IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BST HOLDINGS, LLC; RV TROSCLAIR, 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 PARIS, LLC; TROSCLAIR TERRY, LLC; TROCLAIR WILLIAMS, LLC; RYAN DAILEY; JASAND GAMBLE; CHRISTOPHER L. JONES; DAVID JOHN LOSCHEN; SAMUEL ALBERT REYNA; KIP STOVALL; ANSWERS IN GENESIS, INC.; AMERICAN FAMILY ASSOCIATION, INC.; BURNETT SPECIALISTS; CHOICE STAFFING, LLC; AND STAFF FORCE, INC., *Petitioners*, v. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *Respondents*.	Case No. 21-60845

PETITIONERS' MOTION FOR STAY PENDING REVIEW

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case:

Burnett Specialists

The Burnett Companies Consolidated, Inc.

Choice Staffing, LLC

Staff Force, Inc.

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Petitioners has any parent corporation and that no publicly held corporation holds more than 10% of their stock.

These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners

On November 5, 2021, Respondent Occupational Safety and Health Administration ("OSHA") published an emergency temporary standard involving COVID-19 vaccination of private-sector employees, 29 C.F.R. § 1910.501 et seq. (2021) (the "ETS"). Due to the unique nature of emergency temporary standards, the ETS will take effect without any notice, public comment, or review. Section 6(c)(1) of the OSHA Act. Even under normal circumstances, an ETS is an extraordinary power that should be—and has been—judiciously exercised. But this particular ETS represents a unique and unprecedented assertion of federal authority: namely, the power to coerce at least 80 million Americans to inject an irreversible vaccine into their bodies, under threat of losing their livelihoods and threat of fines and other penalties against Petitioners.

Petitioners Burnett Specialists, Choice Staffing, LLC, and Staff Force, Inc., (collectively, "Petitioners") have requested that this Court review the ETS, pursuant to 29 U.S.C. 655(f), because it represents an unconstitutional delegation of authority from Congress to the executive branch, and therefore violates the non-delegation doctrine under Article I, Section 1 of the U.S. Constitution. Because the ETS, if it is allowed to take effect, will cause irreparable harm to Petitioners, Petitioners ask this Court to stay implementation of the ETS under Rule of Appellate Procedure 18. As shown below, in addition to suffering irreparable harm, Petitioners have a high

likelihood of success on the merits, the federal government will not be harmed by the stay, and the public interest favors issuance of a stay by this Court.

STATEMENT OF FACTS

On September 9, 2021, President Joseph Biden announced his plan to direct the Department of Labor to issue the ETS which, through OSHA, would require all employers with "100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, https://www.whitehouse.gov/covidplan/ (last accessed November 4, 2021). The White House expects the ETS to "impact over 80 million workers in private sector businesses." *Id.*

OSHA published the ETS on November 5, 2021. In addition to requiring employers to check the vaccination status of their employers or to require weekly COVID-19 tests, 29 C.F.R. § 501(e) and (g), it also requires employers to give employees paid time off to obtain and recover from a vaccination, 29 C.F.R. § 501(f). Unvaccinated employees are required to wear masks when in close contact with others while at the workplace. 29 C.F.R. § 501(i). Failure to comply with the ETS could result in penalties of $13,653 per violation and $136,532 per willful or repeated violation. 29 C.F.R. § 1903.15(d).

Petitioners provide staffing services throughout Texas. Decl. of Debbie D'Ambrosio at ¶ 2 (attached); Decl. of Chanel Cantu at ¶ 2 (attached); Decl. of Russell Potocki at ¶ 2 (attached). Between them, they employ well over 10,000 individuals in a given year. D'Ambrosio Decl. at ¶ 2; Cantu Decl. at ¶ 4; Potocki Decl. at ¶ 2. While they each maintain a small amount of dedicated office staff, most of their employees are either temporary workers or "temp-to-hire" workers. D'Ambrosio Decl. at ¶ 2; Cantu Decl. at ¶ 3; Potocki Decl. at ¶ 2. These employees may be people seeking immediate work out of monetary need, people looking to re-enter the workforce, people looking to enter a new field, and people who simply enjoy the flexibility of temporary employment. D'Ambrosio Decl. at ¶ 7; Cantu Decl. at ¶ 5; Potocki Decl. at ¶ 4-5.

