

No. 21-60845

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BST Holdings, LLC; RV Trosclair L.L.C.; 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;
Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John
Loschen; Samuel Albert Reyna; and Kip Stovall,

Petitioners,

v.

Occupational Safety and Health Administration,
United States Department of Labor,

Respondent.

**PETITIONERS' EMERGENCY MOTION TO STAY
ENFORCEMENT PENDING REVIEW & EXPEDITE REVIEW**

Daniel R. Suhr
Liberty Justice Center
141 W. Jackson Blvd., Ste. 1065
Chicago, IL 60604
Telephone: 312-637-2280
dsuhr@libertyjusticecenter.org

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Attorneys for Petitioners

CERTIFICATE OF INTERESTED PERSONS

1. Pursuant to Fifth Circuit Rule 28.2.1, Petitioners file this Certificate of Interested Persons. The case number has yet to be assigned in this case, and the complete case caption of parties is on the preceding cover page.

2. The undersigned counsel of record certifies that the following listed persons and non-governmental entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- a. BST Holdings, LLC
- b. RV Trosclair L.L.C.
- c. Trosclair Airline LLC
- d. Trosclair Almonaster LLC
- e. Trosclair and Sons LLC
- f. Trosclair & Trosclair, Inc.
- g. Trosclair Carrollton LLC
- h. Trosclair Claiborne LLC
- i. Trosclair Donaldsonville, LLC
- j. Trosclair Houma LLC

- k. Trosclair Judge Perez LLC
- l. Trosclair Lake Forest LLC
- m. Trosclair Morrison LLC
- n. Trosclair Paris LLC
- o. Trosclair Terry LLC
- p. Trosclair Williams LLC
- q. Ryan Dailey
- r. Jasand Gamble
- s. Christopher L. Jones
- t. David John Loschen
- u. Samuel Albert Reyna
- v. Kip Stovall

3. Opposing counsel in this case will be the United States Department of Justice.

/s/ Sarah Harbison
Attorney of record for Petitioners

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS..... ii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES..... v
MOTION 1
INTRODUCTION 2
FACTUAL BACKGROUND..... 3
LEGAL STANDARD 6
ARGUMENT 6
 I. This Court should grant a stay pending review because
 Petitioners will likely succeed on the merits that the ETS
 exceeds OSHA’s statutory authority. 6
 A. The ETS is not related to the workplace. 8
 B. The ETS does not address a “grave danger.” 12
 C. The ETS exceeds OSHA’s authority because it is not
 necessary. 17
 D. COVID-19 is not a toxic substance or agent..... 19
 II. Petitioners meet the remaining three criteria for a stay 21
 A. Petitioners will suffer irreparable harm without a stay..... 21
 B. A stay will not harm OSHA..... 24
 C. A stay will further the public interest. 25
 III. The Court should expedite review of the Petition. 26
CONCLUSION 27
CERTIFICATE OF SERVICE 29
CERTIFICATE OF COMPLIANCE 30

TABLE OF AUTHORITIES

Cases

Ala. Ass’n of Realtors v. HHS, 2021 U.S. LEXIS 3679, 2021 WL 3783142 (U.S. 2021)..... 20

Alaska Survival v. Surface Transp. Bd., No. 12-70218, 2012 U.S. App. LEXIS 26797 (9th Cir. Oct. 1, 2012)..... 2

Allied Marketing Group, Inc. v. CDL Mktg., Inc., 878 F.2d 806 (5th Cir. 1989)..... 24

Am. Dental Ass’n v. Sec’y of Labor, 984 F.2d 823 (7th Cir. 1993)..... 9, 10

Asbestos Info. Ass’n/North Am. v. OSHA, 727 F.2d 415 (5th Cir. 1984) 13, 14, 19

Chandler v. Miller, 520 U.S. 305 (1997)..... 22

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012)..... 20

Commonwealth-Lord Joint Venture v. Donovan, 724 F.2d 67 (7th Cir. 1983)..... 2

Deerfield Medical Center v. Deerfield Beach, 61 F.2d 328 (5th Cir. 1981) 22

Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019)..... 11

Dry Color Manufacturers’ Ass’n v. Dep’t of Labor, 486 F.2d 98 (3d Cir. 1973)..... 14

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 21

Fla. Peach Growers Ass’n v. U.S. Dep’t of Labor, 489 F.2d 120 (5th Cir. 1974)..... 8, 13

