# In the United States Court of Appeals for the Eleventh Circuit

No. 21-13866

STATE OF FLORIDA, STATE OF ALABAMA, STATE OF GEORGIA, GEORGIA HIGHWAY CONTRACTORS ASSOCIATION, GEORGIA MOTOR TRUCKING ASSOCIATION, ROBINSON PAVING CO., SCOTCH PLYWOOD COMPANY, INC., THE KING'S ACADEMY, AND CAMBRIDGE CHRISTIAN SCHOOL,
*Petitioners*,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
*Respondent.*

## REPLY IN SUPPORT OF MOTION TO STAY

ASHLEY MOODY
*Attorney General of Florida*
HENRY C. WHITAKER
*Solicitor General*
DANIEL W. BELL
*Chief Deputy Solicitor General*
EVAN EZRAY
JASON H. HILBORN
*Deputy Solicitors General*
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
Henry.Whitaker@myfloridalegal.com

*Counsel for Petitioner the State of Florida*

JAMES H. PERCIVAL
*Deputy Attorney General of Legal Policy*
NATALIE P. CHRISTMAS
*Assistant Attorney General of Legal Policy*

*Additional Counsel Listed on Signature Page*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Counsel for Petitioners certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

1. Alliance Defending Freedom (Counsel for Petitioners Cambridge Christian School and The King's Academy)
2. Baird, Edmund C. (Counsel for Respondent)
3. Betts, Louise M. (Counsel for Respondent)
4. Belinfante, Josh (Counsel for Petitioners Georgia Highway Contractors Association, Georgia Motor Trucking Association, and Robinson Paving Co.)
5. Bell, Daniel (Counsel for Petitioner State of Florida)
6. Bergethon, Ross (Counsel for Petitioner State of Georgia)
7. Boynton, Brian M. (Counsel for Respondent)
8. Broecker, Brian A. (Counsel for Respondent)
9. Bursh, John (Counsel for Petitioners Cambridge Christian School and The King's Academy)
10. Cambridge Christian School (Petitioner)
11. Carr, Christopher (Attorney General of Petitioner State of Georgia)

12. Chang, Frank (Counsel for Petitioners Cambridge Christian School and The King's Academy)
13. Christmas, Natalie (Counsel for Petitioner State of Florida)
14. Cortman, David (Counsel for Petitioners Cambridge Christian School and The King's Academy)
15. Ezray, Evan (Counsel for Petitioner State of Florida)
16. Georgia Highway Contractors Association (Petitioner)
17. Georgia Motor Trucking Association (Petitioner)
18. Harrington, Sarah E. (Counsel for Respondent)
19. Hilborn, Jason (Counsel for Petitioner State of Florida)
20. Jed, Adam C. (Counsel for Respondent)
21. LaCour, Jr., Edmund (Counsel for Petitioner State of Alabama)
22. Marshall, Steve (Attorney General of Petitioner State of Alabama)
23. Moody, Ashley (Attorney General of Petitioner State of Florida)
24. Nanda, Seema (Counsel for Respondent)
25. Occupational Safety & Health Administration, Department of Labor (Respondent)
26. Percival, James (Counsel for Petitioner State of Florida)

27. Pico-Prats, Javier (Counsel for Petitioners Georgia Highway Contractors Association, Georgia Motor Trucking Association, and Robinson Paving Co.)
28. Raab, Michael S. (Counsel for Respondent)
29. Robinson Paving Co. (Petitioner)
30. Schnaith, Marisa C. (Counsel for Respondent)
31. Scotch Plywood Company, Inc. (Petitioner)
32. Springer, Brian J. (Counsel for Respondent)
33. State of Alabama (Petitioner)
34. State of Florida (Petitioner)
35. State of Georgia (Petitioner)
36. The King's Academy (Petitioner)
37. Totaro, Martin (Counsel for Respondent)
38. Tucker, Ryan (Counsel for Petitioners Cambridge Christian School and The King's Academy)
39. Turner, E. Tatum (Counsel for Petitioner Scotch Plywood Company, Inc.)
40. Turner, Halron W. (Counsel for Petitioner Scotch Plywood Company, Inc.)
41. Waldbeser, Drew (Counsel for Petitioner State of Georgia)
42. Whitaker, Henry (Counsel for Petitioner State of Florida)

