No. 21-60845

In the United States Court of Appeals for the Fifth Circuit

BST Holdings, L.L.C., et al.,
Petitioners,

v.

Occupational Safety and Health Administration, United States Department of Labor; Martin J. Walsh, Secretary, U.S. Department of Labor; Douglas Parker, in his Official Capacity as Assistant Secretary of Labor for Occupational Safety and Health,
Respondents.

On Petition for Review of
Occupational Safety and Health Administration
Emergency Temporary Standard

REPLY IN SUPPORT OF MOTION FOR STAY OF EMERGENCY TEMPORARY STANDARD

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INTRODUCTION

OSHA is an occupational-safety agency charged with protecting employees from exposure to dangerous substances and agents in the workplace, not a public-health agency tasked with protecting the general public against communicable diseases. Nevertheless, the Biden Administration has used OSHA to evade limits on its power and impose a COVID-19 vaccination mandate on most of the Nation's workforce. As the panel already recognized, that regulatory action is beset by a multitude of "grave statutory and constitutional issues." OSHA lacks statutory authority to issue a vaccination mandate to control the spread of communicable disease, and any ambiguity on that score is construed against OSHA. Moreover, the ETS is riddled with unexplained reversals of longstanding OSHA policies, arbitrary treatment of relevant decisional factors, and pretextual justifications.

OSHA's Opposition continues this exercise in contradictions. It maintains that no harm will befall Petitioners if this motion is denied because the vaccine mandate becomes effective January 4; but it argues that it will be irreparably harmed if individuals do not get vaccinated in the interim. It claims that statutory language unambiguously empowers it to impose this vaccine mandate notwithstanding that the agency has previously disclaimed that authority. And it contends that vaccination is merely an "alternative" even though it designed the ETS to leave employers and employees with little practical choice.

Such sophistry cannot salvage the ETS. This Court should enter a stay pending adjudication of the Petitions.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. The ETS exceeds the scope of OSHA's statutory authority.

Section 655(c) authorizes the Secretary to issue an ETS only if he identifies an "agent," "substance," or "new hazard" that is "toxic or physically harmful" and poses a "grave danger" to employees. 29 U.S.C. § 655(c)(1). The context within which these statutory phrases are used, OSHA's past practice, and Congress's commitment of regulatory power over communicable diseases to *other* agencies all weigh against OSHA's novel claim of authority. Mot. 7-11. Section 655(b)(7)'s careful delineation of what measures OSHA may take to implement a workplace "standard" precludes any claim of power to issue a nationwide vaccination mandate. Mot. 11-12. And any doubt about whether Congress vested OSHA with such broad authority is construed *against* OSHA under the major-questions doctrine. Mot. 12-14. OSHA makes four rejoinders. None withstands scrutiny.

First, (at 3) OSHA "plays a dictionary game to support its view," *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1313 (D.C. Cir. 1991), that "agent," "physically harmful," and "new hazard" should be defined at high level of generality. Though dictionary definitions are useful guides to statutory meaning, "[o]ne dictionary entry does not override a term's surrounding context." *Gulf Fishermans Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 463 & n.17 (5th Cir. 2020); *see also Yates v. United States*, 574 U.S. 528, 538 (2015).

When confronted with the "context" within which the phrases "agent" and "new hazard" are situated—namely its use alongside the phrases "toxic" or "physically harmful"—OSHA has little to say. Instead, it seeks refuge (at 4) in the principle that "the disjunctive 'or' separating the terms" would make "'physically harmful' redundant surplusage." But OSHA never explains how reading section 655(c) in context would render any of its terms surplusage. Regardless, under the canon of *noscitur a sociis*—which applies to disjunctive language—"[t]he words immediately surrounding" a particular statutory term "cabin the contextual meaning of that term" to avoid "giving unintended breadth to the Acts of Congress." *Yates*, 574 U.S. at 543. Under that well-established principle, the phrases "agent" and "new hazard" "refer to carcinogens, poisons and the like and . . . hazards such as extreme noise and vibration." *Int'l Union*, 938 F.2d at 1315;[1] *see also* S. Rep. No. 91-1282 at 2 (1970). A communicable disease like COVID-19 is analogous to none of these. Mot. 7-8.