Heil Trailer Int’l Co. v. Kula, 542 Fed. Appx. 329 (5th Cir. 2013)..... 24

Indus. Union Dep’t, AFL-CIO v. API, 448 U.S. 607 (1980) 7, 9, 12, 13

Jennings v. Rodriguez, 138 S. Ct. 830 (2018)..... 19-20

Nken v. Holder, 556 U.S. 418 (2009) 6

Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983)..... 13

Taylor Diving & Salvage v. U.S. Dep’t of Labor, 537 F.2d 819 (5th Cir. 1976)..... 13

Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014) 21

Statutes

29 U.S.C. § 651 6, 8, 9
 29 U.S.C. § 655 7, 8, 20
 5 U.S.C. § 553 7

Other Authorities

A. Scalia & B. Garner, *Reading Law* 107 (2012) 20
 Bureau of Labor Statistics, Job Openings and Labor Turnover
 Summary, Sept. 8, 2021,
<https://www.bls.gov/news.release/jolts.nr0.htm> 25
 CCJ Digital, *Majority of Drivers Say They Would Resist Vaccine, COVID
 Testing Requirements From Fleets* (Aug. 26, 2021)
[https://www.ccjdigital.com/workforce/health-
 wellness/article/15066786/mandated-vaccines-in-trucking-may-lead-
 to-employee-recruitment-woes](https://www.ccjdigital.com/workforce/health-wellness/article/15066786/mandated-vaccines-in-trucking-may-lead-to-employee-recruitment-woes) 26
 CDC, *COVID-19 Risks and Vaccine Information for Older Adults* (Aug.
 2, 2021) 16
 CNBC, *Businesses Ask White House to Delay Biden COVID Vaccine
 Mandate Until After Holidays* (Oct. 25, 2021)
[https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-
 delay-biden-covid-vaccine-mandate-until-after-holidays.html](https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html) 26
 Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine
 Mandates That Could Cover 100 Million Americans*, CNN (Sept. 9,
 2021, 9:01 P.M.) [https://www.cnn.com/2021/09/09/politics/joe-biden-
 covid-speech/index.html](https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html) 3
 Laurel Wamsley, *Vaccinated People with Breakthrough Infections Can
 Spread the Delta Variant, CDC Says*, NPR (July 31, 2021) 18
 Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the
 health care industry*, N.Y. Times (June 10, 2021),
[https://www.nytimes.com/2021/06/10/business/economy/osha-covid-
 rule.html](https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html)..... 14
Path Out of the Pandemic, The White House,
<https://www.whitehouse.gov/covidplan/> (last visited Sept. 22, 2021) . 11
Regulatory Framework, Regulations.gov (Oct. 9, 2014)
<https://www.regulations.gov/document/OSHA-2010-0003-0245> 9

Remarks by President Biden on Fighting the COVID-19 Pandemic,
(Sept. 9, 2021) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/> 15

Robert Towey, *Biden Says Unvaccinated Americans Are ‘Costing All of Us’ as He Presses Covid Vaccine Mandates*, CNBC (Sept. 24, 2021, 11:12 A.M.) <https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html>..... 4

Regulations

29 C.F.R. § 1910.1030..... 10

86 Fed. Reg. 32,376 (June 21, 2021)..... 14

MOTION

Petitioners believe action to be necessary by tomorrow.

Pursuant to Federal Rule of Appellate Procedure 18, Petitioners, BST Holdings, LLC; RV Trosclair L.L.C.; 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 (the “Trosclair Companies”); Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; and Kip Stovall (the “CaptiveAire Employees”) (collectively, “Petitioners”), file this emergency motion, requesting the Court to 1) stay enforcement, pending review, of the Emergency Temporary Standard addressing occupational exposure to COVID-19 issued by the Respondent, Occupational Safety and Health Administration, United States Department of Labor (“OSHA”), published in the Federal Register on November 5, 2021 at Volume 86, pages 61402 through 61555 (Ex. A) (“the ETS” or “the mandate ETS”), and 2) expedite briefing in this matter, per Federal Rule of Appellate Procedure 2.

Pursuant to Fifth Circuit Rules 27.3 and 27.4, Petitioners represent that they have made a telephone call to the clerk's office and left a telephone message with the offices of opposing counsel, advising of the filing of this emergency motion, which is filed the same day as the Petition and the Petitioners' Brief. Petitioners anticipate the Government will oppose the motion.

Because the large volume of public opposition to the ETS over the last several weeks did not prevent its promulgation, in accordance with Federal Rule of Appellate Procedure 18(a)(2)(A)(i), Petitioners determined that moving first before OSHA was futile and, therefore, impracticable. *See Alaska Survival v. Surface Transp. Bd.*, No. 12-70218, 2012 U.S. App. LEXIS 26797, at *3 (9th Cir. Oct. 1, 2012); *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983).