43. Wilson, Thomas (Counsel for Petitioner State of Alabama)

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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## INTRODUCTION

OSHA is a workplace-safety agency buried in the Department of Labor. Frustrated by the limited nature of federal power and seeking a "work-around," the Biden Administration directed OSHA to implement an emergency, economy-wide vaccine mandate. *BST Holdings, LLC v. OSHA*, No. 21-60845, at 7 (5th Cir. Nov. 12, 2021). That effort, as the Fifth Circuit recently held, should fail for "a multitude of reasons." *Id.* at 5. OSHA lacks statutory authority to issue a vaccine mandate, failed to satisfy the high bar needed to issue an emergency rule, and violated the First Amendment and the Religious Freedom Restoration Act.

OSHA's response rehabilitates none of those defects. Indeed, the agency does not even acknowledge, much less rebut, the Fifth Circuit's reasons for granting a stay. Instead, OSHA argues (at 12) that it may impose any measure that, in its judgment, addresses "harm" to "workers at their places of employment" if the danger is "grave" enough. On that reasoning, OSHA could require workers to undergo mental health treatment, eat a specialized diet, and undertake a physical training regimen—on an economy-wide basis no less. OSHA thereby runs roughshod over the principle that "Congress must 'speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'" *BST Holdings*, at 17–18 18 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In response, OSHA implausibly contends that Congress "unambiguous[ly]" authorized the agency's unprecedented arrogation of power (at 8) and papers over the mandate's "staggering[] overbr[eadth]," *BST Holdings*,

at 13, with pleas that it was working to halt an emergency. But OSHA waited until two years into the pandemic to issue the ETS and, until now, took the position that it did not need to use its emergency powers. OSHA likewise argues that this challenge is premature because the ETS does not take effect for another six weeks, while simultaneously arguing that the rule will effect immediate change.

Ultimately, this case does not "pose a hard question." *Id.* at 22 (Duncan, J., concurring). This Court should join the Fifth Circuit and stay the ETS pending a decision on the Petition.

## ARGUMENT

### A. Petitioners are likely to succeed on the merits.

#### 1. The ETS exceeds OSHA's statutory authority.

OSHA is a workplace-safety agency charged with setting "conditions" that "provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). That power, as this Court has explained, allows OSHA to confront workplace problems with workplace solutions. *See Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1331–32 (11th Cir. 1983). It does not allow OSHA, as it did here, to regulate general societal ills. Mot. 4–7.

OSHA largely handwaves that critical point, arguing (at 10–11) that it may address even those hazards that are *not* "particularly acute in the workplace." But what OSHA cannot do is regulate societal dangers generally. Mot. 6. OSHA cannot, in other words, require workers to undergo medical procedures simply because they may have a

downstream effect on the workplace; almost everything does. Congress did not—and likely could not under the Constitution (Mot. 3–4)—"authorize [OSHA] to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings*, at 6. Although that distinction now eludes OSHA, historically, it has not. For example, when OSHA confronted Hepatitis B (a societal danger), it did so with workplace-tailored solutions. Mot. 6.

OSHA next contends (at 12) that it may regulate "viruses transmitted through workplace exposure." Even if that is so, *but see* Mot. 7 n.4, OSHA must do so by regulating the workplace, rather than the personal health decisions of millions of Americans. OSHA identifies no occasion when it has similarly tried to solve a societal ill under the guise of regulating the workplace. If Congress had granted OSHA anything approaching that kind of sweeping and intrusive authority, it would have done so unmistakably. *See* Mot. 3.

**2. The ETS was promulgated by an official without lawful authority and OSHA's last-minute ratification cannot save it.**

OSHA does not dispute that the ETS was published in the Federal Register under the signature of an "Acting Assistant Secretary" and that, at that time, there was no such official. OSHA instead argues (at 12–13) that the defect is immaterial because an agency may take ministerial steps to implement a policy after a relevant official loses authority. *NLRB. v. New Vista Nursing & Rehab.*, 870 F.3d 113, 129 & n.8 (3d Cir. 2017) (agency may post decision on its website after board member's term had expired); *Braniff*

*Airways, Inc. v. C. A. B.*, 379 F.2d 453, 459 (D.C. Cir. 1967) (agency may serve already final award after losing quorum). But an ETS is promulgated by publication in the Federal Register, which is not a ministerial act. *See* 29 U.S.C. § 655(c)(1); *Nat'l Grain & Feed Ass'n, Inc. v. OSHA*, 845 F.2d 345, 345–46 (D.C. Cir. 1988) (per curiam).