The current labor market is the tightest that Petitioners have ever seen, making attracting and retaining employees very difficult. D'Ambrosio Decl. at ¶ 7; Cantu Decl. at ¶ 6. Because the temporary worker labor market is very fluid and unstable, Petitioners are concerned that the vaccination, testing, and masking requirements of the ETS will cause them to lose employees, many of whom will never return. D'Ambrosio Decl. at ¶ 9; Cantu Decl. at ¶ 6; Potocki Decl. at ¶ 8. They are also concerned that the requirements will cause some employees to leave them for smaller employers that are not covered by the ETS. *Id*.

The administrative burdens are also significant, if not unworkable. Unlike traditional employers, Petitioners often do not see their employees after the initial onboarding period. D'Ambrosio Decl. at ¶ 6; Potocki Decl. at ¶ 6. This will make tracking paperwork related to testing, exemptions, and vaccination status very onerous, requiring the hiring of additional administrative personnel and new computer software for compliance purposes. Cantu Decl. at ¶ 9; Potocki Decl. at ¶ 8. Petitioners expect a large number of employees to seek exemptions and accommodations as a result of the ETS. D'Ambrosio Decl. at ¶ 10; Cantu Decl. at ¶ 5; Potocki Decl. at ¶ 6. Because of high turnover and the nature of temporary staffing, the paid sick leave requirements of the ETS will also be especially burdensome to Petitioners. Cantu Decl. at ¶ 10.

ARGUMENT

In reviewing a motion for a stay of an OSHA emergency temporary standard, this Court uses the "well settled" test that requires applicants to demonstrate: (1) a substantial likelihood that they will prevail on the merits; (2) that they will suffer irreparable harm if they are not granted a stay; (3) that a stay will not substantially harm other parties to the proceeding; and (4) that a stay will not interfere with the public interest. *Taylor Diving and Salvage Co. v. U.S. Dept. of Labor*, 537 F.2d 819, 821 n.8 (5th Cir. 1976); *Asbestos Info. Association/North Am. v. OSHA*, 727 F.2d 415, 418 n.4 (5th Cir. 1984). The petitioner does not have to show that all factors

favor it. The court will "balanc[e] the equities involved." *Asbestos Info.*, 727 F.2d at 418; *see also Ohio v. United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804, 806 (6th Cir. 2015) (calling the stay factors "not prerequisites to be met, but interrelated considerations that must be balanced").[1] "The first two factors of the . . .standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). As shown below, all four factors weigh strongly in Petitioners' favor.

I. Petitioners have a high likelihood of succeeding on the merits.

"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." *Util Air Reg. Grp. v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014) (internal quotations omitted). Here, a high degree of skepticism is warranted. Of the nine emergency temporary standards published prior to this year, three were not challenged. Scott D. Szymendera, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, at 33, Congressional Research Service (updated Sept. 13, 2021), https://crsreports.congress.gov/product/pdf/R/R46288. Of

[1] The petitioner must "ordinarily" move "first before the agency for a stay pending review of its decision or order" but can file the motion for stay directly to the court of appeals if it can show that moving before the agency would be impractical. Fed. R. App. P. 18(A)(1-2). Here, it is impractical and futile to obtain a stay through OSHA, as the ETS is effective immediately through a process that intentionally avoids the procedures that typically accompany agency rulemaking. 29 U.S.C. § 655(c).

the six that were challenged, only one was fully upheld, and most were stayed prior to enforcement. *Id.* OSHA has once again acted illegally because, as shown below, the subsection that gives it authority issue an ETS violates the nondelegation doctrine under Article I, Section 1 of the U.S. Constitution.