INTRODUCTION

In an attempt to impose a nationwide vaccination mandate without approval from Congress, the executive branch has couched its COVID-19 vaccine mandate as an emergency workplace rule affecting nearly 100 million Americans. But the ETS is neither a workplace rule nor

responsive to an emergency. Vaccination status is a public health issue that affects people throughout society; it is not a hazard particular to the workplace. And there is no need to use an emergency rule to address a pandemic that has been going on for nearly two years. Congress did not grant OSHA such sweeping powers in its authorizing statute.

FACTUAL BACKGROUND

On September 9, 2021, President Joe Biden held a press conference in which he stated that his “patience is wearing thin” with unvaccinated Americans, and he announced COVID-19 vaccine mandates on nearly 100 million Americans.¹ The mandates would be imposed on federal workers, federal contractors, and on workers at private companies like those of Petitioners.¹

The chosen tool for imposing as broad a vaccine mandate as possible was an ETS promulgated by OSHA. After many publicly questioned whether OSHA had such power, President Biden explained at a press

¹ Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans*, CNN (Sept. 9, 2021, 9:01 P.M.), <https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html>.

conference on September 24 that he was “moving forward with vaccination requirements wherever [he] can.”²

On November 5, 2021, OSHA published the ETS in the Federal Register. 86 Fed. Reg. 61402 (Ex. A). The ETS requires all employers with 100 or more employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy, ensuring their workforce is fully vaccinated or requiring any workers who remain unvaccinated to produce a negative test result on at least a weekly basis and wear a mask or face covering while at work. *Id.* at 61402-04.

There are currently three vaccinations available, with two of the vaccinations requiring two primary doses administered at least 21 and 28 days apart, respectively. Another two weeks must pass before someone is considered to be “fully vaccinated.” *Id.* at 61552.

The Trosclair Companies have almost 500 employees, maintain their principal place of business in and are incorporated in Louisiana, and will be adversely affected by the ETS. Trosclair Decl. ¶5 (Ex. B). They

² Robert Towey, *Biden Says Unvaccinated Americans Are ‘Costing All of Us’ as He Presses Covid Vaccine Mandates*, CNBC (Sept. 24, 2021, 11:12 A.M.), <https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html>.

already face a shortage of full-time employees, and the ETS will make it even harder to hire and to maintain employees because many of them do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. *Id.* ¶¶11-13 (Ex. B).

The CaptiveAire Employees reside in Texas and work for a company that has approximately 1,500 employees. Dailey Decl. ¶¶2-3 (Ex. C); Gamble Decl. ¶¶2-3 (Ex. D); Jones Decl. ¶¶2-3 (Ex. E); Loschen Decl. ¶¶2-3 (Ex. F); Reyna Decl. ¶¶2-3 (Ex. G); Stovall Decl. ¶¶2-3 (Ex. H); Luddy Decl. ¶¶2-4 (Ex. I). They will be adversely affected by the ETS because they do not want to be forced to receive the COVID-19 vaccine or be subjected to weekly testing. Dailey Decl. ¶¶6-7 (Ex. C); Gamble Decl. ¶¶6-7 (Ex. D); Jones Decl. ¶¶6-7 (Ex. E); Loschen Decl. ¶¶5-6 (Ex. F); Reyna Decl. ¶¶6-7 (Ex. G); Stovall Decl. ¶¶6-7 (Ex. H). This adverse effect is particularly troubling as it applies to Petitioners Dailey, Gamble, Jones, and Reyna because they work mostly alone on roofs and are highly unlikely to spread COVID-19 to colleagues. Dailey Decl. ¶4 (Ex. C); Gamble Decl. ¶4 (Ex. D); Jones Decl. ¶4 (Ex. E); Loschen Decl. ¶4 (Ex. F); Reyna Decl. ¶4 (Ex. G). Therefore, OSHA's claimed authority over their private healthcare decisions is an egregious government overreach.

LEGAL STANDARD

A motion for a stay pending review of an agency order may be made directly in the Court of Appeals. Fed. R. App. P. 18(a)(2). 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).

ARGUMENT

I. This Court should grant a stay pending review because Petitioners will likely succeed on the merits that the ETS exceeds OSHA’s statutory authority.

Congress passed the Occupational Safety and Health Act (the “Act”) in 1970, codified at 29 U.S.C. §§ 651-678, to assure safe and healthful working conditions for the nation’s work force and to preserve the nation’s human resources. 29 U.S.C. § 651 (1976). The Act allows the Secretary of Labor (the “Secretary”) to promulgate rules and standards for occupational safety and health, *id.* at § 655(b), but “only where a significant risk of harm exists[,] and . . . the Agency [bears the] burden of

establishing the need for a proposed standard.” *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 652–53 (1980). A permanent standard may be issued under 29 U.S.C. § 655(b) to serve the objectives of OSHA and requires procedures similar to informal rulemaking found in the Administrative Procedure Act at 5 U.S.C. § 553.

