of fundamental rights that applies in the context of the ETS today.²

² In addition, the danger present by smallpox a century ago was much greater. The smallpox case mortality rate is 30%, compared to the COVID-19 case mortality rate in the United States of only 1.6%. See Joel Bremen, et al., *Diagnosis and Management of Smallpox*, *NE J. Med.* 2002, 346:1300-1308, available at

Second, the *Jacobson* Court itself specifically pointed out that the decision would have been different if there had been a constitutionally protected right at issue. The Court noted that “even if based on the acknowledged police power of a state,” a public health measure “must always yield in case of conflict with ... any right which [the Constitution] gives or secures.” *Jacobson* at 25. Although the constitutional liberty interests in refusing unwanted medical treatment and bodily integrity were not yet recognized by the Court in 1905, they are now. See *Glucksberg* at 720. Among those constitutionally protected rights are the right to bodily integrity and the right to refuse unwanted medical treatment. *Id.* Therefore, according to *Jacobson* itself, the existence of a constitutionally protected interest changes the outcome. The passage of time has therefore changed the direction of the *Jacobson* holding.

Third, if the Government is going to argue that *Jacobson* remains a binding and relevant decision, they must be prepared to take the entirety of *Jacobson*. The *Jacobson* Court also held that the federal government has no constitutional role in mandating vaccinations. As the *Jacobson* Court put it:

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

197 U.S. at 38 (emphasis added). In short, *Jacobson* cannot save the ETS for

<https://www.nejm.org/doi/10.1056/NEJMra020025>; Mortality Analyses—Johns Hopkins Coronavirus Resource Center at <https://coronavirus.jhu.edu/data/mortality>.

multiple reasons. For these reasons, Petitioner North Dakota employees are likely to prevail on their liberty interest claim.

C. 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 explained 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.

Four-square guidance on the Commerce Power question, in this case, was provided in *National Federation 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. The Government 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 \$39.³ The makers of the vaccines are paid for their products, and the consumers are making subsidized purchases.

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

³ 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, "Surprising 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>.

The Government 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 *NFIB* Court emphatically rejected the argument that the failure of individuals to do what the government commands generates commerce and therefore brings the government decree within the scope of the Commerce Power:

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 *NFIB* 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 *NFIB* holding leads inexorably to the conclusion that ETS exceeds the federal government’s authority under the Commerce Power. Applicants and the North Dakota employers and employees are therefore likely to succeed on the merits of this claim.

D. The ETS Fails to Meet the Statutory Standard of Review

Applicants BST Holdings, LLC, *et al.* present several reasons why the ETS does not meet the standards required by the OSHA statute. Petitioner North Dakota employers and employees agree with those reasons. The following additional arguments further support the conclusion that Applicants are likely to prevail on this claim.

An ETS issued by OSHA must meet a statutory standard of review that is more demanding than the familiar Administrative 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 hurdles 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 heightened reasonableness review are the requirements 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. There are four additional reasons why the ETS does not meet the necessity requirement beyond those presented by Applicants.

First, the ETS fails to meet the necessity requirement because it is not accompanied by a complete cost-benefit analysis that fully accounts for the adverse economic impact of the ETS on workers who lose their jobs and on employers who lose their employees. “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, like the declarations of the North Dakota company owners describe, the ETS will have a destructive impact upon their businesses, as large percentages of their workforce will quit working for them. *See Fleck and Miller Declarations*, attached as Exhibits A and B, respectively.

Second, the ETS fails to meet the necessity requirement because it fails 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. Indeed, the ETS all but ignores natural immunity, which millions of Americans possess. Numerous studies have demonstrated that natural immunity is superior to the protection provided by the COVID-19 vaccines.⁴ Moreover, the ETS offers no answer to the numerous empirical and clinical studies showing natural immunity to be *superior* to vaccinations, particularly in stopping the variants of COVID.⁵ Therefore, the Government has offered no showing of necessity in treating those with natural immunity as if they have no immunity at all. 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/>.