A. *The ETS is a legislative act, not an executive one.*

The U.S. Constitution vests "[a]ll legislative powers" in Congress. U.S. Const. Art. I § 1. Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2123 (quoting *Wayman v. Southard*, 23 U.S. 1, 10 (1825)). Delegations of legislative authority are only permissible when Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. at 409) (alteration in original). Congress did no such thing here.

Section 655(c) gives OSHA quintessentially legislative powers. It allegedly allows the agency to prescribe rules, effective immediately upon publication, governing the conduct of over 80 million workers and their employers. This is "a wafer-thin reed on which to rest such sweeping power." *Ala. Ass'n of Realtors v. HHS*, 210 L. Ed. 2d 856, 861 (2021).

The section allegedly giving OSHA authority to issue ETSs is capacious. It reads:

> OSHA shall provide, without regard to the requirements of chapter 5, title 5, United States Code [5 USCS §§ 500 et seq.], for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) 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 (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. § 655(C). According to OSHA, this delegation of authority allows it to decide if businesses such as Petitioners must inquire into its employees' vaccine status or require its employees to produce a negative test every week and wear masks while at work.

While the line between legislative power and judicial or executive power has not been "exactly drawn," *see Wayman v. Southard*, 23 U.S. 1, 43 (1825), any power to determine the "legislative policy and its formulation and promulgation as a defined and binding rule of conduct" is legislative, *Yakus v. United States*, 321 U.S. 414, 424 (1944). Here, the President set the legislative policy of "substantially increas[ing] the number of Americans covered by vaccination requirements," *Path Out of the Pandemic*, https://www.whitehouse.gov/covidplan/, and then set binding rules enforced with the threat of large fines. That is a quintessential legislative act—and one wholly unrelated to the purpose of OSHA itself, which is protecting

workplace safety. Nowhere in OSHA's enabling legislation does Congress confer upon it the power to end pandemics.

B. *The ETS statute contains no "intelligible principle."*

The prohibition of Congress delegating its legislative authority to another branch of government "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Id.* at 371. Allowing Congress to "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals" undermines our system of government. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Maintaining "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380. Accordingly, when Congress delegates its legislative authority, it must give an intelligible principle to which the Executive is directed to conform, and it must make "clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Gundy*, 139 S. Ct. at 2123, 2129 (quoting *American Power & Light v. Securities & Exchange Comm'n*, 329 U.S. 90, 105 (1946)) (alteration in *Gundy*).

To determine whether Congress has established an intelligible principle for OSHA to follow, it looks at whether it "clearly delineates a general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372–73 (quoting *American Power & Light Co. v.*

Securities & Exch. Comm'n, 329 U.S. 90, 105 (1946)). Failing to delineate these powers will remove our "greatest security against tyranny—the accumulation of excessive authority in a single branch." *Id.* at 381. There is no intelligible principle here for at least three reasons.

First, key words and phrases in the statute are not defined. For instance, Congress provided no guidance on what is to be considered a "grave danger," whether a virus constitutes a "substance or agent," nor whether an illness that has been known about and spreading through the public for almost two years is a "new hazard."

Second, the Act does not give OSHA meaningful boundaries for deciding what is "necessary to protect employees," and it allows the rule to go into effect without a notice-and-comment rulemaking procedure.[2] *Id.*

Third, the authority claimed by OSHA is grossly disproportionate to the amount of guidance provided by Congress. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). As a result, such a statute is "delegation running riot."

[2] A notice and comment procedure only occurs *after* the ETS has been published and taken effect. 29 U.S.C. § 655(c)(3).

See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

1. Congress's failure to define key terms gives OSHA unfettered discretion to trigger an ETS.

The delegation problems with the Act are rooted, in part, in poorly defined boundaries for the scope of OSHA's work. Congress's statement of findings and declaration of purpose and policy for OSHA is almost as inexact as the ETS statute. It declares "its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources[.]" 29 U.S.C § 651(b). It then lists 13 activities for OSHA to conduct, ranging from "encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards" to "encouraging joint labor-management efforts to reduce injuries and disease arising out of employment." *Id.* The "boundaries" of the Executive's authority in doing these things, however, is nowhere to be found, and Congress's failure to define key terms, or at least provide guidance in interpreting them, delegates too much power to OSHA. *See Schechter Poultry*, 295 U.S. at 531–35; *Whitman*, 531 U.S. at 475 ("While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, see § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.").