In addition to ignoring the relevant statutory language, OSHA does not dispute that this ETS is the first time in the agency's fifty-year existence that is has read its organic statute to allow it to regulate actions that might lead to the spread of a communicable disease under the guise of "workplace safety." Mot. 8-9. Instead, it points (at 7) to one of its own regulations—defining a "[t]oxic substance or harmful

[1] *Int'l Union* examines language in section 655(b)(5)—"toxic materials" and "harmful physical agents"—that is materially indistinguishable from, and informs the meaning of, "substances or agents determined to be toxic or physically harmful" appearing in section 655(c)(1). *Contra* Opp. 6-7.

physical agent" to include any "biological agent (bacteria, virus, fungus, etc.)," 29 C.F.R. § 1910.1020(c)(13)—as evidence that "OSHA has always considered viruses to be physically harmful within the meaning of the Act." Yet OSHA does not point to any instance in which it has relied on this regulation to promulgate an ETS or permanent standard concerning a communicable disease. For good reason: this definition comes from a regulation concerning "[a]ccess to employee exposure and medical records," 29 C.F.R. § 1910.1020(c)(13)—not a freestanding grant of regulatory authority. And more fundamentally, Congress vested the power to respond to communicable diseases in other agencies like the CDC. Mot. 8. OSHA replies (at 7) that its "workplace-specific purview routinely overlaps" with other agencies. But Congress has expressly constrained OSHA's authority where other agencies have "statutory authority" to promulgate regulations "affecting" workplace safety. 29 U.S.C. § 653(b)(1).

Second, OSHA claims (at 8) that section 655(b)(7) does not limit its ability to implement a vaccine mandate because section 669(a)(5) authorizes it to require "immunization." But that statute concerns "research and related activities" of the "Secretary of *Health and Human Services*"—not OSHA's power. 29 U.S.C. § 669(a) (emphasis added). Moreover, the statute *forbids*—rather than empowers—HHS from taking action: the Secretary *may not* require "those who object thereto on religious grounds" to undergo "medical examination, immunization, or treatment," *id.* § 669(a)(5), when the HHS Secretary is conducting "research, demonstrations, and experiments," *id.* § 669(a)(2). Because Congress does not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001), OSHA

cannot claim that a statute prohibiting HHS from requiring religious objectors to receive a vaccine somehow deputizes it to implement a nationwide vaccine mandate.

Third, OHSA contends (at 9) that Congress tacitly recognized the agency's authority to implement vaccination mandates by approving OSHA's proposed bloodborne-pathogens regulation in an appropriations bill. But since the regulation concerned a *voluntary* vaccination program, that legislation cannot be read to vest OSHA with broad powers to *mandate* vaccination to prevent the spread of communicable diseases. And Congress's need to pass separate legislation approving this proposed regulation demonstrates the *sui generis* nature of OSHA's previous action.

Finally, OSHA argues (at 10) that the major-questions doctrine is irrelevant because the statutory language at issue here is "unambiguous." Yet as OSHA's own actions for the last half century demonstrate, nothing in the OSH Act unambiguously authorizes OSHA to regulate communicable diseases like COVID-19, much less to do so by implementing a vaccine mandate. *Supra* 3-4. Where, as here, "[a]n agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" courts "typically greet its announcement with a measure of skepticism." *Utility Regulatory Air Grp. v. EPA*, 573 U.S. 302, 324 (2014). That doctrine is especially salient here, where the enacting "Congress repeatedly expressed its concern about allowing [OSHA] to have too much power over American industry." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 651 (1980). The Supreme Court recently applied the major-questions doctrine to stay the CDC's nationwide eviction moratorium. *Ala. Ass'n of Realtors v. HHS*,

141 S. Ct. 2485 (2021). That case is materially indistinguishable from this one, Mot. 12-14, and OSHA does not attempt to show otherwise.