The Secretary may bypass the normal procedure in favor of promulgating an Emergency Temporary Standard (“an ETS”) to take effect immediately upon publication in the Federal Register only if the Secretary determines that “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and “that such emergency standard is necessary to protect employees from such danger.” 29 U.S.C. § 655(c)(1). An ETS shall serve only as a proposed rule, on which the Secretary shall act within six months of publication. 29 U.S.C. § 655(c)(1).

Any standard, permanent or temporary, has the force of law, requiring employers to “comply with occupational safety and health standards promulgated under this chapter” or face civil and criminal penalties. 29 U.S.C. § 654. Therefore, the Secretary must include “a statement of reasons for such action” in the Federal Register. 29 U.S.C.

§ 655(e); *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 124 (5th Cir. 1974).

On November 5, 2021, OSHA published the ETS requiring all employers with 100 or more employees to ensure their workforces are fully vaccinated or show a negative test at least once a week and wear a mask, effective as of November 5, 2021. Ex. A at 61402. The ETS exceeds OSHA's authority in several ways.

A. The ETS is not related to the workplace.

The ETS exceeds the statutory authority given to OSHA by Congress in the Act because it is not related to the workplace. *See* 29 U.S.C. § 651. OSHA has authority over workplace-related hazards, not any hazard one might encounter anywhere in the world. If OSHA's authority were as expansive as it claims, there would be no need for the U.S. Centers for Disease Control and Prevention ("CDC"), which Congress created specifically to address society-wide health hazards.

The purpose of the OSHA Act is 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). While Congress authorized the Secretary to "set mandatory occupational safety and health standards applicable to

businesses affecting interstate commerce,” 29 U.S.C. § 651(b)(3), “Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry.” *Indus. Union Dep’t*, 448 U.S. 607, 651 (1980). The ETS exceeds this power because it is not limited to ensuring that applicable businesses are safe and healthful.

OSHA has never attempted to implement a rule this broad. It considered doing so in 2014 with an “Infectious Diseases Regulatory Framework.”³ This would have given it regulatory authority over airborne infectious diseases, but it declined to promulgate the rule.

The only other vaccination ever covered by an OSHA standard is its Bloodborne Pathogens standard, mandating that employers whose workers could be exposed to blood or other potentially infectious materials at work *offer* free Hepatitis B vaccination to employees. *Am. Dental Ass’n v. Sec’y of Labor*, 984 F.2d 823, 825 (7th Cir. 1993). Workers who choose not to be vaccinated for Hepatitis B are required to sign a form acknowledging that they were offered the shot and declined. *Id*; *see also* 29 C.F.R. § 1910.1030(f)(2)(iv). Unlike the mandate ETS, that rule

³ *Regulatory Framework*, Regulations.gov (Oct. 9, 2014) <https://www.regulations.gov/document/OSHA-2010-0003-0245>.

did not require employees to be vaccinated or test negative. And that rule applied only to workers who could potentially be exposed to bloodborne pathogens in specific fields *at work*. Yet even that rule was found partially unlawful because it applied in an overbroad manner to sites not controlled either by the employer or by a hospital, nursing home, or other entity that is itself subject to the bloodborne-pathogens rule. *Am. Dental Ass'n*, 984 F.2d at 830.

All OSHA standards apply to workplaces where the harm that the standard seeks to mitigate is *more* likely to occur at the workplace than in other places, such as private homes, retailers, or other public places. OSHA standards are historically focused on dangers at work *because of the work*. Allowing OSHA to implement standards based on dangers in society generally, rather than work-specific dangers, would be a huge shift in the law, giving OSHA far more power than Congress intended.

COVID-19 is a danger to society generally. It is likely to spread anywhere people come together, not just the workplace. Thus, the workplace is being used as a pretext for a larger goal: to increase vaccinations everywhere. This Court is “not required to exhibit a naiveté from which ordinary citizens are free.” *Dep’t of Commerce v. New York*,

139 S. Ct. 2551, 2575 (2019). “Accepting contrived reasons [for administrative law decisions] would defeat the purpose of the enterprise.” *Id.*