Unlike the country elevator example from *Whitman*, the meaning of grave danger, substances or agents, and new hazards are vital in determining whether OSHA can trigger the need for a nationwide ETS. By failing to provide any guidance to aid this determination, Congress has merely expressed "vague aspirations" and left OSHA with virtually unlimited discretion to decide whether the requisite conditions for an ETS exists. Not only does this not prevent the accumulation of excessive authority in one branch, it gives OSHA the unrestrained authority to give itself even more authority. To allow such a delegation would completely undermine the Constitution's arrangement of authority among the branches.

2. Congress's failure to provide guidance to determine what is "necessary to protect" also does nothing to confine OSHA's discretion.

In order to comply with the nondelegation doctrine, Congress must provide "boundaries of [for its] delegated authority." *Mistretta*, 488 U.S. at 372–73 (quoting *American Power*, 329 U.S. at 105). In doing so, it must "meaningfully constrain[]" the Executive's discretion. *See Touby v. United States*, 500 U.S. 160, 166 (1991). Here, Congress failed to provide any guidance as to what it meant by "necessary to protect employees," leaving the statute devoid of any meaningful standard to confine OSHA's discretion.

Consider two instances where this Court found a statute to be lacking an intelligible principle, it characterized the relevant statutes as Congress "fail[ing] to

articulate *any* policy or standard' to confine discretion." *Gundy*, 139 S. Ct. at 2129 (quoting *Mistretta*, 488 U.S. at 373 n.7) (emphasis in *Gundy*). In *Schechter Poultry*, 295 U.S. at 538, the Court struck down a statute giving the President the power to make codes of fair competition—an undefined term—but did not limit his discretion in any meaningful way because it did not limit the scope of the codes and he could approve or disapprove of industry suggestions "as he may see fit." His only charge was to make sure the proposed codes were not "designed to promote monopolies or to eliminate or oppress small enterprises." *Schechter Poultry*, 295 U.S. at 538. This "unfettered" ability to approve and prescribe codes affecting trade and industry throughout the country is an unconstitutional delegation of legislative power.[3] *Id.* at 541–42; *see also Panama Refining Co. v. Ryan*, 293 U.S. 38, 43 (1935).

Returning to challenge at hand, the requirement that the ETS be "necessary" to protect employees from the stated emergency is wholly inadequate under the nondelegation doctrine. Other than that one word, there is no constraint on OSHA's discretion. This distinguishes the ETS statute from statutes like the one *Touby v. United States*, where the Attorney General could temporarily schedule a drug if he found "doing so is 'necessary to avoid an imminent hazard to the public safety.'" 500 U.S. 160, 166 (1991) (quoting 21 U.S.C. § 811(h)(1)). In making that finding,

[3] Like the OSHA statute, the statute at issue in *Schechter Poultry* also did not include a procedure for notice and a hearing with the agency. 295 U.S. at 533–34.

Congress provided the Attorney General numerous factors to consider and required him to publish a 30-day notice. *Id.* at 166–67. These lengthy and "multiple specific restrictions," *id* at 167, stand in stark contrast to the ETS statute.

Rather than providing specific guidelines in determining necessity, Congress left OSHA unrestricted in the use of its discretion. It additionally has the power to publish the ETS to take effect immediately without any procedure for notice-and-comment rulemaking. These compound the separation of power problem present in the Act's failure to confine key terms. The result is a situation where OSHA has the unfettered authority to claim more authority, and then unfettered discretion to determine whether the rule it wrote is "necessary" to carry out its claimed authority. Instead of providing meaningful boundaries, the Act leaves OSHA without any meaningful boundaries to confine its discretion when publishing an ETS, a quintessential violation of the nondelegation doctrine.