B. The ETS violates foundational administrative law principles.

OSHA has also failed to rehabilitate the many significant administrative-law flaws in the ETS.

1. Petitioners' motion explained (at 14-16) that the ETS reversed, without explanation, established OSHA positions that (a) mandatory vaccination is bad policy, and (b) OSHA lacks authority regulate communicable diseases. OSHA's response does not meaningfully grapple with these flaws.

First, in 1991 OSHA explained that "voluntary vaccination . . . is the best approach to foster greater employee cooperation and trust." 56 Fed. Reg. 64,004, 64,155 (Dec. 6, 1991). That was an unqualified statement based on OSHA's well-grounded views that vaccination is invasive, and that coercion could provoke resistance and raise serious privacy and religious liberty concerns. Mot. 15. OSHA now says (at 12) that the ETS is actually "consistent with" a voluntary approach because parties have the alternative "masking-and-testing option." But OSHA deliberately designed this "alternative" in a way to coerce vaccination. 86 Fed. Reg. at 61,528. Employees must pay for *every* weekly test—a strong "financial incentive for those employees to become fully vaccinated." *Id.* at 61,532. And employers can be subject to crippling fines merely for failing to force unvaccinated employees to replace face masks that become "wet, soiled, or damaged." *Id.* at 61,553. An ETS must be judged by its "probable practical effect," *Asbestos Info Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 426 (5th Cir. 1984), and OSHA has left no real alternative to vaccination.

Second, OSHA defends (at 13) its previous disavowal of regulatory authority to compel vaccination by contending that the agency "reserved the ability to change its approach" to COVID-19 when times change, and that with the advent of vaccines, times have changed. But OSHA's previous position was not that it might issue an ETS if times change; it was that an ETS should not be issued *altogether* because that entire legal mechanism is a poor fit for a rapidly changing risk. *See* Dep't of Labor's Response to Emergency Pet. for a Writ of Mandamus, *In re Am. Fed'n of Labor & Cong. of Indus. Orgs.*, No. 20-1158 at 30 (D.C. Cir. May 29, 2020). If anything, changing facts just in the last week vindicate that cautious approach, as senior National Institute of Health officials have recently opined that mandatory vaccination could be *counter*-productive and raise ethical concerns. *See* Adam Barnes, *Senior NIH expert pushes back on growing vaccine mandates*, The Hill (Nov.8, 2021), https://tinyurl.com/z7e6bds.

2. OSHA compounded this problem by ignoring reliance. OSHA insists (at 14) that Petitioners do not "state how they relied" on these past decisions. But because *OSHA* decided to issue this mandate without notice and comment, where affected parties could have set forth their reliance interests, it was *OSHA's* obligation to "assess whether there were reliance interests" and then "weigh" them. *Dep't of Homeland Sec. v. Regents*, 140 S. Ct. 1891, 1915 (2020). OSHA does not even claim to have conducted this analysis; that is because it cannot: its preamble merely said that "any" reliance interests would be "unjustified." 86 Fed. Reg. at 61,430. There is nothing OSHA's lawyers can do now to fix that: "courts may not accept appellate

counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983).

3. Petitioners have also explained (Mot. 16-18) that the ETS arbitrarily failed to consider important decisional factors, including the FDA's express recognition that the vaccine clinical trials did not assess whether persons with natural immunity "could benefit from vaccination" or the CDC's conclusion that *vaccinated* individuals can easily spread COVID-19. Instead, OSHA is irrationally mandating vaccines for those with natural immunity, and exempting those with vaccination from wearing masks or taking tests.