The President announced that the true purpose of the ETS is “to reduce the number of unvaccinated Americans by using regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace.”⁴ The ETS is part of a plan to limit the spread of COVID-19 everywhere by forcing vaccinations—ensuring the employee is less likely to spread the disease anywhere he or she goes—or weekly testing—ensuring that the employee did not come into contact with the virus anywhere. Thus, the ETS exceeds OSHA’s statutory authority because it is not targeted at dangers specific to the workplace. It unlawfully attempts to shift the cost of paying for a problem throughout society to employers with more than 100 employees, even though it only incidentally concerns their workplaces. It forces on them responsibility to prevent their employees from spreading COVID-19

⁴ *Path Out of the Pandemic*, The White House, <https://www.whitehouse.gov/covidplan/> (last visited Sept. 22, 2021).

everywhere they go. This overly broad attempt to address a universal health risk contradicts the Act, which requires the Secretary to determine a significant risk of material health impairment *in a job site*. *Indus. Union Dep't*, 448 U.S. at 639–40.

The federal government has never issued a national vaccination mandate because it does not have the constitutional authority to do so. *See* Petitioners' Brief at Sections II and III (filed concurrently). What it does not have the power to do generally, it cannot do piecemeal through OSHA. Congress did not give OSHA authority to use employers to force unvaccinated workers to take the vaccine. The ETS standard, therefore, must be rejected as an improper use of OSHA's congressional authority.

B. The ETS does not address a “grave danger.”

The ETS exceeds OSHA's authority because the Secretary cannot adequately show that “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.” 29 U.S.C. § 655(c)(1). Congress has “narrowly circumscribed the Secretary's power to issue temporary emergency standards.” *Indus. Union Dep't*, 448 U.S. at 651. Before issuing any emergency standard, the Secretary must make the

“threshold determination” that the substance is a grave danger for job sites. *Indus. Union Dep’t*, 448 U.S. at 639–40. The “grave danger” requirement to implement an ETS sets an even higher bar than the “significant risk” requirement that applies to normal standards promulgated by OSHA.

“The Agency cannot use its ETS powers as a stop-gap measure. This would allow it to displace its clear obligations to promulgate rules after public notice and opportunity for comment in any case, not just in those in which an ETS is necessary to avert grave danger.” *Asbestos Info. Ass’n/North Am. v. OSHA*, 727 F.2d 415, 422 (5th Cir. 1984). “[T]he ETS statute is not to be used merely as an interim relief measure, but treated as an extraordinary power to be used only in ‘limited situations’ in which a grave danger exists, and then, to be ‘delicately exercised.’” *Id.* (citing *Public Citizen Health Research Group v. Aughter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)); see also *Taylor Diving & Salvage v. U.S. Dep’t of Labor*, 537 F.2d 819, 820-21 (5th Cir. 1976); *Florida Peach Growers*, 489 F.2d at 129; *Dry Color Manufacturers’ Ass’n v. Dep’t of Labor*, 486 F.2d 98, 104 n.9a (3d Cir. 1973). OSHA must show that the spread of COVID-19 is a grave danger that requires it to implement the measure now rather than

waiting for the normal notice-and-comment procedure. “[T]he plain wording of the statute limits [the court] to assessing the . . . grave danger that the ETS may alleviate, during the six-month period that is the life of the standard.” *Asbestos Info. Ass’n/North Am.*, 727 F.2d at 422.

OSHA’s assertion that the spread of COVID-19 is a grave danger that needs immediate attention rather than waiting for the notice-and-comment procedure is undermined by OSHA’s recent actions. Just a few months ago, OSHA evaluated this exact same hazard—whether COVID-19 presents a grave danger to all covered workplaces—and came to the opposite conclusion: that only workplaces providing healthcare services faced enough grave danger to warrant an ETS. 86 Fed. Reg. 32,376 (June 21, 2021). This was not simply an oversight: OSHA explicitly considered—and rejected—proposals to apply the June 21 ETS beyond healthcare.⁵ Furthermore, though emergency use authorization vaccines were in widespread circulation, there was no mandate for those on the

⁵ Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the health care industry*, N.Y. Times (June 10, 2021), <https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html> (“[Labor Secretary Marty] Walsh indicated that the risks to most workers outside health care had eased as cases had fallen and vaccination rates had risen.”)

front lines of fighting the pandemic. The fact that OSHA concluded that all workplaces did *not* face a grave danger just a few months ago should lead this Court to question whether the evidence OSHA has recently proffered really does show a “grave danger.” OSHA is really attempting to use the ETS as an interim relief measure—exactly the reason courts have said OSHA may not implement an ETS.