OSHA next claims (at 13) that even if the rule is invalid on that ground, it is valid because it was promulgated by the Deputy Assistant Secretary, who can exercise the Assistant Secretary's delegated power. But that "post hoc rationalization[]" for the official's authority is not "properly before" this Court. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

That leaves OSHA to scramble (at 13) for a last-minute ratification. To ratify, however, an official must "have knowledge of all the material facts" and use "detached and considered judgment." *Advanced Disposal Services E., Inc. v. N.L.R.B.*, 820 F.3d 592, 603 (3d Cir. 2016). It defies credulity that an official could do both in just four days. Regardless, the ratification is defective because it ratifies conduct "as of October 26, 2021," *see* https://go.usa.gov/xeBND, which does not include the ETS's promulgation on November 5, 2021.

**3. OSHA did not make the required statutory findings.**

OSHA's attempts to rehabilitate the ETS's reasoning all fail.

**a.** Petitioners explained (Mot. 8–11) that the ETS was not necessary to prevent a grave danger. OSHA argues (at 13) that the ETS is necessary because it cannot rely on its other enforcement powers. But OSHA does not explain why those other powers,

which it has used to issue more than $4 million in pandemic-related fines, were sufficient for nearly two years of the pandemic, but are suddenly not anymore. Instead, OSHA argues (at 15) that it acted now based on new scientific evidence. But that argument cuts the wrong way: If the problem with OSHA's other enforcement authorities is, as OSHA claims, that they lack specifics, 86 Fed. Reg. 61,402, 61,442 (Nov. 5, 2021), then additional scientific evidence would bolster OSHA's use of those authorities. And regardless, OSHA does not respond to the argument that gaps in its enforcement authority can be filled by other agencies, the States, and local governments. Mot. 9. That is damning because, as OSHA explained last year, "an ETS is necessary only where" the reduction in danger it spurs "could not be obtained by . . . requirements administered by other health authorities[.]" Dep't of Labor's Response, *In re: AFL-CIO*, No. 20-1158, at 19–20 (D.C. Cir. May 29, 2020). Here, however, OSHA does not explain at all why gaps in its considerable authority cannot be filled by other actors.

Nor can OSHA explain why the ETS is necessary when the Mine Safety and Health Administration, another component of the Department of Labor, reached the opposite conclusion. OSHA dismisses this evidence (at 14–15) as relating to "a different agency with a different statutory mandate and enforcement tools." But MSHA has essentially the same emergency powers as OSHA, 30 U.S.C. § 811(b), and OSHA does not otherwise explain what differs about MSHA's authority, much less explain why those purported differences matter. That an important component of the Department

apparently disagrees with OSHA's necessity finding is powerful evidence that OSHA went seriously awry.

And awry OSHA went because the ETS is not necessary to address a grave danger. As Petitioners explained (Mot. 9–10), the ETS does not address a grave danger for many workers because (1) many unvaccinated workers have natural immunity and (2) those who do not can protect themselves in many other ways. OSHA responds (at 14) that "vaccination greatly improves the immune response of those who were previously infected." But that misses the point; OSHA needs to show that, absent vaccination, unvaccinated individuals faced "grave danger," not that vaccination would make them better off. And on that score, OSHA "fails almost completely to address, or even respond to," the fact that many workers face little risk. *BST Holdings*, at 13.

**b.** OSHA, as Petitioners explained (Mot. 11–13), also overlooked obvious aspects of the problem. For one, OSHA ignored the variants between workplaces that make its rule "staggeringly overbroad." *BST Holdings*, at 13. OSHA responds (at 16) that "employees can be exposed" in "almost any work setting." Even if that were true, OSHA ignores the variances between workplaces that make exposure more or less likely. And without doing that analysis, OSHA cannot explain why, for example, workers who "work in conditions that allow them to work largely (but not entirely) alone or outside" (Mot. 11) face a grave danger. Nor does OSHA explain why, assuming an ETS must be "a sweeping regulation" (at 16), its one-size-fits-all approach is

consistent with its own finding that individual employers may be "best situated" to design protections calibrated for their own workplaces. 86 Fed. Reg. 61,436.