3. OSHA is claiming authority that is vastly disproportionate to the amount of statutory guidance.

Importantly, the more power a statute gives to an agency, the less discretion in how to wield it is acceptable. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see also Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a

blank check to write a code of conduct governing private conduct for a half-million people."). "Narrow, interstitial delegations of authority" are acceptable, *United States v. Melger-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021), but Congress "must provide substantial guidance" when giving the Executive to set "standards that effect the entire national economy," *Whitman*, 531 U.S. at 475.

This principle is also evident when Congress delegates legislative authority to branches that have independent authority over the subject matter. *Loving v. United States*, 517 U.S. 748, 772-73; *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). But that is not the situation here, where OSHA is claiming that the Act confers to the Executive the power to order 80 million Americans to inject themselves with an irreversible vaccine under threat of losing their livelihood. It is difficult to conceive of a more sweeping claim of authority than this. Extraordinary claims require extraordinary proof, and here, there is very little evidence that Congress intended to confer to the Executive to issue *this* kind of directive under *this* rarely used, rarely upheld Act.

II. Petitioners will be irreparably harmed.

The second prong of this Court's inquiry, when considering whether to grant a stay, is a showing of irreparable harm to Petitioners. If the ETS is not stayed, Petitioners will face administrative and financial burdens that will never be recouped. "Indeed 'complying with a regulation later held invalid almost *always*

produces the irreparable harm of nonrecoverable compliance costs.'" *Texas v. U.S. Environmental Protection Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment)). When considering this prong, "it is not so much the magnitude but the irreparability that counts." *Enter. Int'l v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985) (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974)). shown below, in addition to the financial penalties OSHA may levy on non-compliant businesses, Petitioners face multiple irreparable harms that threatens their present and future success.

A. The financial penalties for non-compliance are extraordinary.

The OSHA statute allows for civil and criminal penalties. 29 U.S.C. § 666. Penalties are assessed "for each violation." *Id* at § 666(a). Every year, OSHA is obligated to adjust its maximum penalty consistent with inflation. *See Southern Hens, Inc. v. Occupational Safety and Health Review Commission*, 930 F.3d 667, 683 (5th Cir. 2019). The current penalty for violations is $13,653 per violation and $136,532 per willful or repeated violation. 29 C.F.R. § 1903.15(d). Even if Petitioners managed to ensure 90% compliance with the ETS, they would still be facing the choice of either losing the use of 10% of their workforce or risking thousands and thousands of dollars in penalties—an impossible choice.

B. The ETS is administratively unworkable.

The administrative costs of inquiring into each of its employees' vaccination status and managing the testing status of those that choose not to get vaccinated will be unduly burdensome and administratively unworkable. D'Ambrosio Decl. at ¶ 5; Cantu Decl. at ¶ 3, 5-8; Potocki Decl. at ¶ 7-8. Petitioners rely on being nimble and administratively light. A handful of administrative employees coordinate the employment of thousands of temporary workers. D'Ambrosio Decl. at ¶ 5; Cantu Decl. at ¶ 9. Petitioners tend to employ people who want immediate work, are open to doing any type of job, or want to try out a new industry. D'Ambrosio Decl. at ¶ 2; Cantu Decl. at ¶ 2, 5; Potocki Decl. at ¶ 4, 5. They also employ people who are looking to fill gaps in employment or are trying to supplement their income with part-time work. Potocki Decl. at ¶ 5.

Additionally, because many employees plan to only work for Petitioners temporarily, many employees do not have, and do not intend to build, long-lasting relationships with Petitioners. D'Ambrosio Decl. at ¶ 6-7; Cantu Decl. at ¶ 2, 5; Potocki Decl. at ¶ 6. They can be hesitant to share personal or medical information. Many of Petitioners' employees also work remotely, or when they do report to a physical location, it is to a client of Petitioners, rather than directly to Petitioners' offices. D'Ambrosio Decl. at ¶ 6. Once a client agrees to take on an employee and the employee is successfully onboarded, communication between the employee and

Petitioners is minimal until the temporary job is finished. D'Ambrosio Decl. at ¶ 6; Cantu Decl. at ¶ 2, 8; Potocki Decl. at ¶ 6.