In addition, President Biden, in his remarks on September 9, announcing that he was instructing OSHA to implement the ETS, stated that over 175 million Americans are fully vaccinated, over 200 million Americans have had at least one shot, and only 80 million Americans for whom vaccines are available remain unvaccinated.⁶ The President continued that “the vaccines provide very strong protection from severe illness from COVID-19,” and specifically “only one of out of every 160,000 fully vaccinated Americans was hospitalized for COVID per day.”⁶ President Biden stated that “the science makes clear [that] if you’re fully vaccinated, you’re highly protected from severe illness, even if you get

⁶ Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

COVID-19” and “there is only one confirmed positive case per 5,000 fully vaccinated Americans per day.”⁶

The President’s remarks lay bare the realities: 2/3rds of American adults are fully vaccinated, and they have a low risk of severe illness, hospitalization, and death from COVID-19. Therefore, there is no “grave danger” to them in the workplace, nor does the ETS claim to protect them. The President does not like that 80 million Americans remain unvaccinated, so he is grasping for any tool within reach to force them to get vaccinated. But his words undermine OSHA’s claim that the spread of COVID-19 is a “grave danger” to employees in the workplace.

In addition, COVID-19 cannot be said to be a “grave danger” at every job site in the nation with more than 100 employees. The consequences of COVID-19 depend significantly on the age and the health of the person that obtains the virus.⁷ Older people and those with weakened immune systems tend to be the most susceptible and at risk of death if they contract COVID-19. *Id.* Younger adults and those who are not immune-compromised are less likely to die or be hospitalized from

⁷ CDC, *COVID-19 Risks and Vaccine Information for Older Adults* (Aug. 2, 2021), <https://www.cdc.gov/aging/covid19/covid19-older-adults.html>.

COVID-19. *Id.* Therefore, it is the condition of the individual that determines whether COVID-19 is a “grave danger”—not the number of workers at the individual’s company.

Finally, it has taken OSHA over eight weeks to finalize its emergency standard. This delay undermines OSHA’s contention that it is addressing a “grave danger.”

C. The ETS exceeds OSHA’s authority because it is not necessary.

OSHA’s requirement that employees either be vaccinated or show a negative test once a week and wear a mask is both underinclusive and overinclusive, conditions which undermine OSHA’s claim that it is necessary. It is underinclusive because vaccination is insufficient to stop the spread of COVID-19. The CDC recognizes that even vaccinated people may be infected and may transmit the disease to others.⁸ For this same reason, masking only the unvaccinated is also underinclusive. Finally, a weekly negative COVID-19 test also won’t ensure that

⁸ Laurel Wamsley, *Vaccinated People with Breakthrough Infections Can Spread the Delta Variant, CDC Says*, NPR (July 31, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/07/30/1022867219/cdc-study-provincetown-delta-vaccinated-breakthrough-mask-guidance>.

unvaccinated employees don't spread the virus since they could obtain and spread the virus between their weekly tests. Thus, the ETS is not necessary because it is underinclusive.

The ETS is also overinclusive as it applies to employees across the board, regardless of age, existing immunity, health, or location of one's work. The risks of obtaining COVID-19 vary depending on several factors OSHA does not consider. The ETS, applying across the board regardless of the risk to an employee cannot be said to be "necessary" for every employee at a large firm.

Also, OSHA does not consider different rules that depend on how workplaces are set up. For example, workers like Petitioners Dailey, Gamble, Jones, and Reyna do not interact with colleagues in person and should not be required to vaccinate or show a negative COVID-19 test and wear a mask since they cannot possibly spread COVID-19 to colleagues. Employees that work outdoors and generally are six feet or more apart also have no need for their employer to force them to vaccinate or to obtain a negative COVID-19 test and wear a mask. The ETS does not consider the different degrees of risk associated with

differing workplaces. It cannot be considered “necessary” as to *all* workplaces.

OSHA is required to consider other potential rules that could address the proposed harm and show that such potential rules are inadequate. *Asbestos Info. Ass’n/North Am.*, 727 F.2d at 426. OSHA has failed to do so here. In several different ways outlined above, OSHA has made zero effort at tailoring the ETS. The White House wanted the broadest possible mandate, and the ETS delivered; now this Court must remind OSHA that its authorizing statute requires narrow tailoring for emergency rules adopted without notice-and-comment rulemaking.