OSHA likewise failed to consider adequately the prospect of mass layoffs and resignations. Mot. 12–13. OSHA's single-sentence defense (at 17) is that it looked to real-world evidence. But OSHA's "evidence" is exceptionally thin—a single article with five anecdotes. Mot. 13. And even assuming that could possibly be sufficient, OSHA fails to respond to Petitioners' argument (Mot. 13) that the evidence is directed to the wrong problem: it focuses on employer-side turnover, not employee-side job loss.

**c.** OSHA also failed to explain its departure from longstanding practice. Mot. 13–17.

OSHA (at 17–18) attempts to explain the stark break from its historical practice of using voluntary vaccination programs by citing amorphous "new facts." That is no explanation at all. Both in 1991, with Hepatitis-B, and in June, with COVID, OSHA confronted deadly viruses with voluntary vaccination. OSHA proffers no explanation for why this problem requires a mandate when the others did not. That leaves OSHA to argue (at 17) that it did not really mandate vaccination. Pure sophistry. The only alternative OSHA allows is designed to be so costly, intrusive, and inconvenient that workers "choose" OSHA's preferred policy outcome. Mot. 3 n.3.

OSHA likewise struggles to explain (at 17–18) its about-face on the need for an ETS. OSHA says that it reversed course based on new science, but OSHA's entire rationale for not adopting an ETS through the first two years of the pandemic was to

avoid locking in a policy response given changing science. *BST Holdings*, at 13–14. OSHA does not say that the science is now settled. And, without that, OSHA has no explanation for why uncertain science was a reason to avoid an ETS a year ago but a reason to issue an ETS today. Instead, OSHA demolishes a strawman, mischaracterizing Petitioners' claim as an argument that OSHA can never regulate when science is unsettled. That is not it. Rather, OSHA cannot, without some cogent explanation, use the unsettled state of the science to resist an ETS a year ago and to support an ETS today.

**d.** OSHA has no cogent explanation because, as Petitioners demonstrated (Mot. 17–18) its reasoning was pretextual. OSHA says (at 18) that policymakers can have policy preferences. That is true, but agencies must disclose the rationale for their actions, particularly when they are politically motivated. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). And here, the real reason OSHA acted is obvious—President Biden directed it out of frustration with the unvaccinated. Mot. 1, 17.

**4. The ETS violates the First Amendment and RFRA.**

The ETS also violates the First Amendment and RFRA. Mot. 18–19. OSHA says (at 19) that the "ministerial exception" does not apply to health and safety rules. But this fails to rebut the fact that the ETS imposes an *employment* qualification for religious employees, many of whom are "ministers," based on vaccination status. And the broader religious autonomy doctrine allows a religious organization to determine what "activities are in furtherance of" its mission and who gets to "conduct them"—

including non-minister employees who share the same faith. *Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). It then prevents governmental interference with religious organizations' "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

OSHA is also wrong (at 19-20) that the ETS does not burden religion. OSHA says that Petitioners suffer no religious burden because they can choose not to require vaccines. But even the alternative "put[s] substantial pressure" on Petitioners "to modify [their] behavior," favor vaccinated employees, and "violate [their] beliefs." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). If Petitioners pass the cost of testing to their employees, Petitioners will violate their beliefs by burdening their employees' religious beliefs. If Petitioners bear the testing cost, the sum will be crushing. *See* Martin Decl. ¶ 30; Minks Decl. ¶ 27.

**B. The remaining stay factors favor Petitioners.**

**a.** OSHA incorrectly asserts (at 4–5) that Petitioner's stay request is premature. Legally, OSHA is mistaken that the Circuit lottery precludes a stay. The opposite is true: Congress contemplated pre-lottery stays. 28 U.S.C. § 2112(a)(4). And factually, OSHA's

claim that Petitioners will suffer no harm until January is just not credible when the administration is pressuring employers to implement the mandate now.[1]

**b.** OSHA's remaining equitable arguments fare no better. OSHA first claims (at 20–21) that a stay will cost lives. But numerous COVID-19 mitigation efforts, including the widespread availability of free vaccines, can protect the public during a stay. And regardless, if a short delay would really cost lives, then OSHA would not have waited months to issue the ETS. Indeed, if OSHA actually believed that the mandate prevented deaths "every day," then its decision to delay the rule for a day to hold an "embargoed press call" was shameful.[2] But OSHA does not believe that. On the contrary, OSHA claims (at 4–5) that the mandate does nothing until January. If that is true, then a short stay will work no inequity.