Any added administrative burden will result in lost hours for Petitioners' administrative staff, perhaps resulting in the need to work overtime or hire new employees. D'Ambrosio Decl. at ¶ 5; Cantu Decl. at ¶ 9; Potocki Decl. at ¶ 7-8. Additionally, because the employees rarely work at Petitioners' facilities, complying with the testing requirement is not as simple as using at-home tests when employees come to work. Requiring unvaccinated employees to come in to test or meeting them at their physical working location will take an untold number of hours. The required paid time off will, likewise, cause great hardship to petitioners because of the high-turnover in the industry. Cantu Decl. at ¶ 10.

C. Due to unequal application of the vaccine mandate, Petitioners are likely to lose employees to smaller competitors.

An additional irreparable harm is that valuable employees will either leave Petitioners for a smaller entity not subject to the mandate or drop out of the workforce entirely. D'Ambrosio Decl. at ¶ 9; Cantu Decl. at ¶ 5, 6; Potocki Decl. at ¶ 6, 8. This is a unique harm to Petitioners' business practices. The temporary nature of its job assignments makes employees especially mobile, and employees will often work at the physical location of smaller firms that are not subject to the ETS. These employees will immediately notice the incongruity of having to be vaccinated or tested, unlike their officemates. D'Ambrosio Decl. at ¶ 10. The employees who only

work on a part-time or especially short-term bases may also decide the added burden of getting vaccinated or getting tested weekly is not worth the hassle of maintaining employment. D'Ambrosio Decl. at ¶ 7-9; Cantu Decl. at ¶ 9; Potocki Decl. at ¶ 6. If employees leave or become ineligible to work, it will harm the existing relationship between Petitioners and their clients. In sum, the ETS threatens Petitioners' ability to retain and recruit employees, which will harm its relationship with existing clients and prevent it from developing relationships with new potential clients.

D. The ETS puts Petitioners in the position of either violating the ETS, or violating Texas state law.

The ETS also puts Burnett in a precarious legal position. On October 11, 2021, Governor Greg Abbott issued an executive order forbidding any "entity in Texas" from "compel[ing] receipt of a COVID-19 vaccine by any individual, including an employee or consumer who objects to such vaccination for any reason of personal conscience . . . or for medical reasons." Tx. Exec. Order GA-40 (Oct. 11, 2021). For this first ever federal vaccine mandate, Petitioner is also in the position of navigating Equal Opportunity Employment Commission guidelines. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (September 9, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K. This includes developing accommodations under the Americans with Disabilities Act, the Rehabilitation Act,

the Genetic Information Nondiscrimination Act, and Title VII of the Civil Rights Act. *Id.*; *see also Dr. A. et al. v. Hochul*, 2021 U.S. Dist. LEXIS 199419, No. at *24–25 (N.D. N.Y. Oct. 12, 2021) (granting plaintiffs' motion for a preliminary injunction against the State of New York's vaccine mandate for failing to provide a religious accommodation). Even though the ETS contains express language about preempting conflicting state laws, that issue has not been adjudicated at the time of this writing. Forcing Petitioners to comply with the ETS, only for it later to be ruled illegal, will result in irreparable harm.

III. The federal government will not be substantially harmed.

Under the third prong, the federal government will not suffer any harm from a stay. In conjunction with his announcement of the OSHA ETS, President Biden announced plans for other vaccine mandates. These included requiring vaccinations for all federal workers and contractors, requiring vaccines for healthcare workers through the Centers for Medicare and Medicaid Services, and requiring vaccines for staff in Head Start Programs, Department of Defense Schools, and Bureau of Indian Education-Operated Schools. Preventing the OSHA ETS. *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, https://www.whitehouse.gov/covidplan/. Staying the ETS will do nothing to frustrate these efforts. It will also not affect OSHA of Defense's efforts to require vaccination for all servicemembers, civilian employees, and contractor personnel. *See Memorandum For All Department of*

Defense Employees, Secretary of Defense (Aug. 9, 2021), https://media.defense.gov/2021/Aug/09/2002826254/-1/-1/0/MESSAGE-TO-THE-FORCE-MEMO-VACCINE.PDF. Accordingly, there is no real risk of harm to staying the enforcement of this illegal ETS.