D. COVID-19 is not a toxic substance or agent.

The Secretary is allowed to promulgate an ETS only to prevent exposure to “substances or agents determined to be toxic or physically harmful or from new hazards.” 29 U.S.C. § 655(c)(1). But COVID-19 is not a “toxic or physically harmful” “substance” or “agent.” It is an infectious disease. OSHA cannot attempt to shoehorn this disease into the phrase “new hazards.” “The expression of one thing implies the exclusion of others (*expression unius est exclusion alterius*).” *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (quoting A. Scalia & B. Garner,

Reading Law 107 (2012)). Because Congress expressly allowed for an ETS to be issued for “substances or agents determined to be toxic or physically harmful,” the catch-all phrase to encompass other hazards must be read in light of, and limited to, items similar to those that come before it. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 n.19 (2012) (“the canon of ejusdem generis limits general terms that follow specific ones to matters similar to those specified”) (cleaned up). The Supreme Court recently reminded this Administration that a catch-all phrase at the end of a statute is not a loophole through which a mission-specific administrative agency may drive nationwide social policy. *See Ala. Ass’n of Realtors v. HHS*, 2021 U.S. LEXIS 3679, 2021 WL 3783142 (U.S. 2021) (prohibiting the CDC from creating a nationwide landlord-tenant eviction moratorium by an emergency agency rule). If Congress had wanted to include infectious diseases within OSHA’s authority, it would have mentioned them expressly.

Under OSHA’s interpretation, the Secretary would have unbridled power to promulgate any regulation that would have the arguable effect of preventing the spread of a communicable disease. The Supreme Court has explained that courts should not lightly presume congressional

intent to implicitly delegate decisions of major economic or political significance to agencies. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (plurality) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.”).

II. Petitioners meet the remaining three criteria for a stay.

This Court should stay the ETS pending review because Petitioners also meet the remaining three criteria for a stay: 2) Petitioners will suffer irreparable harm without a stay; 3) OSHA will not be harmed by a stay; and 4) a stay is in the public interest.

A. Petitioners will suffer irreparable harm without a stay.

If no stay is issued, Petitioners will suffer irreparable harm. The decision to receive a COVID-19 vaccine is a deeply personal healthcare decision that is made for life. If this Court does not stay the ETS, it will coerce employees like the CaptiveAire Employees to receive the COVID-19 vaccine against their will, and that action cannot be undone.

Those remaining unvaccinated will be subjected to needless hours of weekly testing that will invade their privacy and cannot be undone. Even “relatively noninvasive” drug testing for political candidates was enjoined by the Supreme Court because mandated testing constitutes an invasion of privacy. *Chandler v. Miller*, 520 U.S. 305, 318 (1997). And as this Court has held, invasion of privacy “cannot be undone by monetary relief.” *Deerfield Medical Center v. Deerfield Beach*, 61 F.2d 328, 338 (5th Cir. 1981). Therefore, the harm the CaptiveAire Employees face is irreparable. Dailey Decl. ¶¶6-7 (Ex. C); Gamble Decl. ¶¶6-7 (Ex. D); Jones Decl. ¶¶6-7 (Ex. E); Loschen Decl. ¶¶5-6 (Ex. F); Reyna Decl. ¶¶6-7 (Ex. G); Stovall Decl. ¶¶6-7 (Ex. H).

Alternatively, the ETS will force many employees to quit their jobs, and this harm, too, is irreparable. Dailey Decl. ¶8 (Ex. C); Gamble Decl. ¶8 (Ex. D); Jones Decl. ¶8 (Ex. E); Loschen Decl. ¶7 (Ex. F); Reyna Decl. ¶8 (Ex. G); Stovall Decl. ¶8 (Ex. H); Luddy Decl. ¶¶6,11 (Ex. I).

Also, the harm to the Trosclair Companies of losing current workers and future workers is irreparable. The Trosclair Companies are already short five to ten full-time employees at virtually every grocery store. Trosclair Decl. ¶12 (Ex. B). The ETS would compound this problem by

encouraging many of its employees who remain unvaccinated to find employment elsewhere. *Id.* ¶13. This harm is not speculative: it is real. Anecdotally, the Trosclair Companies are presently hiring a Director of Maintenance away from his current employer for the very reason that the prior employer imposed a vaccine mandate. *Id.* ¶14. If such a mandate were imposed on Trosclair employees, dozens would quit or find work elsewhere. *Id.* ¶¶13-15. On top of that, the Trosclair Companies would have even more difficulty filling the open positions that it already cannot fill. Ultimately, “the ETS [would] substantially decrease the workforce, drastically reduce their ability to serve the public, make it exponentially harder to hire the new employees they need, and put them at a competitive disadvantage to corporations with fewer than 100 employees, who will not be subject to the ETS.” *Id.* ¶15. Estimating the loss attributable to the ETS versus the overall worker shortage in the economy would be near impossible to calculate and reimburse. A “finding of irreparable harm is appropriate even where economic rights are involved when the nature of those rights makes establishment of the dollar value of the loss especially difficult or speculative.” *Allied Marketing Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n.1 (5th Cir.