⁵ For example, in Israel the vaccinated had a 13.06-fold greater risk of infection from the Delta variant than did those with natural immunity. The vaccinated were also at greater risk of requiring hospitalization. Sivan Gazit, et al., *Comparing SARS-CoV-2 Natural Immunity to Vaccine-Induced Immunity*, MedRxiv (2021), available at <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.full-text>.

ETS's disregarding these many studies also disproves the assertion that the OSHA record is comprehensive. A notice and comment period would have allowed commenters to present the many studies ignored by OSHA.

The ETS could have been designed in a more narrowly-tailored and sophisticated way, allowing employees who possess natural immunity to opt out by taking an antibody test to show that they possess the antibodies that fight COVID. The ETS also could have been designed to simply require social distancing and regular, government-funded testing of all employees, with no vaccine mandate. Because the ETS does not explain why its approach is superior to these alternative approaches, it fails to satisfy the necessity requirement.

Third, 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. Thus, the mask regime is perfectly irrational. If the most effective use of a mask is to prevent an infected person from spreading the virus,⁶ then the employees who have *not* presented a negative test result should be the ones wearing masks because vaccinated persons can become

⁶ *See* Food and Drug Administration (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.”)

infected with COVID-19 and can transmit the virus to others.⁷ For all these reasons, Applicants are likely to prevail on the merits.

II. Irreparable Harm to North Dakota Employers and Employees.

Petitioner North Dakota employers face devastating and irreparable consequences if the ETS is not stayed immediately. Compliance with the ETS would likely cause DTN Staffing to lose 40 to 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 North Dakota employers are ill-equipped to implement or enforce compliance with the ETS mandate. Fleck Decl. ¶ 13.

North Dakota employee 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. (Exh. C); ¶ 6; Ortiz Decl. (Exh. D) ¶ 4. Petitioners at DTN staffing would likely be forced to quit their jobs and suffer financial hardship. Johnston Decl. (Exh. E) ¶ 8; Sharma Decl. (Exh. F) ¶ 7. Petitioners at Miller Insulation would face the same hardship or the expense of weekly testing. Janz Decl. (Exh. G) ¶ 10, Miller Decl. (Exh. B) ¶ 9.

⁷ Centers for Disease Control and Prevention (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>.

And if an employee submits to the coercion and is vaccinated against his will, the vaccine cannot be reversed. It is irreparable. A stay is 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 Applicants and North Dakota employers and employees is not matched by any comparable hardship on the part of the Government. 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*. Vaccines were already widely available when the new administration took office in January 2021. If this ETS was urgently needed, why wait until November 5, 2021, to issue it? Clearly, delay in execution of the ETS causes no injury to the Government; they, themselves, have embraced delay. The minimal additional delay while the courts consider the weighty constitutional and statutory questions at stake does not injure the Government.

In addition, private companies that favor the ETS would suffer no injury whatsoever from a stay because they are free to implement the regime of the ETS on their own, without compulsion from OSHA.

In the proceedings below, the Government argued that asserted increased health of the public resulting from the ETS's vaccine mandate should be weighed in their favor. However, that argument is highly speculative and is directed at the wrong inquiry. OSHA has offered no basis for predicting what number of

employees would succumb to the pressure and get vaccinated, nor do they attempt to predict what the difference in total vaccinations would be if the ETS were implemented a few months sooner—and that is the relevant number here, not how many might occur over the years. The question is not what injuries might the Government suffer from a permanent stay. Rather, the question is what injuries might the Government suffer during a stay pending review. For these reasons, the balance of hardships is not even close. It favors Applicants and North Dakota employers and employees.

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 the courts decide 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 the reasons above, the Applicants’ emergency motion should be granted, and the ETS should be stayed pending review.

Respectfully submitted,

December 30, 2021

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

/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

*Counsel for Petitioner North Dakota
Employers and Employees*