IV. A stay will promote the public interest.

Under the final prong, the public interest favors a stay. There "is generally no public interest in the perpetuation of unlawful agency actions." *State v. Biden*, 2021 U.S. App. LEXIS 24872, at *45, 10 F.4th 538 (5th Cir. 2021) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). 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).

The public would benefit greatly from a stay of the ETS. A stay will help ensure OSHA does not illegally assert its authority beyond that allowed by the Constitution. If the ETS remains in effect during this litigation, employers will spend time and money complying with a standard likely to be declared invalid. Employees that do not want to be vaccinated, tested, or simply do not want to share their personal healthcare decisions with their employers will quit their jobs for smaller firms or leave the workforce all together, exacerbating an already pressing labor shortage. Additionally, as the President himself noted, vaccinated workers are

"highly protected from severe illness" even in breakthrough cases. Accordingly, workers that want to be protected from severe illness can be and have already dramatically lowered their risk of contracting a rare breakthrough case. Issuing a stay will also preserve our federal order, where it is the primary province of the States to regulate public health and safety. *See Jacobson*, 197 U.S. at 25. Further, a stay will allow OSHA to conduct a notice and comment procedure that will result in a more thorough, better tailored ETS.

Furthermore, consider the balance of equities vis-à-vis unvaccinated individuals. Once vaccinated, an individual cannot be de-vaccinated if the mandate is ultimately declared unconstitutional—vaccination is a one-way street. Furthermore, as President Biden himself pointed out in announcing the mandate, vaccines confer excellent protection against hospitalization and death *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, https://www.whitehouse.gov/covidplan/. Therefore, the unvaccinated pose little risk to vaccinated individuals while the merits of the ETS are considered by this Court.

V. A nationwide stay is appropriate.

Equitable principles also point to a nationwide injunction, as "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano*, 442 U.S. at 702. Here, the ETS is effective nationwide. Thus, its violation is nationwide, and the injunction should

be, too. A nationwide stay, in particular, would promote the public interest of equal treatment under the law and be consistent with basic administrative law principles, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998), equitable jurisprudence, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and the uniform enforcement of federal law, *see Texas v. United States*, 787 F.3d 733, 768-69 (5th Cir. 2015). It would make little sense if this Court, having found that the ETS is likely unconstitutional, merely proscribe its application to Petition while allowing OSHA to continue enforcing it against other entities.

CONCLUSION

For the foregoing reasons, this Court should issue an order staying the enforcement of the ETS until it can be fully reviewed on its merits.

Respectfully submitted,

/s/Matthew R. Miller
MATTHEW R. MILLER
mmiller@texaspolicy.com
ROBERT HENNEKE
rhenneke@texaspolicy.com
CHANCE WELDON
cweldon@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

CERTIFICATE OF CONFERENCE

As required by 5th Cir. Rule 27.4, I certify that I have emailed Edmund Baird, the agency designee regarding the merits of this motion and I have not received a response from Mr. Baird.

/s/Matthew R. Miller
MATTHEW R. MILLER

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2021, in accordance with 28 U.S.C. 2112(a), I served a copy of Petitioner's Motion for Stay Pending Review by delivering a copy via electronic mail to the agency designee:

Edmund C. Baird
Associate Solicitor for OSHA
Office of the Solicitor
U.S. Department of Labor
zzSOL-Covid19-ETS@dol.gov

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,198 words.

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 this document has been prepared in a proportionally spaced typeface suing Word O365 in 14-point, Times New Roman font.

Dated November 5, 2021

/s/Matthew R. Miller
MATTHEW R. MILLER
Counsel for Petitioners