1989) (cleaned up); *see also Heil Trailer Int'l Co. v. Kula*, 542 F. App'x. 329, 335 (5th Cir. 2013) (“An irreparable injury is . . . one for which monetary damages would be especially difficult to calculate.”) (cleaned up). Thus, the harm would be irreparable.

B. A stay will not harm OSHA.

Almost two years into the COVID-19 pandemic, OSHA is just now issuing an emergency standard. Temporarily staying the ETS upon review by this Court will not harm OSHA. It will continue its mission unaffected and will remain in the same posture regarding COVID-19 safety.

OSHA has never enacted a mandatory vaccination standard before. *See, supra*, at 9-10. A stay does not interfere with OSHA’s clearly-defined powers over workplace safety—only with novel powers that it has never before asserted. Therefore, a stay will not harm OSHA.

C. A stay will further the public interest.

A stay will prevent a massive upheaval in the American economy that would occur if the ETS were allowed to go into effect, pushing millions out of the workforce. The Trosclair Companies are not alone in their shortage of workers. At the end of July, there were 10.9 million job

openings in America, contrasted with 6.7 million new hires that month.⁹ The ETS would compound this problem by forcing workers to choose between staying at their jobs or having a deeply personal health decision forced upon them.

In addition, the ETS would have a devastating ripple effect across the economy. Supply chain bottlenecks would worsen, and transportation costs would soar. For example, according to a recent poll, only 25% of truck drivers said they have been vaccinated; 30% said they would refuse a mandated vaccine, an additional 17% said they would claim a medical or religious exemption, and another 16% would quit.¹⁰ Adding to the current shortage of truckers in America would substantially increase the costs of commodities to all businesses and citizens.¹¹ Thus, staying the ETS is very much in the public interest.

⁹ Bureau of Labor Statistics, Job Openings and Labor Turnover Summary, Sept. 8, 2021, <https://www.bls.gov/news.release/jolts.nr0.htm>.

¹⁰ CCJ Digital, *Majority of Drivers Say They Would Resist Vaccine, COVID Testing Requirements From Fleets* (Aug. 26, 2021), <https://www.ccjdigital.com/workforce/health-wellness/article/15066786/mandated-vaccines-in-trucking-may-lead-to-employee-recruitment-woes>.

¹¹ CNBC, *Businesses Ask White House to Delay Biden COVID Vaccine Mandate Until After Holidays* (Oct. 25, 2021), <https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html>.

III. The Court should expedite review of the Petition.

Federal Rule of Appellate Procedure 2 states, “On its own or a party’s motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” Here, expedited review is necessary for the reasons stated above in Sections I and II. Specifically, it is necessary to protect the Trosclair Companies from losing dozens of employees upon the enactment of the ETS. It is also necessary to protect individual employees like the CaptiveAire Employees from being subjected to irrevocable healthcare decisions against their will. Expedited review is necessary because although employees have until January 4, 2022 to be vaccinated, they must begin a two-dose regimen at least 21 or 28 days prior to then to be in compliance with the ETS. Ex. A at 61417, 61552-54.

Therefore, Petitioners request a briefing schedule in which Petitioners’ Brief is filed today, Respondent’s Brief is due November 12, and any Petitioners’ Reply Brief is due November 17.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enter an order staying enforcement of the ETS in the United States and setting an expedited briefing and hearing schedule for the Petition. Per Fifth Circuit Rule 27.3, Petitioners believe action to be necessary by tomorrow to avoid adverse effect on them.

November 5, 2021

Respectfully submitted,

Daniel R. Suhr, WI Bar # 1056658

Application for Admission Submitted

Liberty Justice Center

141 W. Jackson Blvd., Ste. 1065

Chicago, IL 60604

Telephone: 312-637-2280

dsuhr@libertyjusticecenter.org

/s/ Sarah Harbison

Sarah Harbison, LA Bar # 31948

Pelican Institute for Public Policy

400 Poydras St., Suite 900

New Orleans, LA 70130

Telephone: 504-952-8016

sarah@pelicaninstitute.org

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on November 5, 2021, I caused a copy of this Emergency Motion to Stay Enforcement Pending Review & Expedite Review to be served on Respondent by email as directed in the ETS:

Edmund C. Baird
Associate Solicitor of Labor for
Occupational Safety and Health
Office of the Solicitor
United States Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
zzSOL-Covid19-ETS@dol.gov

/s/ Sarah Harbison
Attorney of record for Petitioners

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, according to the Word Count function, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2, it contains 5,162 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Word in a proportionally spaced typeface, using Century Schoolbook 14-point font.

3. Per Local Rule 27.3, I certify that the facts supporting emergency consideration of the motion are complete.

/s/ Sarah Harbison
Attorney of record for Petitioners