OSHA next quibbles (at 21) with Petitioners' injuries. But Petitioners' declarations explain in detail the immediate harm the mandate will cause. And OSHA has no response whatsoever to the fact that staying unlawful government action is always in the public interest. Mot. 21.

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[1] Reuters, *Don't wait on vaccine rules, White House tells companies amid legal fight* (Nov. 8, 2021), https://www.reuters.com/world/us/dont-wait-vaccine-rules-white-house-tells-companies-amid-legal-fight-2021-11-08/.

[2] Background Press Call on OSHA and CMS Rules for Vaccination in the Workplace (Nov. 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/11/04/background-press-call-on-osha-and-cms-rules-for-vaccination-in-the-workplace/.

**c.** Finally, a comprehensive stay is warranted. Courts do not divide up invalid agency rules, applying them to some 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. 1998).

## CONCLUSION

As the Fifth Circuit did, the Court should stay the ETS while this case is pending.

Respectfully submitted,

ASHLEY MOODY
*Attorney General of Florida*

*/s/ Henry C. Whitaker*
HENRY C. WHITAKER
*Solicitor General*

DANIEL W. BELL
*Chief Deputy Solicitor General*

EVAN EZRAY
JASON H. HILBORN
*Deputy Solicitors General*

JAMES H. PERCIVAL
*Deputy Attorney General of Legal Policy*

NATALIE P. CHRISTMAS
*Assistant Attorney General of Legal Policy*

STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
Henry.Whitaker@myfloridalegal.com

*Counsel for the State of Florida*

CHRISTOPHER M. CARR
*Attorney General of Georgia*

ROSS W. BERGETHON
DREW F. WALDBESER
*Deputy Solicitors General*

STATE OF GEORGIA
OFFICE OF THE ATTORNEY GENERAL
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 458-3378
(404) 656-2199 (fax)
rbergethon@law.ga.gov
dwaldbeser@law.ga.gov

*Counsel for the State of Georgia*

JOSH BELINFANTE
JAVIER PICO-PRATS
ROBBINS ALLOY BELINFANTE LITTLEFIELD LLC
500 Fourteenth Street NW
Atlanta, GA 30318
404.856.3262 (Direct)
678.701.9381(Main)
Josh.Belinfante@robbinsfirm.com
Javier.Picoprats@robbinsfirm.com

*Counsel for Georgia Highway Contractors Association, Georgia Motor Trucking Association, and Robinson Paving*

HALRON W. TURNER
E. TATUM TURNER
TURNER, ONDERDONK, KIMBROUGH, HOWELL, HUGGINS & BRADLEY, PA
13212 West Central Avenue

STEVE MARSHALL
*Attorney General of Alabama*

EDMUND G. LACOUR JR.
*Solicitor General*

THOMAS A. WILSON
*Deputy Solicitor General*
STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
(334) 353-8400 (fax)
Edmund.LaCour@AlabamaAG.gov

*Counsel for the State of Alabama*

DAVID A. CORTMAN
JOHN J. BURSCH
FRANK H. CHANG
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
dcortman@ADFlegal.org
jbursch@ADFlegal.org
fchang@ADFlegal.org

RYAN J. TUCKER
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rtucker@ADFlegal.org

*Counsel for Cambridge Christian School and The King's Academy*

Post Office Drawer 1389
Chatom, Alabama 36518
(251) 847-2237
hwt@tokh.com
ett@tokh.com

*Counsel for Scotch Plywood Company, Inc.*

**CERTIFICATE OF COMPLIANCE**

1. This document complies with the type-volume limits of Fed. R. App. P. 27 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,583 words.

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*/s/ Henry C. Whitaker*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2021, I electronically filed the foregoing motion with the Clerk of Court by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Henry C. Whitaker*