OSHA cherry picks (at 15-16) isolated material from the record—in total occupying just a few lines of its preamble—suggesting vaccination could help those with natural immunity. This fails to satisfy OSHA's heightened ETS evidentiary burden. *See Asbestos Info. Ass'n*, 727 F.2d at 421 (courts "must take a 'harder look' at OSHA's [ETS] than [they] would if [they] were reviewing the action under the more deferential [APA standard]"). And it utterly fails to explain how OSHA came to a conclusion that the FDA—whose statutory mandate is to assess the efficacy of vaccines—has stated is unsupported by clinical-trial data.

OSHA's explanation for why the vaccinated need not mask and test also fails. OSHA claims (at 16-17) that even though the vaccinated can spread COVID-19, they are less likely to spread it. But the ETS admits there is evidence "that infected individuals who are vaccinated may be *just as likely* to transmit the virus." 86 Fed. Reg. at 61,418-19 (emphasis added). OSHA's current legal position ignores OSHA's statutory duty—when the science is unsettled—to "promulgate the standard which

assures the greatest protection of the safety or health of the affected employees," 29 U.S.C. § 655(a); *Chlorine Inst. v. OSHA*, 613 F.2d 120, 124 n.10 (5th Cir. 1980). If OSHA were sincere (and consistent) about its justification for vaccination, it would have had to mandate masks and testing for all—not merely for the unvaccinated individuals with whom President Biden is frustrated.

4. But OSHA was not sincere, and it has also done nothing to rebut the clear evidence showing its rationale for the ETS is pretextual. OSHA argues (at 18 & n.3) that the Court should ignore Chief of Staff Ron Klain's *concession* that the ETS is built on a pretext, because his "retweet" of this characterization is not "an endorsement" of the characterization. As this Court's sister circuit has recognized, that is wrong: "[l]iking a tweet conveys approval or acknowledgement of a tweet." *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated on other grounds*, 141 S. Ct. 1220 (2021).

And this just confirms the obvious: President Biden has admitted that OSHA promulgated this ETS because he asked it to out of frustration with the unvaccinated. Mot. 2, 4. Contrary to OSHA's strawman argument (at 17), Petitioners are not claiming that policymakers cannot arrive to a problem with a preexisting opinion. But agencies must disclose the rationale for their actions, particularly where politically motivated. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). OSHA failed to do that.

II. The Remaining Stay Factors Favor Petitioners.

OSHA's response confirms that the equities favor Petitioners. OSHA's core equitable argument (at 18-19) is that a stay will result in deaths of unvaccinated

persons. But OSHA also says (at 1-2) the Court need not act because the operative date for full vaccination is January 4. OSHA cannot have it both ways. The reality is that, absent a stay, the ETS requires action now to be in full compliance when the deadline arrives. Because many of those actions are irreversible, they create an injury that is irreparable, and OSHA has no competing injury to balance.

The same principles demonstrate that OSHA's argument (at 1-2) that this Court's intervention would be premature is wrong. Courts have repeatedly issued immediate stays of ETSs, *see Taylor Diving & Salvage Co. v. U.S. Dep't of Labor*, 537 F.2d 819, 820 n.4 (5th Cir. 1976), including *before* consolidation or transfer occurred when multiple petitions for review were filed, *see Industrial Union Dep't v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977); *Fla. Peach Growers Ass'n v. U.S. Dep't of Labor*, 489 F.2d 120, 126 (5th Cir. 1974). Congress expressly contemplated such pre-lottery stays. *See* 28 U.S.C. § 2112(a)(4).

Finally, a comprehensive stay of the ETS is warranted. Courts do not divvy up invalid agency rules, applying them to certain parties but staying them as to others. *See Nat'l Mining Ass'n v. U.S. Army Corps.*, 145 F.3d 1399, 1409 (D.C. Cir. 1988).

Conclusion

The Court should stay the ETS pending adjudication of the Petition for Review and toll all compliance deadlines in the ETS.

Respectfully submitted.

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On November 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ William F. Cole
William F. Cole

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